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Prosecuting Race

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PROSECUTING RACE

ANTHONY V. ALFIERI†

ABSTRACT

Theoreticians and practitioners in the American criminal justice system increasingly debate the role of racial identity, racialized narratives, and race-neutral representation in law, lawyering, and ethics. This debate holds special bearing on the growing prosecution and defense of acts of racially motivated violence. In this continuing investigation of the prosecution and defense of such violence, Professor Alfieri examines the recent federal prosecution of five white New York City police officers charged with assaulting Abner Louima, a young male Haitian immigrant, in 1997. Professor Alfieri presents a race-conscious, community-oriented model of prosecutorial discretion guided by constitutional precepts, citizenship ideals, professionalism

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This Article is dedicated to the avenues of light and memory at 4138 Carpenter and 1088 Park.

values, racial traditions, and moral customs. This model provides an alternative to the dominant colorblind prosecutorial canon of race neutrality in cases of racially motivated violence.

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[T]hey take me to the bathroom and they threw me to the ground. One start beating me up and then one of them, there was two of them, one picked up something on the floor—I don't know what it is, but it looked like a plunger to me—and just, you know, push it on my ass and then it come out with shit and blood and then after that he put it in my mouth and he said that's my shit.¹

No, I don't think there's a race factor here.²

INTRODUCTION

This Article begins the fourth year of an interdisciplinary enterprise venturing to study the role of race, lawyers, and ethics in the American criminal justice system. Sparked by the new jurisprudence of race,³ the project employs a series of case studies to investigate the rhetoric of race, or “race-talk,” in the prosecution and defense of acts of racially motivated violence.⁴ The purpose of this long-term project is to understand the meaning and the place of racial identity, racialized narrative, and race-neutral representation in law, lawyering, and ethics.

1. *Nightline: The Blue Wall—Part II: Police Brutality and Police Silence* (ABC television broadcast, Aug. 22, 1997), available in LEXIS, News Library, ABCNew File (interview by Ted Koppel with Abner Louima).

2. Nat Hentoff, *Jim Crow in Blue: Eighty Per Cent of Civilian Complaints Are from Nonwhites*, VILLAGE VOICE, Sept. 23, 1997, at 20 (quoting Howard Safir, New York City Police Commissioner, speaking about the Louima case on Jesse Jackson's CNN program *Both Sides* (broadcast Sept. 21, 1997)).

3. Roughly framed, the jurisprudence of race includes the movements of critical race theory, Asian-Pacific theory, and LatCrit theory. For helpful surveys of critical race theory, see CRITICAL RACE FEMINISM (Adrien Katherine Wing ed., 1997); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); see also Anthony V. Alfieri, *Black and White*, 85 CAL. L. REV. 1647, 1654, 10 LA RAZA L.J. 561, 568 (1997) (reviewing CRITICAL RACE THEORY: THE CUTTING EDGE, *supra*, and CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra*, and offering a sympathetic critique of critical race theory literature, while highlighting its failure to integrate a racial analysis of legal theory and practice).

For a mapping of Asian-Pacific theory, see Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993).

For overviews of LatCrit theory, see Symposium, *LatCrit: Latinas/os and the Law*, 85 CAL. L. REV. 1087, 10 LA RAZA L.J. 1 (1997); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997).

4. For a broad illustration of the case study approach to legal theory and practice, see LAW STORIES (Gary Bellow & Martha Minow eds., 1996).

The opening work of this series contemplated the rhetoric of race in cases of black-on-white racially motivated violence, interrogating the defense of Damian Williams and Henry Watson on charges of beating Reginald Denny and others during the 1992 South Central Los Angeles riots.⁵ The next work pondered racial rhetoric in cases of white-on-black racially incited violence, extrapolating from the criminal and civil trials of the Alabama Ku Klux Klan in the 1981 lynching of Michael Donald.⁶ The third work parsed the rhetorical meaning of race in the “double trial” (i.e., successive state criminal and federal civil rights prosecutions) of Lemrick Nelson and Charles Price growing out of four days of interracial violence in the Crown Heights section of Brooklyn, New York, in 1991.⁷

The work at hand examines the federal prosecution of five white New York City police officers on charges of assaulting a young male Haitian immigrant by the name of Abner Louima.⁸ The assault erupted in the aftermath of a street fight between club patrons and police officers outside a popular local nightclub in the Flatbush section of Brooklyn on August 9, 1997.⁹ The Louima assault began in a police patrol car and continued at a Brooklyn police precinct. Newspaper accounts reported that the four arresting officers, enraged by Louima’s alleged battle with the police and his protests of innocence, twice stopped their patrol cars “to beat him with their fists.”¹⁰ At the 70th Precinct station house, two officers continued their beating of Louima in the men’s bathroom, one shoving the wooden handle of a mop or toilet plunger into Louima’s rectum, and afterward into his mouth, while shouting racial slurs.¹¹ Thereupon, one or both of the officers carried Louima to a holding cell and locked him inside, calling for an am-

5. See Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); see also Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996) (responding to Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788 (1996) (critiquing Alfieri, *Defending Racial Violence*, *supra*)).

6. See Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) [hereinafter Alfieri, *Lynching Ethics*].

7. See Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998).

8. The federal prosecution included additional charges of assaulting a second young male Haitian immigrant named Patrick Antoine.

9. Police officers charged Louima with disorderly conduct, obstructing governmental administration, and resisting arrest. See David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody*, N.Y. TIMES, Aug. 13, 1997, at B1.

10. *Id.*

11. See *id.*

balance only when other inmates complained of his profuse bleeding.¹² Louima suffered extensive internal injuries from the assault, including a perforated colon and a ruptured bladder.¹³

Within ten days, the Kings County district attorney in Brooklyn, Charles J. Hynes, indicted four of the arresting officers and ordered their arrest on state charges of assault and sexual abuse.¹⁴ Shortly thereafter, Louima's legal defense team filed a \$155 million federal civil damages action against the officers complaining of police brutality.¹⁵ In late August 1997, the U.S. Attorney for the Eastern District of New York, Zachary W. Carter, commenced a federal investigation of the incident.¹⁶ Described as "one of the most prominent black law enforcement officials in the country,"¹⁷ Carter convened a federal grand jury in October 1997 to conduct a criminal inquiry.¹⁸ On February 26, 1998, Carter filed a superseding federal indictment, notwithstanding the risk of a double jeopardy bar,¹⁹ charging five of the police officers from the 70th Precinct with criminal civil rights violations in the arrest and assault of Louima.²⁰ At the same time, Carter referred the Louima incident to the Civil Rights Division of the U.S. Department of Justice for a broader investigation into "whether the Police Department created an atmosphere conducive to brutality by systematically failing to supervise or discipline its officers adequately."²¹

Seizing upon the federal criminal prosecution and civil rights investigation in the Louima case, this Article presents a race-conscious, community-oriented model of prosecutorial discretion applicable to cases of racially motivated violence. This presentation may both baffle

12. *See id.*

13. *See id.*

14. *See* John Kifner, *Nurse Claims Staff Cover-Up on Louima*, N.Y. TIMES, Aug. 25, 1997, at B1; Helen Peterson, *Louima Case Still Far from Trial*, DAILY NEWS (New York), Aug. 23, 1998, at 28.

15. *See* Joseph P. Fried, *In Louima Case, Dream Team and Perhaps Overkill*, N.Y. TIMES, Nov. 9, 1997, at 37.

16. *See* John Kifner, *Louima Says His Attackers Did Not Yell 'Giuliani Time'*, N.Y. TIMES, Jan. 15, 1998, at B3.

17. David Firestone, *Louima Case Tugs at a Prosecutor's Mask*, N.Y. TIMES, Mar. 12, 1998, at B2.

18. *See* Lawrence Goodman, *Fed Grand Jury Hears Louima*, DAILY NEWS (New York), Feb. 5, 1998, at 46.

19. *See* Firestone, *supra* note 17, at B2; Joseph P. Fried, *Prosecutors Building a Case for a Federal Louima Trial*, N.Y. TIMES, Feb. 20, 1998, at B4.

20. *See* Joseph P. Fried, *U.S. Takes Over the Louima Case; 5th Suspect, a Sergeant, Is Indicted*, N.Y. TIMES, Feb. 27, 1998, at A1.

21. *Id.*

and offend. For some, the Louima prosecution and investigation merely demonstrate the exercise of federal prosecutorial convention, nothing more. For others, the reconfiguration of that conventional exercise into a scheme of racial reformation snacks of woolly-headed theorizing and makeshift minority-preference policymaking. This Article will demonstrate that a race-conscious approach to prosecutorial decisionmaking, evidenced by Zachary Carter's conduct as a federal prosecutor in the Louima case, both honors and reinvigorates the ethics rules and standards promulgated by the American Bar Association and the Justice Department.

Carter's actions, however, acquire significance for reasons apart from mere rule compliance. His actions stand out in contemporary law and society because they reaffirm the foundational sociolegal norms animating formal ethics rules. The founding norms at stake here are racial dignity and equality. Both apply to individuals and communities of color in the face of group- or state-sanctioned racial violence. Racial dignity refers to the physical and psychological integrity of the self, experienced as an interior sense of worth and as an exterior acknowledgement of respect. Dignity confers self-esteem and the esteem of others outside the self. Equality here relates to the outward egalitarian treatment of the self by others, whether private individuals and groups, or public agents and institutions of the state. That treatment preserves equal racial standing and safeguards against discriminatory conduct in private and public transactions.

Carter's normative exercise of prosecutorial discretion to safeguard the dignitary and equality interests of communities of color provides the springboard for a wider inquiry into the role of racial identity, racialized narrative, and race-neutral representation in law, lawyering, and ethics. Careful inquiry dictates scrutiny of the source of that discretion, its evolution, its scope, and its regulation. To come to fruition, that inquiry requires a mapping of the reformist deployment of prosecutorial discretion and a rough measuring of its impact on interracial community. This initial mapping marks the starting point of a longer meditation on the conjunction between the prosecution of violence and the construction of community in American law and society.

The Article is divided into six Parts. Part I describes the arrest and assault of Abner Louima, the police investigation of the assault, the state criminal prosecution, the superseding federal criminal civil rights prosecution, and the subsequently commenced federal civil damages action. The description draws upon press reports, as well as the federal

and state pleadings of the prosecutors, defense attorneys, and civil rights attorneys.

Part II examines the Louima assault as a form of sexualized racial violence recurrent in American legal and social history. Culling from both historical and jurisprudential materials, the examination compares the Louima incident to the public and private sexualized racial violence against blacks during the antebellum, Civil War, and Reconstruction periods. Moreover, it inspects the racial/sexual content of the assault under critical race theory, feminist jurisprudence, and queer studies.

Part III surveys the current regulation of the prosecution function in cases of racially motivated violence under rules prescribed by the American Bar Association and the Justice Department. The survey canvasses the ethical guidelines and the underlying racial canons that direct the prosecution of cases involving civil rights complaints, violence against women, and hate crimes.

Part IV proposes a model of race-conscious, community-oriented prosecutorial discretion as an alternative to the dominant colorblind prosecutorial canon of race neutrality. This Part unpacks that alternative model into several components, emphasizing the centrality of racial identity and racialized narrative to the exercise of prosecutorial discretion. It also compares the proposed model to race-conscious practices in other civil and criminal law fields.

Part V considers whether federal prosecutors ought to carry special race-conscious, community-oriented duties to investigate and to prosecute cases of racially motivated violence. This Part endeavors to show that the foundation for such duties may obtain from a battery of norms moored in constitutional precepts, citizenship ideals, professionalism values, racial traditions, and moral customs.

Part VI enumerates four objections to the proposed race-conscious, community-based approach to prosecutorial discretion. The first objection protests the constitutional incompatibility of race-conscious standards of prosecutorial discretion under equal protection principles. The second objection assails the same standards as unworkable, pointing to the mutability of racial identity and the incoherence of racialized narratives. The third objection cites to the expressive or representational harm inflicted on white-majority communities when governmental prosecutorial action favors minority interests. The fourth objection complains of the injury to voluntary, cross-racial communities when prosecutorial intervention, intended

to remedy the effects of interracial violence, displaces alternative community-based, citizen-led modes of racial reconciliation.

With luck, the process of engaging, and perhaps overcoming, the above objections will serve to advance the larger project underway in this series and, thereby, compel the bar and bench to reconsider the ethical responsibilities of prosecutors in racially and politically charged cases like the assault of Abner Louima and, more recently, the New York City police killing of Amadou Diallo.²² Progress may also be achieved if the same process persuades interdisciplinary scholars of American law and society to appreciate the importance of integrating the new jurisprudence of race into their analysis of both high- and low-profile race cases. In these complementary ways, the Article may contribute to a greater understanding of the place of racial identity, racialized narrative, and race-neutral representation in law, lawyering, and ethics.

I. THE LOUIMA CASE

A. *The Louima Arrest, Assault, and Investigation*

The assault of Abner Louima is cast against a sociolegal backdrop of sharpening community-police conflict fueled by the growing tensions over immigration, race, and crime in Brooklyn. Complicated by the increasing diversity of racial and ethnic groups and subgroups,²³ and continuing public and private displays of racism,²⁴ the relationship between

22. On February 4, 1999, four white New York City police officers, members of a Bronx Street Crimes Unit, shot and killed Amadou Diallo, a 22-year-old unarmed West African immigrant street peddler, who had no criminal record, in a "ferocious barrage" of 41 bullets in the vestibule of his apartment building in the Bronx borough of New York City. Robert D. McFadden, *U.S. Examining Killing of Man in Police Volley*, N.Y. TIMES, Feb. 6, 1999, at A1. Diallo suffered 19 gunshot wounds. *See id.* Like the Louima incident, the Diallo killing sparked community protests, state and federal investigations, and a national outcry. *See* Elisabeth Bumiller, *Giuliani Cancels Political Trip amid Protest over Shooting*, N.Y. TIMES, Feb. 10, 1999, at A1; Kevin Flynn, *Police Killing Draws National Notice*, N.Y. TIMES, Feb. 8, 1999, at B5. The killing also inflamed racial tensions across New York City. *See* Dan Barry, *A Reopened Divide*, N.Y. TIMES, Feb. 11, 1999, at A1; Amy Waldman, *Killing Heightens the Unease Felt by Africans in New York*, N.Y. TIMES, Feb. 14, 1999, at A1.

23. *See* CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 3-24 (1993) (surveying historical and experiential diversity of minority groups).

24. *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT 1 (1996) (asserting that the New York City Police Department is plagued by "problem[s] of police brutality and excessive force" and concluding that "the large majority of the victims of police abuses are racial minorities, particularly African-Americans and people of Latin American or Asian descent");

crime and communities of color has been the subject of renewed academic and popular interest.²⁵ This interest exploded with the perverse violence inflicted on Abner Louima. In 1997, Louima was a married thirty-year-old Haitian legal immigrant and father of two children, who had lived in Brooklyn for six years.²⁶ Although he had studied electrical engineering in Haiti, Louima worked as a night security guard at the Spring Creek water-and-sewage treatment plant in the Flatlands section of Brooklyn.²⁷ On August 9, 1997, he visited Club Rendez-Vous, a popular nightclub in the East Flatbush section of Brooklyn.²⁸ Late in the evening, a small crowd gathered outside the nightclub after Louima and several other men interceded in a fight between two women.²⁹ Called to intervene, police officers from the nearby 70th Precinct immediately clashed with patrons and bystanders outside the nightclub.³⁰ The patrol officers included Justin Volpe, Charles Schwarz, Thomas Bruder, and Thomas Wiese, among others.³¹ In the ensuing scuffle, one or more patrons or bystanders struck Volpe.³² Enraged, Volpe, a twenty-five-year-old "short and muscular" second-generation officer,³³ "took off his gun belt and squared off in a fistfight against one of the men on the street corner."³⁴ Evidently, this man "knocked Mr. Volpe

see also Dan Berry & Marjorie Connelly, *Poll in New York Finds Many Think Police Are Biased*, N.Y. TIMES, Mar. 16, 1999, at A1 (reporting the results of a recent *New York Times* poll showing that "fewer than a quarter of all New Yorkers believe that the police treat blacks and whites evenly, with blacks in particular viewing the police with fear and distrust").

25. See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 3-167 (1997) (exploring the intersection of race relations and criminal law).

26. See Associated Press, *The New New Yorkers/Focus on a Community's Fear/Louima Case May Galvanize City's Haitians*, NEWSDAY (New York), Aug. 27, 1997, at A39 [hereinafter Associated Press, *Louima Case May Galvanize City's Haitians*]; Dan Barry, *Charges of Brutality: The Overview; Officer Charged in Man's Torture at Station House*, N.Y. TIMES, Aug. 14, 1997, at A1 [hereinafter Barry, *Charges of Brutality*]; Kocieniewski, *supra* note 9, at B1.

27. See Barry, *Charges of Brutality*, *supra* note 26, at A1; David M. Herszenhorn, *Family Describes a Readily Friendly Man*, N.Y. TIMES, Aug. 13, 1997, at B3.

28. See Garry Pierre-Pierre, *Charges of Brutality: The Club; Solidarity at Arrest Site a Week Later*, N.Y. TIMES, Aug. 17, 1997, at 41.

29. See Barry, *Charges of Brutality*, *supra* note 26, at A1; Mike McAlary, *The Frightful Whisperings from a Coney Island Hospital Bed*, DAILY NEWS (New York), Aug. 13, 1997, at 2 [hereinafter McAlary, *Frightful Whisperings*].

30. See *Charges of Brutality: The Roster; Shake-Up at a Precinct*, N.Y. TIMES, Aug. 15, 1997, at B8; *Chronology of Events in Brooklyn Torture Case*, NEWSDAY (New York), Aug. 21, 1997, at A32 [hereinafter *Chronology of Events*].

31. See *Police Torture: Sequence of Events*, DAILY NEWS (New York), Aug. 20, 1997, at 4.

32. See William K. Rashbaum, *Mistaken ID Theory Is Eyed in Sex Abuse*, DAILY NEWS (New York), Aug. 21, 1997, at 5.

33. Barry, *Charges of Brutality*, *supra* note 26, at A1.

34. John Kifner, *Investigators Looking at New Allegations in Brutality Case*, N.Y. TIMES, Aug. 21, 1997, at B1 [hereinafter Kifner, *Investigators Looking*].

flat in front of his fellow officers."³⁵ Believing that he had been sucker punched, Volpe, for reasons that remain unclear, identified Louima as his assailant, declaring, "[h]e hit me," and "[t]his collar is mine."³⁶ Bent on reprisal, Volpe arrested Louima on charges of disorderly conduct, obstructing government administration, and resisting arrest.³⁷ That same night, Volpe also arrested Patrick Antoine, a second Haitian immigrant, on similar charges³⁸ after Antoine happened upon Volpe and other officers several blocks away during the subsequent beating of Louima.³⁹ Antoine reported that Volpe and the other officers struck and kicked him both on the street and in a squad car en route to the station house.⁴⁰

Upon arrest, Schwarz and Wiese handcuffed Louima and placed him in the backseat of their patrol car.⁴¹ During the drive to the station house, Volpe, Schwarz, Bruder, and Wiese twice stopped their respective patrol cars and beat Louima with their fists, nightsticks, and handheld police radios.⁴² At the 70th Precinct station house, Schwarz and Wiese strip searched Louima.⁴³ Soon after, Schwarz moved the handcuffed Louima from a holding cell to the bathroom where he and Volpe renewed beating Louima.⁴⁴ At some point during the assault, Volpe produced a two- to three-foot-long stick⁴⁵—a plunger or mop handle.⁴⁶ While Schwarz pinned Louima to the floor of the bathroom, Volpe sodomized Louima with the stick and then jammed the handle into Louima's mouth, breaking several of his teeth.⁴⁷ During the assault, Volpe and Schwarz hurled racial invectives at Louima.⁴⁸ After-

35. *Id.*

36. Dan Barry, *2d Police Officer Charged in Attack on Arrested Man*, N.Y. TIMES, Aug. 16, 1997, at A1 [hereinafter Barry, *2d Police Officer Charged*]; Lawrence Goodman, *Sgt. Said Louima Punched Cop*, DAILY NEWS (New York), Apr. 5, 1998, at 22; Mike McAlary, *'It Wasn't Me,' Cop Maintains*, DAILY NEWS (New York), Aug. 22, 1997, at 2.

37. See Editorial, *A Sickening Spectacle*, DAILY NEWS (New York), Aug. 14, 1997, at 42.

38. See Kifner, *Investigators Looking*, *supra* note 34, at B1.

39. See *id.*

40. See *id.*

41. See *Police Torture: Sequence of Events*, *supra* note 31, at 4.

42. See *Chronology of Events*, *supra* note 30, at A32.

43. See *id.*; Corky Siemaszko et al., *Cop Nabbed in Torture Case—Sgts. Grilled About Assault*, DAILY NEWS (New York), Aug. 14, 1997, at 3.

44. See *Chronology of Events*, *supra* note 30, at A32; Michael Cooper, *2d Officer Gives Account of Sex Assault of Haitian*, N.Y. TIMES, Aug. 18, 1997, at B3.

45. See *Chronology of Events*, *supra* note 30, at A32.

46. See Cooper, *2d Officer Gives Account of Sex Assault of Haitian*, *supra* note 44, at B3.

47. See *Chronology of Events*, *supra* note 30, at A32.

48. New York City's *Daily News* reported that Louima recounted that one of the officers

wards, Volpe and perhaps another officer brought the still-handcuffed Louima to a station house holding cell and “dumped” him inside the cell.⁴⁹

At dawn, apparently alarmed by the complaints of adjoining prisoners regarding Louima’s condition, precinct officers summoned an ambulance.⁵⁰ Although arriving within twenty-four minutes, the ambulance inexplicably failed to depart for well over an hour.⁵¹ Finally, more than three hours after the arrest and attack inside the 70th Precinct, a police-escorted ambulance transported Louima to the Coney Island Hospital emergency room.⁵² At the hospital, officers transporting Louima “indicated that he had been injured during homosexual activity.”⁵³ In fact, the officers portrayed Louima “as a victim of ‘abnormal homosexual activity,’” informing emergency room doctors and nurses that he had been “found injured with his pants down lying in the street in front of Club Rendez-Vous.”⁵⁴ Furthermore, they described the nightclub as a “homosexual club.”⁵⁵ But a Coney Island Hospital emergency room nurse, suspecting Louima’s injuries were not the result of gay sex, notified Louima’s family and the Police Department’s Internal Affairs Bureau of the likelihood of a sexual assault and battery.⁵⁶ Subsequently transferred to Brooklyn Hospital Center, Louima remained hospitalized for two months.⁵⁷

declared, “You niggers have to learn to respect police officers,” while another allegedly commanded, “If you yell or make any noise, I will kill you.” Siemaszko et al., *supra* note 43. Louima added that one of the officers, when plunging the stick in his mouth, proclaimed, “That’s your shit, nigger.” McAlary, *Frightful Whisperings*, *supra* note 29, at 2.

49. Kifner, *Investigators Looking*, *supra* note 34, at B1.

50. See *Chronology of Events*, *supra* note 30, at A32.

51. Relying on investigative statements, the press reported that “the [70th] precinct called for an ambulance at 6:01 a.m., more than an hour after Louima was booked on charges of assault and resisting arrest, and that the ambulance arrived about 6:25. But the ambulance did not leave the station house until 7:58, more than 90 minutes after arriving.” Peter Noel, *Were Cops Trying to Kill Abner Louima? Making the Case for Attempted Murder*, VILLAGE VOICE, Sept. 23, 1997, at 47 [hereinafter Noel, *Were Cops Trying*].

52. See Kifner, *Nurse Claims Staff Cover-Up on Louima*, *supra* note 14, at B1. Press reports noted that “the Patrol Guide, the police regulation book, gives specific instructions that injured prisoners be taken to Kings County Hospital, which has a prison ward.” *Id.*

53. *Id.*

54. Peter Noel, *Ex-Louima Lawyers Lien on ‘Dream Team’*, VILLAGE VOICE, Sept. 22, 1998, at 53 [hereinafter Noel, *Ex-Louima Lawyers*].

55. *Id.*

56. See *id.*

57. See Metropolitan Desk, *Louima, on Critical List, Has Blood Clot*, N.Y. TIMES, Sept. 24, 1997, at B4.

Within weeks of the assault, the Police Department disciplined fifteen officers in the 70th Precinct, including the precinct's commanding officer, a captain, and two sergeants.⁵⁸ Disciplinary measures ranged from transfer to suspension and placement on modified assignment.⁵⁹ During the same period, New York City Mayor Giuliani created a citywide task force to investigate accusations of police brutality arising out of the Louima case.⁶⁰ In September 1997, the Police Department filed misconduct charges against Volpe, Wiese, Bruder, and Schwarz.⁶¹ Highlighting Volpe's role in the assault, the charges alleged that he "did wrongfully insert a foreign object into the rectum of a prisoner, Abner Louima, causing injury."⁶² Volpe's attorney, Marvyn Kornberg, assailed the charges as "nothing more than political grandstanding and showboating" springing out of "political expediency."⁶³ Later, in October 1998, the Police Department filed additional administrative and disciplinary charges against the 70th Precinct officers, alleging that they had lied to FBI agents investigating the assault of Abner Louima.⁶⁴ To avoid jeopardizing the ongoing state and federal investigations, the Police Department elected to hold its disciplinary trials in abeyance until the conclusion of the criminal prosecutions.⁶⁵

B. Community Protest

The Louima assault caused a political and popular uproar over police brutality within the Haitian community, as well as in other

58. See Leonard Levitt, *A Detective Transferred/Still Unclear How Louima Tip Was Mishandled*, NEWSDAY (New York), Aug. 28, 1997, at A33.

59. See *id.*

60. See Daniel Wise, "Katie Who?" a Quiet Powerhouse, N.Y. L.J., Sept. 9, 1997, at 1. Upon release of the task force recommendations, however, Giuliani stated that some of the proposals were "unrealistic and make very little sense," and moreover "sarcastically derided the task force's work." Jodi Wilgoren, *Police Critics Renew Call for Change in Attitudes*, N.Y. TIMES, Feb. 25, 1999, at B4.

61. See Graham Rayman, *Cochran to Join Louima's Legal Team*, NEWSDAY (New York), Sept. 4, 1997, at A29.

62. Michael Cooper, *Brutality Case Seen Bringing Modified Duty for Officer*, N.Y. TIMES, Sept. 4, 1997, at B3. Cooper reported that the charges also accuse Volpe of "placing the object" into Louima's mouth, "striking" Louima, "failing to report a beating in custody to police authorities and uttering an ethnic slur." *Id.*

63. Rayman, *supra* note 61, at A29.

64. See Helen Peterson & John Marzulli, *More Cops Hit on Lying in Louima Case*, DAILY NEWS (New York), Oct. 30, 1998, at 24.

65. See Michael Cooper, *Accused Officers Barred from Duty, but with Pay*, N.Y. TIMES, Sept. 8, 1997, at B1.

communities of color in New York City.⁶⁶ Already roiling from the story of “The Rockaway Five”—a report that a white New York City police officer had repeatedly kidnapped and sodomized African and West Indian immigrant jitney drivers without arousing police suspicion, departmental investigation, or state prosecution⁶⁷—Haitian political and social groups began mobilizing a grassroots movement intended to focus attention on the community-wide issue of police brutality and racial violence.⁶⁸ Citing an ongoing escalation in such race-motivated state brutality, local movement organizers compared “the white police of Brooklyn’s 70th Precinct” to “just another version of Duvalier’s paramilitary thugs, the TonTon Macoutes.”⁶⁹ Invocations of this kind sparked the organization of a protest rally attended by thousands outside the 70th Precinct on August 16, 1997,⁷⁰ and a march in the Flatbush section of Brooklyn on August 23, 1997.⁷¹ Speakers at the march expressed the collective view that people of color suffered unfairly as “targets of special abuse by police.”⁷² Targeting of this sort, they complained to reporters, “created the understanding among some police officers” that those officers had the extralegal freedom “to take unnecessarily brutal measures against ‘powerless minorities,’ the city’s most vulnerable group.”⁷³

Emboldened by the protest, a coalition of twelve political and social groups, led by the Haitian-American Alliance and Haitian Enforcement Against Racism,⁷⁴ organized a march and a “rally against

66. See Associated Press, *Louima Case May Galvanize City’s Haitians*, *supra* note 26, at A39 (speculating that “the Louima case could be a watershed for the metropolitan area’s 400,000 to 1 million Haitians, who wield little political power and formed few alliances with other ethnic groups”).

67. See Wilbert A. Tatum, *Giuliani’s Police Force: A Twice-Told Tale of Police Rape, Sodomy and Bestiality in the NYPD*, N.Y. AMSTERDAM NEWS, Aug. 27, 1997, at 12.

68. See James Ridgeway & Jean Jean-Pierre, *Louima Time: An Alienated and Angered Haitian American Community Fights Back*, VILLAGE VOICE, Sept. 2, 1997, at 53.

69. *Id.* Specifically, it was reported that many Haitians feel that “the white police of Brooklyn’s 70th Precinct are just another version of Duvalier’s paramilitary thugs, the TonTon Macoutes: appearing out of nowhere, setting up nighttime checkpoints, swooping down in unmarked cars to harass teenagers, and yelling insults at Haitian women on the street.” *Id.*

70. See Robin Leary, *Haitians Outraged over New York Cop Attack*, PHILADELPHIA TRIB., Aug. 19, 1997, at 1A.

71. See Charles Baillou, *Angry Haitians March at the 70th Precinct in Brooklyn*, N.Y. AMSTERDAM NEWS, Aug. 27, 1997, at 1.

72. *Id.*

73. *Id.*

74. See Richard Goldstein & Jean Jean-Pierre, *Day of Outrage*, VILLAGE VOICE, Sept. 9, 1997, at 44.

police brutality”⁷⁵ on August 29, 1997. Reports show that in addition to “Haitians and Haitian Americans, scores of people from other parts of the Caribbean along with Hispanics, whites, and African Americans took part in the march.”⁷⁶ The Haitian-American Alliance and Haitian Enforcement Against Racism both publicly urged that the Louima assault “not be portrayed as an isolated incident,” and recommended that “no self-proclaimed community leader enter into negotiations” with local, state, or federal officials over the issue of police brutality “on behalf of the community.”⁷⁷ Further, they called “for the trial and conviction of all police personnel involved” in the assault, and “for the termination of all police officers in the 70th precinct” tied to the assault.⁷⁸ Additionally, the protest groups demanded the “formation of a community task force to investigate complaints against the police” and to better supervise racially motivated police behavior.⁷⁹

Concretely, the August 29 mobilization galvanized more than “7,000 angry but peaceful protesters” into marching upon City Hall to deliver the “twin messages” of “zero tolerance for police brutality and justice” for Louima.⁸⁰ Denominated as a “Day of Outrage Against Police Brutality and Harassment,”⁸¹ the march “shut down the Brooklyn Bridge and part of Broadway”⁸² resulting in the arrest of 107 protesters on charges of disorderly conduct and obstructing governmental administration.⁸³ Throughout the march, protesters waved toilet plungers and carried signs condemning state-condoned police brutality.⁸⁴ One protester declared: “We’re here to send a message to America that

75. Patrick Markey, *Louima Too Weak to Watch Rally Live*, NEWSDAY (New York), Aug. 31, 1997, at A8.

76. Goldstein & Jean-Pierre, *supra* note 74, at 44.

77. See Taibah L. Chikwendu, *Louima Case—‘Cover Up?’*, BALT. AFRO-AMERICAN, Aug. 30, 1997, at A1.

78. *Id.*

79. *Id.*

80. Timothy Williams, *Marchers Denounce Attack on Suspect*, CHI. SUN-TIMES, Aug. 30, 1997, at 12 [hereinafter Williams, *Marchers Denounce*]. Crowd estimates “varied widely from organizers (20,000) to the police department (7,000).” Goldstein & Jean-Pierre, *supra* note 74, at 44. The crowd included dozens of demonstrators from the Washington, D.C., chapter of the National Organization for the Advancement of Haitians. See Timothy Williams, *Protesters Target Police*, BUFF. NEWS, Aug. 30, 1997, at A1 [hereinafter Williams, *Protesters*].

81. Williams, *Protesters*, *supra* note 80, at A1.

82. Williams, *Marchers Denounce*, *supra* note 80, at 12.

83. See *Four Protesters in Louima March Remain in Custody*, ASSOCIATED PRESS, Aug. 30, 1997, available in 1997 WL 2546626.

84. See Williams, *Marchers Denounce*, *supra* note 80, at 12.

people of color will not sit idly by when someone is brutalized.”⁸⁵ Another lamented: “The problem is the police think they are the only ones that count—no one else.”⁸⁶ The rally itself “began with protesters singing ‘We Shall Overcome,’ followed by a prayer in Creole.”⁸⁷ Continuing for “more than three hours,” it featured “tales of police brutality” and derisive references to the Patrolmen’s Benevolent Association, the union representing rank-and-file police officers in New York City, in the form of protesters chanting “‘PBA, KKK, different name, same thing’”⁸⁸ By linking up historical forms of public and private racial oppression, the rally inflamed the political consciousness of a Haitian community historically unaccustomed to domestic political activism.

In an expansion of the nascent activism stirring the Brooklyn Haitian community, protest groups organized a third march and rally on September 5, 1997, which was attended by thousands of marchers who traveled across the Brooklyn Bridge into Manhattan for a rally at City Hall.⁸⁹ Protests also extended to Washington, D.C., where on September 12, 1997, “several hundred protesters marched to the Justice Department” rallying to demand “a federal investigation into police brutality.”⁹⁰ Demonstrators, many “carrying photographs of loved ones and family members” allegedly “killed or beaten while in police custody,” decried police brutality as “an everyday fact of life in many black and minority communities.”⁹¹

85. *Id.* (quoting DeLacy Davis, an East Orange, N.J., police officer demonstrating at the August 29 protest on City Hall).

86. *Id.* (quoting Jean Bernard, a demonstrator who marched on City Hall in protest over the attack on Louima).

87. *Id.*

88. *Id.*

89. See Vinette K. Pryce, *A Week of Outrage, Pain and Celebration: Thousands March Across B'klyn Bridge in Search of Justice*, N.Y. AMSTERDAM NEWS, Sept. 10, 1997, at 1. Reports document that many marched to the chant of “Bad cops, bad cops, what you gonna do? What you gonna do when they come for you?” *Id.*

90. Ronald Powers, *Protesters Seek Federal Probe of Police Brutality Allegations*, ASSOCIATED PRESS, Sept. 12, 1997, available in 1997 WL 4883331.

91. *Id.* That same day, Congressman John Conyers, the ranking member of the House Judiciary Committee, convened a hearing on “African Americans and Police Misconduct” at the Annual Congressional Black Caucus Weekend in Washington, D.C., that garnered wide participation by advocacy groups. See Ron Daniels, *CBC Hearing on Police Misconduct Planned*, OAKLAND POST, Aug. 27, 1997, at 4.

C. State Criminal Prosecution

The state criminal prosecution in the Louima case commenced in August 1997 with the indictment of Volpe, Schwarz, Bruder, and Wiese on counts of assault, sexual abuse, harassment, and illegal weapons possession.⁹² Promising "swift prosecution" of the officers,⁹³ Charles Hynes, the Kings County district attorney, assigned a team of seven prosecutors to the case.⁹⁴ On September 8, 1997, the state prosecution team filed a superseding indictment charging Volpe, Schwarz, Bruder, and Wiese with first degree assault, criminal possession of a weapon (i.e., police nightsticks and radios), and aggravated harassment based on "race, color, religion or national origin."⁹⁵ Additionally, the superseding indictment charged Volpe and Schwarz with aggravated sexual abuse in the first degree and assault in the first degree.⁹⁶

The state prosecution team's indictment and arraignment of the four officers from the 70th Precinct left two fundamental matters unresolved. The first pertained to the facts of the assault. Shrouded by a precinct-wide "Blue Wall" of silence, both the nature of the assault and the extent of the ensuing conspiracy remained unsettled. Even the basis of Louima's arrest, albeit outwardly pretextual,⁹⁷ rested unconfirmed.

The second matter concerned the U.S. Attorney's impending intervention in the criminal and civil rights prosecution of the Louima case. The decision to relinquish control of a case to the federal government, rather than maintain a dual state/federal prosecution,⁹⁸ de-

92. See Tom Hays, *Four New York Policemen Indicted on Bias Charge in Torture Case*, ASSOCIATED PRESS, Aug. 21, 1997, available in 1997 WL 4880547; Patricia Hurtado, *Cops Go Down: B'klyn Officers Face Assault Rap in Torture Case*, NEWSDAY (New York), Aug. 19, 1997, at A5 [hereinafter Hurtado, *Cops Go Down*].

93. See Editorial, *It Can Happen to You*, INDIANAPOLIS RECORDER, Sept. 6, 1997, at A2.

94. The prosecution team included assistant district attorneys Dennis R. Hawkins, Edward Boyar, Lance P. Ogiste, Neal F. Doherty, Jay Shapiro, Charles Guria, and Jeffrey Ferguson. See *Attorneys Crowd Police Assault Case*, N.Y. L.J., Aug. 29, 1997, at 1.

95. Richard Pyle, *Bias Charge Added Against Two Officers in Brutality Case*, FORT WORTH STAR-TELEGRAM, Sept. 9, 1997, at 6.

96. See *Superseding Indictment, New York v. Bruder*, No. 8925/97 (N.Y. Sup. Ct. Sept. 8, 1997) (on file with the *Duke Law Journal*); Patricia Hurtado, *A Second Witness? Cop's Lawyer: Prosecutors Holding Back*, NEWSDAY (New York), Sept. 9, 1997, at A33 [hereinafter Hurtado, *A Second Witness?*]; *Today's News Update*, N.Y. L.J., Sept. 9, 1997, at 1.

97. See generally Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 694-715 (1998) (explicating the constitutional jurisprudence ratifying pretextual arrests).

98. Dual state-federal prosecution statistics reflect a federal policy of selectivity borne out of inadequate institutional resources. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 695 (1997) (commenting that "federal prosecu-

pends on several considerations. Institutional competence, public resources, and organizational relationships rank as noteworthy among the many considerations germane to state prosecutorial deference. State prosecutors, for example, amass experience in state criminal law and procedure, but their expertise seldom encompasses federal criminal and civil rights law. Moreover, in high-profile cases, state prosecutors suffer from comparatively scarce institutional resources relative to federal prosecutors.⁹⁹ Resource scarcity yields a particularly deleterious effect on the investigative function of a prosecutorial office. Last, state prosecutors rely on organizational relationships with police officers and other bureaucratic agents of the state criminal justice system for the purposes of fact investigation, early disposition through plea bargaining, and trial adjudication.¹⁰⁰ These relationships may spawn conflicts of interest. Some media commentators in fact suggested that Hynes suffered “a clear conflict of interest in prosecuting police officers from a local precinct.”¹⁰¹

tors lack the resources necessary to review the evidence in all cases eligible for duplicative federal prosecution”) (footnote omitted); Renée M. Landers, *Prosecutorial Limits on Overlapping Federal and State Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 69 (1996) (noting that congressional expansion of federal criminal jurisdiction is unaccompanied by a corresponding increase in the resources of federal law enforcement agencies or the federal courts on a scale necessary to alter the disproportionate state-federal ratio of criminal law enforcement); Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI., 72, 77 (1996) (mentioning that dual prosecutions appear to be “quite rare”).

99. The comparative advantage federal prosecutors enjoy in resource allocation varies by both case and context. See Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 976-77 (1995). Gorelick and Litman explain:

The federal government’s advantages may vary according to the case, but they typically include inter-jurisdictional investigative capabilities, victim- and witness-assistance programs, expertise in traditionally federal areas of law such as organized crime or environmental crime, and favorable procedures, such as preventive detention. The availability of stiffer penalties in the federal system is also a potential comparative advantage, particularly in multiple-offender cases, where the prospect of a long sentence may induce a low-level figure to plead guilty and cooperate in the prosecution of the most culpable offenders.

Id.

For a broad discussion of the federalization of criminal law and duplicative state-federal law enforcement, see Symposium, *The Federal Role in Criminal Law*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 9 (1996); Symposium, *Federalism and the Criminal Justice System*, 98 W. VA. L. REV. 757 (1996); Symposium, *Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System*, 46 HASTINGS L.J. 965 (1995); Symposium, *Rethinking Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 1 (1997).

100. See Benjamin Weiser, *Some Favor Federal Role in Police Shooting Inquiry*, N.Y. TIMES, Feb. 10, 1999, at B6 (quoting Michael Hardy, attorney for the family of a previous victim of deadly police violence, in observing that “[o]ne thing about the Federal Government is that they don’t have the conflict of interest with the New York City police”).

101. Noel, *Were Cops Trying*, *supra* note 51, at 47.

More base considerations, such as political advancement or self-aggrandizement, may also influence a state's decision to cede the field of prosecution to the federal government. Reports indicated, for example, that Hynes seriously considered running for governor in 1998 and appeared "determined to increase his influence among police groups, to whom he owes his political existence."¹⁰² Indeed, some saw his decision to pursue the Louima prosecution against the arresting officers, particularly the upgrading of charges, as a "political blunder."¹⁰³

The defense strategy in the state prosecution of the Louima assault presented both conventional and racialized opportunities for criminal legal advocacy. Shaped by defense attorneys Marvyn Kornberg, Stuart London, Joseph Tacopina, and Stephen Worth,¹⁰⁴ those opportunities provided the defense teams not only the standard maneuvers of attacking victim credibility,¹⁰⁵ quashing the indictment, changing venue,¹⁰⁶ severing the trials,¹⁰⁷ negotiating for immunity, and plea bargaining, but also the more novel stratagem of fashioning a racialized defense. American legal history offers multiple versions of the racialized defense, including black rage,¹⁰⁸ white rage,¹⁰⁹ racial self-

102. *Id.*

103. *Id.*

104. Kornberg, London, Tacopina, and Worth served, respectively, as the attorneys for Volpe, Bruder, Wiese, and Schwarz. See Joseph P. Fried, *Judge Sets Tentative Trial Date for Five Policemen in Louima Brutality Case*, N.Y. TIMES, Sept. 19, 1998, at B3 [hereinafter Fried, *Judge Sets Tentative Trial Date*]; Hurtado, *A Second Witness?*, *supra* note 96. Each of the four defendants moved for severance and a separate trial on the ground of "antagonistic" joint defense theories. See Fried, *Judge Sets Tentative Trial Date*, *supra*.

105. In March 1998, Louima's legal team issued a public retraction of its prior claim that arresting officers had taunted Louima during the assault with the mocking refrain, "It's Giu-liam time." Firestone, *supra* note 17, at B2.

106. The New York State Supreme Court Appellate Division denied Volpe's motion for a change of venue, originally brought on the ground of prejudicial pretrial publicity. See Joseph P. Fried, *Judge Rejects Plea for Change of Venue in the Louima Case*, N.Y. TIMES, Nov. 21, 1997, at B4. Wiese also filed the same motion. See Helen Peterson, *Cop's Lawyer Seeks Change of Trial Site*, DAILY NEWS (New York), Nov. 18, 1997, at 61.

107. See Joseph P. Fried, *Officer Accused in Louima Case Seeks Separate Trial*, N.Y. TIMES, Dec. 16, 1997, at B3.

108. On the evolution of the black rage defense, see PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 1-202 (1997); BELL HOOKS, *KILLING RAGE: ENDING RACISM* 8-30 (1995) (discussing the legacy of contemporary black rage). See also WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* 200-13 (1992) (exploring the roots of black rage); John C. Brittain, *Book Review*, 54 NAT'L LAWYER'S GUILD PRAC. 178, 178 (reviewing PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* (1997)) (explaining that "the black rage defense presents certain criminal conduct in the context of social, political and economic experiences of African Americans").

109. On the origins of the white rage defense, see Alfieri, *Lynching Ethics*, *supra* note 6, at

defense,¹¹⁰ and the variegated cultural defense.¹¹¹ This race-specific defensive stratagem lays the foundation for the color-coded tactics of victim denigration, diminished capacity, and jury nullification.¹¹² The latter tactic may induce jurors to discount evidentiary inferences, disobey statutory commands, and dispense legal excuses on behalf of racially sympathetic defendants.¹¹³

At the arraignment before Brooklyn State Supreme Court Judge Priscilla Hall on the original indictment, Volpe's defense team sketched the early contours of a racialized strategy in pleading not guilty.¹¹⁴ Echoing postbellum race-specific victim denigration tactics, Kornberg declared: "What happened to [Louima] was not a result of anything that took place in the station house."¹¹⁵ More sharply, in responding to the accusation of racially motivated assault, Kornberg dismissed the charge as "ridiculous," pointing to Volpe's black girlfriend as proof that he could not be a racist.¹¹⁶ Coming to the defense of

1074-84. See also HARRIS, *supra* note 108, at 214-40 (explicating white rage).

110. On racialized claims of self-defense, see JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 3-5, 21, 50-58 (1997) (analyzing the use and justification of race-based self-defense claims); GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* (1988) (discussing the Goetz trial); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 402-23 (1996) (discussing "the Black-as-criminal" stereotype).

111. On the context of cultural defenses, see Farah Sultana Brelvi, "News of the Weird": *Specious Normativity and the Problem of the Cultural Defense*, 28 COLUM. HUM. RTS. L. REV. 657, 679-83 (1997).

112. See Alfieri, *Lynching Ethics*, *supra* note 6, at 1074-84.

113. See generally Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 449-54 (1998) (discussing jury nullification as a Sixth Amendment right). Compare Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) (arguing that "the race of a black defendant is sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict of not guilty"), with Lawrence W. Crispo et al., 31 LOY. L.A. L. REV. 1 (1997) (assailing the right of jury nullification for inducing anarchy, unchecked power, and arbitrary results) and Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 111 (1996) (rejecting the proposed right of jury nullification as "foolish and dangerous"). See also Symposium, *The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 J. MARSHALL L. REV. 907, 907-35 (1997) (debating the merits of jury nullification).

114. See Dan Barry, *2 More Officers Held in Attack on Haitian Man*, N.Y. TIMES, Aug. 19, 1997, at A1 [hereinafter Barry, *2 More Officers Held*].

115. Christopher John Farley, *A Beating in Brooklyn; New York's Finest Come Under Fire After a Haitian Man Is Sexually Assaulted, Allegedly by Cops*, TIME, Aug. 25, 1997, at 38 (quoting Marvyn Kornberg).

116. Associated Press, *Officers Say Immigrant Hurt Before Arrest; The Haitian Immigrant's Attorney Says He Smells an Attempted Cover-Up*, GREENSBORO NEWS & RECORD, Aug. 23, 1997, at A4 (quoting Marvyn Kornberg).

Schwarz by contrast, Worth “said prosecutors had arrested the ‘wrong man.’”¹¹⁷ Further, he ridiculed the state prosecution for having “‘rushed to judgment,’” remarking that the prosecution of the case showed signs of “‘disarray.’”¹¹⁸ In the subsequent arraignment before Judge Hall on the superseding indictment, Volpe and Schwarz, together with Bruder and Wiese, pleaded not guilty.¹¹⁹ This initial posture of innocence extended to the federal criminal prosecution as well.

D. Federal Criminal Civil Rights Prosecution

Zachary W. Carter, the U.S. Attorney for the Eastern District of New York,¹²⁰ commenced the federal criminal prosecution in August 1997, asserting several violations of civil rights laws.¹²¹ Federal civil rights laws, Carter explained:

grant[] to the attorney general of the United States the authority to seek civil injunctive relief where it can be established that a pattern or practice exists of failing to take effective action against officers who are guilty of civil rights violations, or otherwise permitting an atmosphere of tolerance for police abuse of authority in violation of the U.S. Constitution or federal statutes.¹²²

Citing issues of police brutality, racism, and conspiracy, observers quickly ranked the prosecution of the Louima assault among “the most explosive cases to be handled by the office of the U.S. Attorney for the Eastern District.”¹²³ To his credit, Carter recognized the significance of the Louima prosecution. At a news conference on August 18, 1997, Carter described the assault as “an act of almost incomprehensible de-

117. Hurtado, *Cops Go Down*, *supra* note 92, at A5 (quoting Stephen Worth).

118. *Id.* (quoting Stephen Worth).

119. See Hurtado, *A Second Witness?*, *supra* note 96, at A33; *Today's News Update*, N.Y. L.J., Sept. 9, 1997, at 1.

120. Carter served as the U.S. Attorney from 1993 to 1999. See Joseph P. Fried, *As Federal Prosecutor Quits, Aspiring Successors Rush In*, N.Y. TIMES, June 12, 1999, at B2; Mark Hainblett, *Carter's Chief Assistant Recommended for Top Post*, N.Y. L.J., July 14, 1999, at 1.

121. See Blaine Harden, *Civil Rights Investigation Targets N.Y. Police; Two More Brooklyn Officers Arrested in Brutal Assault on Haitian Immigrant Under Arrest*, WASH. POST, Aug. 19, 1997, at A1 [hereinafter Harden, *Civil Rights Investigation*]; Hurtado, *Cops Go Down*, *supra* note 92, at A5.

122. *All Things Considered: Justice Department to Investigate in Louima Case* (National Public Radio broadcast, Aug. 18, 1997).

123. David W. Chen, *Prosecutor in Louima Case Will Resign*, N.Y. TIMES, June 10, 1998, at B3.

pravity.”¹²⁴ Addressing the implied police expectation that the act would go not only undetected but unpunished, he remarked: “The boldness of the action suggests a mind-set that they could possibly get away with this extraordinarily heinous offense.”¹²⁵

Carter defined his investigation of the Louima assault as a determined effort “to hold accountable any officer who failed to protect, fails to report or fails to cooperate with Federal investigators when a criminal civil rights violation is committed in their presence or on their watch.”¹²⁶ The investigation, according to Carter, reflected a “commitment to bring to justice any police officer who abuses the public trust through the use of unjustified punitive force.”¹²⁷ More profoundly, Carter proclaimed: “We must seize this opportunity once and for all to strike a death blow against police abuse of force.”¹²⁸

In addition, Carter stated that the Louima trial “will unmask the ugly side of police brutality when cops themselves testify and break the Blue Wall of Silence.”¹²⁹ Describing the “extent of cooperation by police, the FBI and prosecutors,” he asserted that the trial “will show a positive side—how officers broke the invisible wall of silence at the precinct level.”¹³⁰

Carter quickly assembled an experienced federal prosecution team.¹³¹ By early June, however, local newspapers reported that the

124. Barry, *2 More Officers Held*, *supra* note 114, at A1.

125. *Id.*

126. David Kocieniewski, *Precinct Silence on Louima Is Still Under Investigation*, N.Y. TIMES, Feb. 27, 1998, at B5.

127. *Morning Edition: Indictments in Louima Case* (National Public Radio broadcast, Feb. 27, 1998).

128. Barry, *2 More Officers Held*, *supra* note 114, at A1. Articulating the same reasoning, on February 1, 1999, Carter announced that the office of the U.S. Attorney for the Eastern District of New York, acting with the approval of the Nassau County district attorney Denis Dillon and the aid of the FBI, “will investigate allegations of the misuse of force by guards at the Nassau County Jail, including the death, ruled a homicide, of a prisoner while in custody last month.” *Today’s News*, N.Y. L.J., Feb. 2, 1999, at 1. Carter stated: “We came jointly to the conclusion that a federal investigation had the greatest potential for fulfilling our mutual interest in the vindication of the rights of prisoners to be free from the unlawful use of force.” *Id.*

129. Maria Alvarez, *Louima Trial to Break Blue Wall*, N.Y. POST, Oct. 11, 1998, at 11.

130. *Id.*

131. The original federal prosecution team consisted of assistant U.S. Attorneys Catherine E. Palmer, Kenneth Thompson, Loretta Lynch, and Margaret Giordano. *See* Chen, *supra* note 123, at B3. In June 1998, Palmer, the lead attorney, resigned without prior warning to return to private law firm practice. *See id.* Press reports indicated that “Carter was stunned by Palmer’s resignation.” Peter Noel, *U.S. Attorney Resigns from Louima Case*, VILLAGE VOICE, June 16, 1998, at 23 [hereinafter Noel, *U.S. Attorney Resigns*]. Subsequently, Alan Vinegard joined Lynch and Thompson on the federal prosecution team. *See* Mark Hamblett, *Louima Jury in Place, Brutal-*

FBI "was investigating whether Federal prosecutors and agents and New York police detectives tried to coerce testimony from witnesses and to strengthen the testimony of other potential grand jury witnesses."¹³² In particular, reports indicated that "federal agents are questioning colleagues, NYPD internal affairs brass, and NYPD detectives to see if prosecutors pressured them to change reports of interviews with potential grand jury witnesses or put words in the mouths of people they questioned."¹³³ Although no charges of witness or evidence tampering resulted from this probe, the Justice Department reassigned two lead FBI agents, who had "clash[ed] with federal prosecutors."¹³⁴

1. *Prosecution Strategy.* The federal prosecution team filed both an original and a superseding indictment in the Louima case. The original indictment, filed on February 26, 1998, named five defendants from the 70th Precinct: officers Volpe, Bruder, Schwarz, and Wiese, along with Michael Bellomo, a police sergeant.¹³⁵ The indictment set forth twelve counts of assault, conspiracy, and civil rights deprivations material to the arrest and beating of Louima.¹³⁶

ity Trial Is Set to Open This Week, N.Y. L.J., May 3, 1999, at 1, 8.

132. Chen, *supra* note 123, at B3. Nonetheless, the federal investigation continued. Increasingly thwarted by the silence of precinct officers closing ranks out of loyalty to the indicted officers, federal prosecutors accused undercover police officers Rolando Aleman and Francisco Rosario of "lying to the FBI to protect colleagues charged with torturing" Louima. Peter Noel, *One in the Chamber*, VILLAGE VOICE, Jan. 12, 1999, at 52 [hereinafter Noel, *One in the Chamber*]. Aleman and Rosario had been in the 70th Precinct when police officers Justin Volpe and Charles Schwarz allegedly dragged Louima into the station house. *See id.* Nevertheless, Aleman and Rosario maintained that another officer, not Justin Volpe, placed Louima in the prison cell. *See* Joseph P. Fried, *2 Officers Accused of Lying to Investigators in Louima Case*, N.Y. TIMES, Dec. 17, 1998, at B6. On December 16, 1998, federal prosecutors arrested Aleman and Rosario, charging them with "attempting to cover up the attack." *Id.* Federal prosecutors said that Aleman and Rosario were motivated not so much to protect Volpe himself as to avoid being labeled as rats. *See id.* The arrests increased the number of police officers charged in the case to seven.

133. Noel, *U.S. Attorney Resigns*, *supra* note 131, at 23.

134. Alvarez, *supra* note 129, at 11.

135. Indictment, *United States v. Volpe*, No. 98-196, at 1 (E.D.N.Y. Feb. 26, 1998) (on file with the *Duke Law Journal*).

136. The indictment also encompassed the assault on Patrick Antoine. The counts of the indictment pertinent to Antoine charged Volpe and Bellomo with "knowingly and willfully" conspiring to "injure, oppress, threaten and intimidate" Antoine in the "free exercise and enjoyment" of his right to be free from "arrest and seizure without probable cause" and "the intentional use of unreasonable force." *Id.* at 6-8. The alleged conspiracy involved several overt acts: first, the physical assault of Antoine by Volpe, *see id.* at 6-7; second, the false arrest of Antoine by Volpe "in order to conceal an unlawful assault", *id.*; third, the false report "in writing" by Bellomo that Antoine "attempted to interfere" with the arrest of Louima by striking Volpe, *id.*; and fourth, Bellomo's and Bruder's statements to the FBI that they witnessed Antoine "run and charge" into Volpe, which constituted acts of "knowingly and willfully" making "materially false" statements,

The inclusion of the civil rights count enabled Carter “to broaden the prosecution to include officers who tried to cover up the beating, as well as those who were in a position to stop [it] and did not.”¹³⁷

The counts of the indictment charged Volpe, Bruder, Schwarz, and Wiese with “knowingly and willfully” conspiring to “injure, oppress, threaten, and intimidate . . . Louima in the free exercise and enjoyment” of his “right to be free from the intentional use of unreasonable force”¹³⁸ The alleged conspiracy involved multiple acts of physical and sexual assault “resulting in bodily injury” during police custody.¹³⁹ The first set of acts occurred on August 9, 1997 in a police car when officers physically assaulted Louima “while his hands were handcuffed behind his back.”¹⁴⁰ A second set of acts occurred on the same date but in a 70th Precinct bathroom where Volpe and Schwarz assaulted Louima “by kicking him and by shoving a wooden stick into his rectum and mouth while his hands were handcuffed behind his back.”¹⁴¹ A third set of acts also occurred in the 70th Precinct where Volpe “knowingly and intentionally” intimidated and threatened Louima “with the intent to hinder, delay and prevent the communication” of information “to a [federal] law enforcement officer” relating to the deprivation of Louima’s civil rights.¹⁴² A fourth set of acts occurred thereafter in the 70th Precinct when Belloino “knowingly and intentionally” assisted Volpe, Bruder, Schwarz, and Wiese in an attempt “to hinder and prevent their apprehension, trial and punishment,”¹⁴³ and “knowingly and willfully” made “a materially false, fictitious and fraudulent statement” to the FBI that he had authorized the arrest of Louima on August 9, 1997.¹⁴⁴

The superseding indictment, filed November 1, 1998, reiterated the first twelve counts of the original indictment, and also contained a thirteenth count of conspiracy to obstruct justice, an asserted violation of section 1503 of the federal code governing crimes and criminal procedure.¹⁴⁵ Section 1503 comprises part of the general provision defining

id. at 10.

137. Dan Barry, *Officers’ Silence Still Thwarting Torture Inquiry*, N.Y. TIMES, Sept. 5, 1997, at A1.

138. Indictment, *United States v. Volpe*, *supra* note 135, at 2.

139. *Id.* at 4.

140. *Id.* at 3.

141. *Id.*

142. *Id.* at 9.

143. *Id.* at 5-6.

144. *Id.* at 9.

145. See Superseding Indictment, *United States v. Volpe*, No. 98-196 (E.D.N.Y. Nov. 1,

and regulating federal obstruction of justice offenses, in particular acts influencing or injuring an officer in the performance of her official duties.¹⁴⁶ Specifically, count thirteen alleged that Bruder and Wiese provided "false and misleading information to federal and local law enforcement authorities in an effort to exculpate" Schwarz on the charge of sexually assaulting Louima.¹⁴⁷

Count thirteen further alleged several overt acts, occurring between August 11, 1997 and August 14, 1997, in aid of the conspiracy. The acts in controversy pertained to confidential statements made between and among Bruder, Schwarz, and Wiese, and investigative statements made by individual officers to federal and local law enforcement authorities representing the Brooklyn district attorney's office, the New York City Police Department, the U.S. Attorney's Office for the Eastern District of New York, and the FBI. The first act concerned statements made in common between August 11, 1997 and August 14, 1997 by the officers to each other concerning the sexual assault.¹⁴⁸ The second act referred to false and misleading statements, also concerning the Louima sexual assault, made on or about August 17, 1997 by Wiese to representatives of the Brooklyn district attorney's office and the New York City Police Department.¹⁴⁹ The third act addressed false and misleading statements once again regarding the Louima assault made on or about November 8, 1997 by Bruder to representatives of the U.S. Attorney's Office and the FBI.¹⁵⁰

The trial of the superseding indictment commenced on May 4, 1999 before U.S. District Judge Eugene Nickerson.¹⁵¹ Delayed initially "by a switch from state to Federal prosecution" and then "by a dispute over legal representation for two of the officers,"¹⁵² the case presented a crucial test for the federal enforcement of criminal civil

1998) (on file with the *Duke Law Journal*).

146. 18 U.S.C. §1503 (1994).

147. Superseding Indictment, *United States v. Volpe*, *supra* note 145, at 11-12.

148. *See id.* at 12.

149. *See id.*

150. *See id.* at 12-13. In early March 1999, the U.S. Attorney's Office announced its decision to drop the charge of misrepresentation against Bruder, citing insufficient evidence to prove that Bruder willfully made the false statements. *See* Joseph P. Fried, *Judge Refuses Separate Trials For 5 Officers in Louima Case*, N.Y. TIMES, Mar. 4, 1999, at B3 [hereinafter *Fried, Judge Refuses Separate Trials*].

151. *See* Joseph P. Fried, *Graphic Details as Trial Opens in Torture Case*, N.Y. TIMES, May 5, 1999, at A1.

152. *Fried, Judge Sets Tentative Trial Date*, *supra* note 104, at B3.

rights laws against state actors under a race-conscious, community-oriented model of prosecutorial discretion.¹⁵³

2. *Defense Strategy.* The early defense strategy in the federal prosecution of the Louima assault relied upon pretrial maneuvers involving trial severance and venue change. Borrowed from the state defense teams, the attorneys again included Kornberg, London, Tacopina,¹⁵⁴ and Worth,¹⁵⁵ as well as John Patten for Bellomo.¹⁵⁶ To set the groundwork for severance, each of the defense attorneys publicly announced that he would seek a separate trial for his client from the other defendants because of conflicting defense strategies.¹⁵⁷ Noting this conflict, Kornberg remarked: "We have antagonistic defenses."¹⁵⁸ Like the others, Kornberg submitted a motion for change of venue, claiming that "the intensive pre-trial publicity would prevent Officer Volpe from obtaining a fair trial in Brooklyn."¹⁵⁹ Judge Nickerson rejected the motions for trial severance,¹⁶⁰ along with the requests to move the trial outside New York City.¹⁶¹

153. Subsequent trial events suggest an ambiguous outcome to that prosecutorial test. On May 25, 1999, in a surprising development, Volpe pleaded guilty to six of seven counts of the superseding indictment, including violating the civil rights of Antoine and Louima. See David Barstow, *The Louima Case: The Overview; Officer, Seeking Some Mercy, Admits to Louima's Torture*, N.Y. TIMES, May 26, 1999, at A1; Helen Peterson, *Volpe Admits Louima Attack: Pleads Guilty to Torture, Says 2nd Cop Was Present*, DAILY NEWS (New York), May 26, 1999, at 2. Under federal sentencing guidelines, Volpe faces a maximum prison sentence of life without parole and a minimum sentence of 30 years, in addition to a fine of up to \$1.5 million. See Barstow, *supra*; Peterson, *supra*.

Further, on June 8, 1999, after two-and-a-half days of deliberations, the jury convicted Schwarz on two counts of violating Louima's civil rights through sexual assault, but acquitted Schwarz, Wiese, and Bruder of additional civil rights charges. See Joseph P. Fried & Blaine Harden, *The Louima Case: The Overview; Officer Is Guilty in Torture of Louima*, N.Y. TIMES, June 9, 1999, at A1; Mark Hamblett, *Louima Jury Convicts One Officer; Acquits 3*, N.Y. L.J., June 9, 1999, at 1. The jury also acquitted Bellomo of attempting "to cover up the beating" of Antoine and Louima. Fried & Harden, *supra*. Carter immediately announced that his office would seek to try Schwarz, Wiese, and Bruder on charges of conspiring to obstruct justice. See Joseph P. Fried, *The Louima Case: The Aftermath; For Acquitted Officers, Their Department and the City, Legal Action Is Far From Over*, N.Y. TIMES, June 9, 1999, at B8.

154. See *id.*

155. See Patricia Hurtado, *Cops' Defense Lawyers OK'd*, NEWSDAY (New York), Sept. 17, 1998, at A40.

156. See Fried, *Judge Refuses Separate Trials*, *supra* note 150, at B3.

157. See Fried, *Judge Sets Tentative Trial Date*, *supra* note 104, at B3.

158. *Id.*

159. *Id.*

160. See Fried, *Judge Refuses Separate Trials*, *supra* note 150, at B3.

161. See Joseph P. Fried, *Judge in Louima Case Refuses to Move Trial*, N.Y. TIMES, Feb. 20,

3. *Justice Department Civil Rights Division Referral.* In February 1998, Carter referred evidence of misconduct gathered from his investigation of the 70th Precinct in the Louima case, and from related cases of police brutality, to the Civil Rights Division of the Justice Department.¹⁶² In 1994, Congress authorized the Justice Department to prosecute "pattern or practice" cases of police abuse and brutality against entire precincts and departments.¹⁶³ Spurred by the aftermath of the Rodney King trials, this grant of authority expressly empowers federal intervention in circumstances of state and local police misconduct.¹⁶⁴ Absent such legislation, the Justice Department lacks constitutional and statutory authority to commence civil actions for injunctive relief "even where police abuse is alleged to be widespread."¹⁶⁵

Enacted under the Violent Crime Control and Law Enforcement Act of 1994, the legislative grant enlarges the enforcement powers of the Justice Department to investigate department-wide police misconduct and to collect police misconduct statistics.¹⁶⁶ Section 14141 of the Act establishes a cause of action for unlawful conduct given evidence of "a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."¹⁶⁷ Section 14141 also provides for a civil action by the Attorney General when she finds "reasonable cause to believe" that unlawful conduct has occurred.¹⁶⁸ The action may seek to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice."¹⁶⁹ Similar legislation authorizes injunctive relief in cases of

1999, at B4.

162. See Harden, *Civil Rights Investigation*, *supra* note 121, at A1; Hurtado, *Cops Go Down*, *supra* note 92, at A5.

163. See 42 U.S.C. § 14141(a) (1994).

164. See David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 500 (1992) (discussing the genesis of the legislation); Gregory Howard Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 HARV. BLACKLETTER J. 79, 100-02 (1993) (same).

165. Rudovsky, *supra* note 164, at 499; see also *United States v. City of Philadelphia*, 644 F.2d 187, 189-206 (3d Cir. 1980) (dismissing a civil action brought by the Justice Department against the city of Philadelphia and members of the Philadelphia Police Department because of a lack of constitutional and statutory authorization for the lawsuit).

166. See Mark Curriden, *When Good Cops Go Bad*, A.B.A. J., May 1996, at 62, 63 ("Effective use of this legislation could disarm Justice critics who contend internal politics and limited resources have kept federal prosecutors from making police brutality cases a priority.").

167. 42 U.S.C. § 14141(a) (1994).

168. *Id.* § 14141(b).

169. *Id.*

employment¹⁷⁰ and housing¹⁷¹ discrimination.

In addition, section 14142 of the Act commands the Attorney General to “acquire data about the use of excessive force by law enforcement officers.”¹⁷² It also directs the Attorney General to “publish an annual summary of the data acquired.”¹⁷³ Pursuant to this mandate, the federal government is preparing a victimization study and compiling a database on the use of force by police.¹⁷⁴ Since 1994, acting pursuant to local “pattern or practice” findings, the Justice Department has commenced department-wide federal investigations of police abuse and brutality in New Orleans, Philadelphia, and Pittsburgh.¹⁷⁵ In 1997, the Department entered a consent decree with the city of Pittsburgh.¹⁷⁶ More recently, newspapers reported that the Department will propose a consent decree establishing federal monitoring and oversight of the New York City Police Department.¹⁷⁷

170. See *id.* § 2000e-6(a); see also Sofia C. Hubscher, *Making It Worth Plaintiffs' While: Extra Incentive Awards to Named Plaintiffs in Class Action Employment Discrimination Lawsuits*, 23 COLUM. HUM. RTS. L. REV. 463, 465-66 (1992) (discussing the use of government and private class action litigation to address “pattern or practice” cases of employment discrimination).

171. See 42 U.S.C. § 3613(c) (1994); see also Johnnie Scott Jr., Comment, *Eradicating Discriminatory Housing Practices: The Role of Damages and the Discriminatory Effects of Evidentiary Standards in Fair Housing Litigation*, 22 N.M. L. REV. 571, 580-81 (1992) (noting the availability of injunctive relief in Justice Department “pattern or practice” fair housing litigation).

172. 42 U.S.C. § 14142(a) (1994).

173. *Id.* § 14142(c).

174. See Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 710 n.130 (1996). Absent this information, political and legal reforms aimed at addressing police abuse may be frustrated. See Rudovsky, *supra* note 164, at 500.

175. See Editorial, *Police Brutality/Police Abuse*, WASH. INFORMER, Aug. 27, 1997, at 12; see also Harden, *Civil Rights Investigation*, *supra* note 121, at A5. Harden reported: “In Pittsburgh, the city escaped a major court battle with the Justice Department by agreeing to reforms in police training and discipline. Philadelphia has also worked out an arrangement with the federal government; the investigation in New Orleans is still underway.” *Id.*

176. See Jon Schmitz, *A Blueprint for Change*, PITT. POST-GAZETTE, Feb. 27, 1997, at A14 (summarizing the terms of the consent decree).

177. See Jack Newfield, *Feds May Soon Appoint Monitor for NYPD—U.S. Attorney Weighs Action as Result of Louima Probe*, N.Y. POST, Mar. 23, 1999, at 6; Robert Pohner & Patricia Hurtado, *Rudy Says No/Vows Opposition to Federal Monitoring of NYPD*, NEWSDAY (New York), Mar. 24, 1999, at A7; Benjamin Weiser, *Federal Inquiry Criticizes Police in New York City*, N.Y. TIMES, July 10, 1999, at A1.

E. Federal Civil Damages Action

In August 1998, a legal team representing Louima filed a federal civil damages action in federal district court in the Eastern District of New York.¹⁷⁸ The complaint named the city of New York, the New York City Police Department, the Patrolmen's Benevolent Association (i.e., the police union), and the five officers.¹⁷⁹ The complaint asserted that the alleged acts of police brutality violate federal civil rights laws, federal constitutional provisions, and state tort laws.¹⁸⁰ For relief, the complaint sought compensatory and punitive damages.¹⁸¹ Slated to be held before U.S. District Judge Sterling Johnson, the Louima civil suit remains postponed until after the completion of the federal criminal civil rights trial.¹⁸²

The arrest and assault of Louima, the explosion of urban protest marches and rallies in politically dormant immigrant communities, the state criminal indictments of police officers, the superseding federal criminal civil rights prosecution, and the pending federal civil damages actions all provide the sociolegal framework for the examination of the history of private and public sexualized racial violence in the United

178. See Complaint, *Louima v. City of New York*, No. 98-5083 (E.D.N.Y. filed Aug. 6, 1998) (on file with the *Duke Law Journal*). The legal team consists of Johnnie Cochran, Barry Scheck, and Peter Neufeld, acting in association with Sanford Rubenstein. See Joseph P. Fried, *Louima Said to Add Police Union to Those Named in Civil Suit*, N.Y. TIMES, Aug. 6, 1998, at B8. A legal team representing Patrick Antoine filed a similar civil suit against New York City and the New York City Police Department. See Patricia Hurtado, *Trial Date for Officers in Abner Louima Case*, NEWSDAY (New York), Sept. 19, 1998, at A16 [hereinafter Hurtado, *Trial Date for Officers*].

The practice of employing private civil damage actions to enhance public civil rights enforcement and prompt remedial reform is well established. Indeed, private enforcement actions arise commonly in the fields of employment and housing discrimination. See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1404 (1998) (concluding that private attorneys have been more successful than government attorneys at obtaining monetary relief for plaintiffs in such cases). The practice continues even in a perceived climate of growing congressional and judicial hostility. See Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 245-46 (1997) (observing that numerous plaintiffs' attorneys perceive the federal judiciary and Congress "as having become much more hostile to civil rights litigation"). The similar deployment of civil actions for the sake of tort law enforcement seems equally well settled. Private actions of this sort provide a means to consolidate tort law and social justice. See Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 259 (1998) (proposing the development of new causes of action aimed at promoting social equality and protecting human dignity).

179. See Complaint, *Louima v. City of New York*, *supra* note 178.

180. See *id.*

181. See *id.*

182. See Hurtado, *Trial Date for Officers*, *supra* note 178, at A16.

States. Juxtaposing this history against the facts of the Louima case may explicate the logic of Carter's decision to pursue a superseding federal prosecution and to refer the case to the Civil Rights Division of the Justice Department for a department-wide investigation of race-infected police brutality.

II. SEXUALIZED RACIAL VIOLENCE

This Part examines the Louima assault as a form of sexualized racial violence common to American legal and social history. Winnowing from historical and jurisprudential materials, the examination compares the Louima incident to the public and private sexualized racial violence against blacks during the antebellum, Civil War, and Reconstruction periods. Moreover, it inspects the racial/sexual content of the assault under critical race theory, feminist jurisprudence, and queer studies.

The starting point of this examination is definitional. Broadly defined, sexualized racial violence intertwines sexuality, race, and violence in a single act. The discrete elements that comprise this historical act suffer from interpretive contest and instability. Furthermore, the elements often surrender to dichotomy. Sexuality, for example, accedes to a masculine/feminine duality while shifting the dominant/subordinate alignments of sex, gender, and sexual orientation.¹⁸³ Likewise, race collapses into a binary white/black opposition in spite of the vagaries of color.¹⁸⁴ Even violence erupts into a material/interpretive tension¹⁸⁵ noteworthy in the conflict over the regulation of hate speech.¹⁸⁶ Rather than boil down the categories of sexual-

183. See generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995) (examining the distortions of sex, gender, and sexual orientation as social and legal constructs); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996) (exploring the historical origins for the Euro-American sex/gender system).

184. See generally Juan F. Perea, *The Black-White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 10 LA RAZA L.J. 127 (1997) (discussing the black/white paradigm of race and its omission of nonblack people of color).

185. For an investigation of violence, both in the form of material impoverishment and institutional oppression, and in the form of interpretive subordination and discipline, see Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2118-30 (1991).

186. On the harm of racist hate speech, see Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT*

ity, race, and violence into essentialist ideals of universal appeal, the instant examination focuses on the contextual facts of the Louima assault and assigns only a contingent meaning to the elements of sexuality, race, and violence found in the assault. For the limited purposes of this examination, it suffices to observe that the evidence of racial animus, forced sodomy, and repeated physical assault compels the conclusion of sexualized racial violence.

Beyond this definitional threshold, the next task is to determine to what extent sexualized racial violence represents a form of racism. Consider two basic types of racism borrowed from the work of David Lyons. The first involves “naked hostility, inhuman cruelty, and brutal violence toward persons who are identified in racial terms.”¹⁸⁷ This overt style of racism accompanies “harsh measures to secure status in a racial hierarchy.”¹⁸⁸ The Louima assault conforms to this overt brand of racism by reinforcing the dominant status of white police officers and the subordinate status of black immigrants. A second, more covert type entails “tolerance of racist conduct or of racist social arrangements.”¹⁸⁹ Such tolerance, Lyons explains, comes from the “failure to attach proper importance to known facts which primarily concern people with whom one does not identify in racial terms.”¹⁹⁰ In the Louima case, the precinct-wide conspiracy to conceal evidence of the assault reflects this manner of tolerance.

A. *Sexualized Racial Violence: Black History*

Sexualized racial violence emerges throughout American history. Coinciding with the racial struggle for dignity and equality,¹⁹¹ it finds expression in both private and public acts, materializing at the

89-110 (1993) (arguing for an independent tort action as a means of redressing the harm of racial insults); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in MATSUDA ET AL., *supra*, at 17, 51 (attempting to strike a balance between protecting freedom of speech and prosecuting racist hate speech); cf. KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 63 (1995) (“If racial and ethnic slurs are to be made illegal by independent legal standards, the focus should be on face-to-face encounters, targeted vilification aimed at members of a specific audience.”) (footnote omitted).

187. David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, 27 *PHIL. & PUB. AFF.* 31, 48 (1998).

188. *Id.*

189. *Id.*

190. *Id.*

191. The postbellum racial struggle for dignity and equality spans the fields of law, labor, and politics. See JULIE SAVILLE, *THE WORK OF RECONSTRUCTION: FROM SLAVE TO WAGE LABORER IN SOUTH CAROLINA, 1860-1870*, at 102-95 (1994).

intersection of race and sex.¹⁹² Historically, race and sex represent sites of discipline and punishment. Linked to the state and the juridical violence of public and private law enforcement, these sites reinforce racial and sexual status hierarchies. Consistent with hierarchical reinforcement, the act of violence signals a “corrective normalization”¹⁹³ of racial/sexual relations dependent on the treatment of black men and women as governable and punishable imperial subjects.

The infliction of racial violence against black men and women through extralegal forms of behavior occurred under specific historical conditions shaped by changing racist ideologies.¹⁹⁴ Inflamed by racial aggression, white cultural supremacy, and complex political and socioeconomic forces, that behavior spanned a variety of ritualized acts of mob violence, including lynching.¹⁹⁵ Tailored to preserve and reaffirm white supremacy, these acts of violence provided the tools to perpetuate white dominance, notwithstanding a diversity in race relations and a “fluidity in racial contact.”¹⁹⁶ This historical diversity and regional fluidity produced both “continuity and change” in southern race relations and the “varied and contradictory character” of white-on-black violence.¹⁹⁷

Racial violence finds roots deeply embedded in the history of slavery in the antebellum South.¹⁹⁸ The exigencies of that institution fostered violence marked by “a powerful extralegal undercurrent.”¹⁹⁹

192. See Marilyn Maness Mehaffy, *Advertising Race/Raceing Advertising: The Feminine Consumer(-Nation), 1876-1900*, 23 *SIGNS: J. WOMEN IN CULTURE & SOC'Y* 131, 132-33 (1997) (documenting post-Reconstruction era stereotypes of race and gender in the commercial binary construction of black and white female consumers).

193. Patricia Gray, *Deconstructing the Delinquent as a Subject of Class and Cultural Power*, 24 *J. L. & SOC'Y* 526, 545 (1997).

194. The instant historical analysis borrows from the works of W. Fitzhugh Brundage and Jacquelyn Dowd Hall. See W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930*, at 13 (1993); JACQUELYN DOWD HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* 129-57 (1993); see also *AMERICAN VIOLENCE* 107-09 (Richard Maxwell Brown ed., 1970) (chronicling an 1899 “lynch-burning”).

195. See BRUNDAGE, *supra* note 194, at 9-16.

196. *Id.* at 13.

197. *Id.* at 15.

198. See generally DICKSON D. BRUCE, JR., *VIOLENCE AND CULTURE IN THE ANTEBELLUM SOUTH* 114-60 (1979); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 141-91 (1956); see also HALL, *supra* note 194, at 130-36 (describing the origins, development, and consequences of southern extralegal racial violence).

199. See BRUNDAGE, *supra* note 194, at 4 (“By the close of the antebellum era, the tradition of mob violence had evolved into an integral part of southern culture.”).

Imposed by force of act or threat, violence “became a customary way to compel deference and acceptable behavior in slaves.”²⁰⁰ Indeed, during the Civil War, southern slaveholders executed large numbers of slaves “in gruesome spectacles aimed at intimidating the slave community into submission and loyalty.”²⁰¹ The Reconstruction era later “unleashed an unprecedented wave of extralegal violence,” not only perpetuating but also “expanding antebellum customs of communal violence in southern culture.”²⁰² Found throughout the decade-long era of Radical Reconstruction, “the lynching of black men and the rape of black women became the most spectacular emblems of a counterrevolution that convulsed almost every former Confederate state.”²⁰³ The convulsions induced by postbellum “economic and racial tensions” in fact transformed lynching into an “increasingly sadistic” practice of “emasculat[i]on, torture, and burning.”²⁰⁴

Captured in the commonplace lawlessness of mob lynching,²⁰⁵ southern culture during the late nineteenth and early twentieth centuries forged an ethic of communal violence intended “to elaborate and impose a racial hierarchy upon people of color throughout the globe.”²⁰⁶ Lynching in particular “served as a dramatization of hierarchical power relationships based both on gender and on race.”²⁰⁷ Derivative of the tradition of public vengeance and reminiscent of “fron-

200. *Id.*; see also HALL, *supra* note 194, at 131 (observing that antebellum “lynch law helped suppress both white dissidence and slave rebellion”).

201. BRUNDAGE, *supra* note 194, at 6; see also HALL, *supra* note 194, at 131 (arguing that “lynching took on new significance as a systematic weapon of terror against blacks” during the Civil War).

202. BRUNDAGE, *supra* note 194, at 6.

203. HALL, *supra* note 194, at 131 (“By the time federal troops withdrew in 1877, signaling the North’s abandonment of the ex-slaves, private, collective violence in support of white supremacy was embedded in southern political culture.”); see also BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 172-78 (Gerda Lerner ed., 1972) (excerpting testimony from witnesses before a House of Representatives-appointed committee to investigate the Memphis race riot of 1865).

204. HALL, *supra* note 194, at 133.

205. Brundage writes:

Few images of the travail of white-black relations in the South are more compelling than those of baying hounds and armed whites chasing black men across moonlit swamps, of frenzied mobs torturing and mutilating their victims, and of festive crowds gathering to gawk at the dangling or charred bodies of lynching victims.

BRUNDAGE, *supra* note 194, at 1.

206. *Id.* at 2. Hall adds: “In some cases lynching was a specific mode of political repression. In others, it represented a diffuse reassertion of white solidarity.” HALL, *supra* note 194, at 132.

207. HALL, *supra* note 194, at 156.

tier vigilante justice,"²⁰⁸ lynching and other communal forms of violence served as extralegal methods of punishment in defense of slavery and "community morals and virtues."²⁰⁹ Evolving through the late nineteenth century, lynching became a "semiofficial institution of the South," and part of "an elaborate code of behavior that required white men to respond to challenges to their honor by acting outside of the law."²¹⁰ Rising to enforce the code of "lynch law," white men might cast themselves as "the protectors of women, dispensers of justice, and guardians of communal values."²¹¹ Under that cultural code of honor, "skin color determined status."²¹² The status hierarchy of color presented "pervasive racist stereotypes of blacks as degraded and dishonorable."²¹³ Stereotypes of white supremacy and black inferiority in turn "gave whites license to punish blacks ruthlessly without suffering attacks of conscience."²¹⁴ In this way, postbellum modes of punishment worked to discipline and to enforce "conformity to prevailing racial roles" in southern society.²¹⁵ Indeed, the "communal ritual" of punishment "reinforced white unity, intimidated blacks as a group, and ensured allegiance to caste roles on the part of both whites and blacks."²¹⁶

The assault on Louima presents a form of public and private violence against people of color designed to discipline political and socioeconomic hierarchy, and to punish disobedience and rebellion. Like postbellum blacks, Louima belongs to a subordinate black immigrant group "associated with whites' repressed fears and desires."²¹⁷ Moreover, like postbellum blacks, his perceived act of insolence in denying police accusations of wrongdoing constitutes "the transgression of a whole range of nebulous taboos," traditionally de-

208. BRUNDAGE, *supra* note 194, at 1.

209. *Id.* at 4.

210. *Id.* at 3-5.

211. HALL, *supra* note 194, at 151.

212. BRUNDAGE, *supra* note 194, at 5.

213. *Id.*

214. *Id.*

215. *Id.* at 6; *see also* HALL, *supra* note 194, at 136 (describing lynching as "an instrument of social discipline intended to impress not only the immediate victim but all who saw or heard about the event").

216. HALL, *supra* note 194, at 139; *see also id.* at 144 ("Lynching persisted as much to reaffirm solidarity and demonstrate power to whites themselves as to punish and intimidate blacks.").

217. BRUNDAGE, *supra* note 194, at 9.

serving of "a verbal rebuke, a beating, or a lynching."²¹⁸ His resulting brutalization by the police not only affirms the unity of white supremacy within portions of the New York City Police Department, but also instills individual and collective fear within communities of color.²¹⁹

Consider the specific sexualized racial violence against Louima. Here, the violence bolsters the discipline of racial hierarchy through the act of forced sodomy. Perversely, that act reinforces the insistent masculinity and heterosexuality of the arresting officers. At the same time, it buttresses the armament of violence wielded by state agents (the white Volpe) against alien victims (the black/immigrant Louima). The fact that hierarchy survives this intermixing and reconstitution of categories of state violence suggests that "whiteness and masculinity have no single 'natural' or 'objective' standing beyond the cultures they organize."²²⁰ This outcome indicates that the disciplinary function of masculinity may "designate a whole range of cultural forms and practices."²²¹

Michael Uebel, a postmodern scholar of English literature, offers a dialectical constructionist view of racial and gender subjectivities. Uebel contends that "the active production of new meanings," seen here in the Louima case, forges "alliances such as the masculine with patriarchy or blackness with absolute otherness."²²² But these alliances remain short-lived, betraying a kind of "ideological flexibil-

218. HALL, *supra* note 194, at 141.

219. Hall adds:

In addition to its ritualistic affirmation of white unity, lynching functioned as a mode of repression because it was arbitrary and exemplary, aimed not at one individual but at blacks as a group. White supremacy was maintained by psychological repression as well as by economic and political control, and lynching worked effectively to create a general milieu of fear that discouraged individual or organized black assertiveness.

Id. at 141.

220. Michael Uebel, *Men in Color: Introducing Race and the Subject of Masculinities*, in RACE AND THE SUBJECT OF MASCULINITIES 2-3 (Harry Stecopoulos & Michael Uebel eds., 1997).

221. *Id.* at 4. Uebel explains that the category of "masculinities" is not meant to be a stable consolidation of historically specific subject-positions or a collective term for masculinity, but a polysemy denying the autonomy and stability of male identity as it claims to specify and interpret masculine self-perception, performativity, and existence." *Id.* For Uebel, the use of the term "masculinities" as an analytic tool "brings into play the recognition of the profound multiplicity and conditional status of the historical experience of male subjects." *Id.* Accordingly, masculinity becomes for him "not the defining quality of men, of their fantasies and real experiences of self and other, but one coordinate of their identity that exists in a constant dialectical relation with other coordinates." *Id.*

222. *Id.* at 4-5.

ity.”²²³ For Uebel, the coupling and uncoupling of such alliances “reveal the contingency and fragility of their encodings and the possibilities for altering their own terms of reference.”²²⁴ Under this analysis, the Louima sexual assault receives its racial and gender “inscription within a systematics of performance.”²²⁵ Out of this systematic cultural and social framework, Uebel argues, “racial and gender identities emerge as dynamic performances scripted, rehearsed, and (re)enacted in the presence of one another.”²²⁶

Like any dynamic cultural performance featuring the “interplay of racial masculine particularities and generalities,”²²⁷ the Louima assault reenacts a historically scripted and rehearsed racial hierarchy in the public/private space of a patrol car and a precinct bathroom. The reenactment inscribes dominant/subordinate identities of race and power, effectively marginalizing Louima and privileging his assailants. The presence of others—both arresting and precinct officers—during the acts of physical and sexual assault underscores Louima’s colonized status. In this way, Uebel notes, “definitions of black masculine identity crucially hinge on investments in white male identity.”²²⁸ Volpe’s act of forced sodomy defines black masculine identity in terms of white dominance even while the act itself crosses and uncrosses “masculine sex/gender interests and class/ethnic identities.”²²⁹ To Uebel, such performative acts entangle interests and identities in the impulse toward dominance.²³⁰ Driven by that impulse, Volpe and the other arresting officers deploy physical and sexual forms of violence to underwrite their own masculinities, thereby asserting the supremacy of their own “racialized masculinities” of whiteness.

The cultural production of racial/sexual dominance through acts of sexualized racial violence also affects women. Historically enacted within a culture of white supremacy and patriarchy,²³¹ sexualized ra-

223. *Id.* at 5.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 3.

228. *Id.*

229. *Id.*

230. *See id.* at 3-4.

231. *See* Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 HOWARD L.J. 459, 474-79 (1997) (discussing the merger of white supremacy, patriarchy, and phallogocentrism to “racially construct rape”).

cial violence inflicts individual harm²³² and collective injury.²³³ The harm may come as a result of battering or interracial rape and may be visited not only upon black women, but upon other women of color as well.²³⁴ When these communities confront the sexualized racial violence of rape, Lisa Crooms points out that “[p]atriarchy and its phallogentrism merge with white supremacy to racially construct rape.”²³⁵ The consequent racial construction of sexualized violence realigns the “hierarchy of crime, injury, and credibility.”²³⁶ Under this postbellum realignment, according to Crooms, “both Black and white women were presumptively incredible when charging white men with rape which, in most cases, merely reinforced the broad scope of the sexual access rights held by white men.”²³⁷ In this way, Mary Joe Frug remarks, “legal rules—like other cultural mechanisms—encode the female body with meanings.”²³⁸

B. *Theories of Violence: Race, Gender, and Sexuality*

Theories of sexualized racial violence shape prosecutorial decisionmaking at both the federal and state levels. Although increasingly

232. These individual harms include physical and mental trauma. See Jacqueline St. Joan, *Sex, Sense, and Sensibility: Trespassing into the Culture of Domestic Abuse*, 20 HARV. WOMEN'S L.J. 263, 272-73 (1997) (discussing post-traumatic stress disorder).

233. Crooms observes that “the law not only granted white women limited protection against real and contrived sexual violence, but also recognized a larger, collective injury suffered by white men because of the intrusion on their sexual rights of both access and exclusion.” Crooms, *supra* note 231, at 474.

234. See Yvette Flores-Ortiz, *La Mujer y La Violencia: A Culturally Based Model for the Understanding and Treatment of Domestic Violence in Chicano/Latina Communities*, in CHICANO CRITICAL ISSUES 169, 176 (Norma Alarcón et al. eds., 1993) (arguing that “Latinas who are battered are typically blamed for their own situation by the batterer, the larger cultural system and the social institutions that exist to help her”); Jacqueline Dowd Hall, “*The Mind That Burns in Each Body*”: *Women, Rape, and Racial Violence*, in POWERS OF DESIRE 328, 329-40 (Ann Smitow et al. eds., 1983) (discussing how sexual violence against black women was a comparable form of domination to lynching in the post-Reconstruction South).

235. Crooms, *supra* note 231, at 474; see also Dorothy E. Roberts, *Rape, Violence and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 366 (1993) (arguing that “whites have used both the act and the law of rape as an instrument of white supremacy”); Jennifer Wriggins, *Rape, Racism and the Law*, 6 HARV. WOMEN'S L.J. 103, 117-23 (1983) (discussing the systematic neglect in American law of the rape of black women).

236. Crooms, *supra* note 231, at 475.

237. *Id.*

238. MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 129 (1992). Frug comments that “[l]egal discourse then explains and rationalizes these [gendered] meanings by an appeal to the ‘natural’ differences between the sexes.” *Id.* For Frug, it is the “formal norm of legal neutrality” that “conceals the way in which legal rules participate in the construction of those meanings.” *Id.*

challenged by critical race scholarship, feminist jurisprudence, and queer studies, the theories draw mainly from a crude version of scientific formalism. Prosecutors follow a formalist expectation of violence.²³⁹ This expectation distinguishes between legal and social forms of, and motives for, violence. The legal construction of violence interprets criminal conduct in narrow, reductionist terms framed by statutory or common law doctrine. For this type of violence, prosecutorial expectation looks *inward* to the law and the legal system. This inward-looking expectation strives to classify criminal wrongdoing in terms of statutory or doctrinal prohibition. In contrast, the social construction of violence comprehends the same conduct in broad, inferential terms tied to general sociolegal currents such as class, race, ethnicity, or sexuality. For this kind of violence, prosecutorial expectation rotates *outward* to culture, society, and political economy. This outward-looking expectation seeks to explain, rather than simply classify, criminal wrongdoing. In this manner, it departs from the terms of positive law prohibition to link the banned conduct to larger patterns of human behavior.

Lyrissa Barnett Lidsky mentions that the "legal form not only gives the law inner coherence, it also preserves law's autonomy."²⁴⁰ For Lidsky, it is the "formal character" of law that renders it distinctively legal instead of political, sociological, or moral.²⁴¹ The Louima case acquires its formal character from state criminal and federal civil rights statutes, and the evidence of their violation. This distinctive character derives from the separation of law and politics. Absent that distinction, the Louima case descends into the politics of race, class, and ethnicity, spheres traditionally located outside the formal province of law. Only in the insular province of statutory construction does the law enjoy the limited autonomy of its own internal logic without the tainted intrusion of politics, culture, and society.

For prosecutors, formalism carries the implication of neutrality and with it the cloak of impartiality. Despite postwar attacks on the viability of legal neutrality launched from the jurisprudential movements

239. See generally Jeffrey Malkan, *Literary Formalism, Legal Formalism*, 19 CARDOZO L. REV. 1393 (1998) (discussing aesthetic and scientific formalism in the law). Formalism, according to Malkan, "presumes that there is a fundamental difference between a substantive agenda and its formal expression in law; the lawyer's job is to translate one into the other so that substantive problems become legal problems." *Id.* at 1399.

240. Lyrissa Barnett Lidsky, *Defensor Fidei: The Travails of a Post-Realist Formalist*, 47 FLA. L. REV. 815, 825 (1995) (footnote omitted).

241. *Id.*

of Legal Realism²⁴² and Critical Legal Studies,²⁴³ prosecutors basically adhere to the foundationalist belief that “a neutral interpreter can discern objective meaning free from the influences of her own subjective predispositions.”²⁴⁴ Here, the claim of objectivity, rather than being naïve or illusory, may simply posit a dual sense of descriptive accuracy. A strong sense of objectivity,²⁴⁵ akin to empiricism, might claim the ability to verify the external world by concrete physical measurement or alternate methods of factual proof. A weak sense of objectivity might limit its claim to courtroom veracity during pleading and discovery.²⁴⁶

Application of critical race theory, feminist jurisprudence, and queer studies heightens a juridical sense of empirical doubt. Postulating alternative theories of objectivity and violence, critical race theorists make claims that undermine the standard gauge of colorblind neutrality, and reconfigure the stock construction of racial violence. Rooted in the rejection of the separation of law and politics, the claims find the structures and institutions of the law saturated by conscious and unconscious racial bias. Feminist scholars advance similar contentions that assail the survival of contradictory and pernicious renditions of gender-based discrimination and violence. Frequently locating both contradiction and harm in the criminal law setting, especially in the contexts of battered women and rape, the contentions dispute the equity and objectivity of established legal classifications.²⁴⁷ In the case of battered women, this dispute reconceives the claim of self-defense in light of the

242. See Gary Peller, *The Metaphysics of American Law*, 73 CAL L. REV. 1151 (1985).

243. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

244. Ian Crosby, Note, *Worlds in Stone: Gadamer, Heidegger, and Originalism*, 76 TEX. L. REV. 849, 850 (1998).

245. Feminist theorists critique the strong objectivity claims of scientific knowledge. See Sandra Harding, *Rethinking Standpoint Epistemology: What Is “Strong Objectivity”?*, in FEMINIST EPISTEMOLOGIES 49, 49-82 (Linda Alcoff & Elizabeth Potter eds., 1993).

246. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 313 (1997) (mentioning that “the folk theories of adjudication that lawyers employ all the time seem to lack the systematicity characteristic of genuine scientific theories: in particular, they fail to generate laws of judicial behavior”). However, the standards governing the introduction of “scientific” evidence, which allow judges to regulate the admissibility of junk science, demonstrate doubts about objectivity even in the limited sense of advocacy and adjudication. See *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

247. See Patricia A. Cain, *The Future of Feminist Legal Theory*, 11 WIS. WOMEN’S L.J. 367, 372-76 (1997) (linking the validity of sexual classification to the harm of sex discrimination and the context of remedial compensation).

harsh material reality experienced by victims of domestic violence.²⁴⁸ The quarrel over objectivity also extends to the gendered-efficacy of expert testimony in trials involving battered women.²⁴⁹ Although these controversies may disturb traditional classifications inimical to the rights of women, they may produce an alternate set of classifications equally noxious in their depiction of women's lives. The advent of state doctrine endorsing rape trauma syndrome,²⁵⁰ and the resulting deformation of female identity, exemplifies this point.

Likewise, queer studies scholars work to reinvent theories of objectivity and violence. Queer theory signifies both "a coalition of culturally marginal sexual self-identifications" and "a nascent theoretical model."²⁵¹ Mustered against the rising violence aimed at suppressing the articulation of sexual difference in public and private social spaces,²⁵² queer theorists seek both to encompass and to transcend the identity categories of gay and lesbian sexuality by linking performativity and identity.²⁵³ Noting the underlying sway of the theory of performativity, Annamarie Jagose mentions that queer theory "opts for denaturalisation as its primary strategy."²⁵⁴ Shared by critical race theory and feminist theory, the strategy of denaturalization attempts to disen-

248. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 34-43, 79-93 (1991) (intertwining analyses of self-defense, battered women's syndrome, and the notion of learned helplessness); Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 497-512 (1996) (identifying gender bias in syndrome-based criminal defenses and excuses).

249. See Regina A. Schuller & Janice Cripps, *Expert Evidence Pertaining to Battered Women: The Impact of Gender of Expert and Timing of Testimony*, 22 LAW & HUM. BEHAV. 17, 27-30 (1998) (investigating the contextual variable impact of the expert's gender, as well as the timing of testimony, on jury evaluation and verdict decision in homicide trials of battered women).

250. See Kenneth Winchester Gaines, *Rape Trauma Syndrome: Toward Proper Use in the Criminal Trial Context*, 20 AM. J. TRIAL ADVOC. 227, 228-32 (1997) (commenting on the development and evidentiary appeal of rape trauma syndrome); cf. Fiona E. Raitt & M. Suzanne Zeedyk, *Rape Trauma Syndrome: Its Corroborative and Educational Roles*, 24 J. L. & SOC'Y 552, 565 (1997) (mentioning the danger that the rape trauma syndrome phenomenon may become "merely another form of control of women, prescribing as it does the manner in which women are supposed to react to an invasion of their physical and emotional integrity").

251. ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 1 (1996).

252. See, e.g., Patricia M. Logue & David S. Buckel, *Fighting Anti-Gay Abuse in Schools: The Opening Appellate Brief of Plaintiff Jamie Nabozny in Nabozny v. Podlesny*, 4 MICH. J. GENDER & L. 425, 429-43 (1997) (describing specific acts of homophobic harassment of a teenage boy in a public school).

253. See JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 223-42 (1993); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1-34, 128-41 (1990).

254. JAGOSE, *supra* note 251, at 98.

tangle the analytics of sexualized power²⁵⁵ by mapping the elements of identity “contestation and regulation.”²⁵⁶ Applied to the case at hand, this strategy comes to view the Louima assault as an individual and institutional attempt to stigmatize people of color racially and sexually. Here, the stigma of male-imposed sodomy links the public/private formation of Louima’s racial identity to an institutionally condoned practice of sexual degradation.²⁵⁷ In effect, the act of forced sodomy works to transform Louima’s identity into “a cultural matter of group signification” derisive of the Haitian community “based on historically specific social relations” of racial inferiority.²⁵⁸

The prosecution of the Louima assault publicly exposes this stigmatizing practice. Prosecutorial exposure of this sort may induce shame and encourage the convention of silence²⁵⁹ in the victims of sexualized racial violence. At the same time, exposure may prompt a law-propelled cultural and political enablement²⁶⁰ of such victims and their communities. In either event, prosecutors will encounter a practice of sexualized racial violence tenacious in its ability to wound black men and women, and yet obscured by a theory of violence wedded to the formal separation of law and politics. This ever-present practice of violence, and the corresponding absence of a well-developed prosecutorial, community-based politics to combat its public and private manifestations, furnishes the basis for reviewing the regulation of the prosecutorial function under ABA and Justice Department rules. Applying these rules to the facts of the Louima case may elucidate Carter’s decision to commence a superseding federal prosecution and to refer the

255. See Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 48 STAN. L. REV. 449, 453-54 (1996) (reviewing ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* (1994)).

256. WILLIAM G. TIERNEY, *ACADEMIC OUTLAWS: QUEER THEORY AND CULTURAL STUDIES IN THE ACADEMY* 169 (1997).

257. See *id.*

258. *Id.*

259. See David L. Chambers & Steven K. Homer, *Honesty, Privacy, and Shame: When Gay People Talk About Other Gay People to Nongay People*, 4 MICH. J. GENDER & L. 255, 258-70 (1997).

260. See TIERNEY, *supra* note 256, at 171. Tierney contends that “[t]he challenge is to create the conditions for enablement where our multiple identities can be decoupled from overarching norms.” *Id.* This view posits “the need of pluralities rather than singular norms.” *Id.* Hence, to Tierney, “[t]he struggle becomes one of cultural politics over the discursive conditions of identity formation.” *Id.* Rejecting “the duality in terms of minority/majority, as if all minorities were similar,” he urges us to “seek multiple voices and try to make sense of where differences and similarities lie.” *Id.*

case to the Justice Department for a department-wide investigation of police brutality.

III. PROSECUTORIAL REGULATION: THE AMERICAN BAR ASSOCIATION AND THE JUSTICE DEPARTMENT

This Part surveys the ethical rules prescribed by the ABA²⁶¹ and the Justice Department²⁶² that regulate the prosecution of racially motivated violence. Starting from the postbellum federal prosecution of Klan violence in the late nineteenth century, the survey canvasses the ethical guidelines governing the prosecution of cases involving civil rights complaints, violence against women, and hate crimes. Two premises inform this survey. The first concerns the widely acknowledged “dominant and commanding role” prosecutors exert in both federal and state criminal justice systems “through the exercise of broad, unchecked discretion.”²⁶³ The second premise pertains to the “inextricable and profound” nature of the prosecutorial role in dealing with “the complexities of racial inequality in the criminal process.”²⁶⁴

A. Prosecuting Racially Motivated Violence

The prosecution of racially motivated violence marks the historical intersection of race and the criminal justice system. That intersection unfolds across a continuum of federal and state prosecutions that alternately elevate and debase the exercise of prosecutorial discretion. Debased discretion occurs notwithstanding federal and state statutory constraints.²⁶⁵ Historical antecedents show that such racially invidious discretion forms part of a colonial discourse that repro-

261. The survey draws on four ABA rule clusters: the CANONS OF PROFESSIONAL ETHICS (1908), reprinted in ABA OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 11-197 (1967); the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1982); the MODEL RULES OF PROFESSIONAL CONDUCT (1999); and the ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION (1993).

262. See U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 8-3.000 to 8-3.150 (visited Apr. 22, 1999) <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/>.

263. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16-17 (1998).

264. *Id.* at 17 (footnote omitted).

265. See James A. Strazzella, *The Relationship of Double Jeopardy to Prosecution Appeals*, 73 NOTRE DAME L. REV. 1, 8-16 (1997) (discussing statutes which implicate double jeopardy concerns); see also JAMES GOODMAN, *STORIES OF SCOTTSBORO* 111-17 (1994) (discussing the racial ideology of the Attorney General of Alabama, Thomas E. Knight, Jr., who led the prosecution in the Scottsboro case).

duces the constraints and the discipline of “colonized minds.”²⁶⁶ Explicating this disciplinary dynamic, Pier Larson comments that “colonized people routinely engaged and rearranged colonial discourses by fitting them into local systems of knowledge.”²⁶⁷ Viewed as imperial subjects, victims of racially motivated violence nevertheless may constrain, limit, and transform the “cognitive culture of the foreign and politically dominant” through “their active engagement with the intellectual material of colonial discourses”²⁶⁸

In the Louima case, Carter’s decision as a person of color to file a superseding federal indictment and to refer his investigative fact findings to the Civil Rights Division signifies a cognitive transformation in the culture of federal prosecutorial discretion. Prodded by community protest, this transformation braves the structures of popular and institutional racism that “circulate across and around the contours of material power” in the private and public domains of civil society.²⁶⁹ By publicly braving the racist culture of the 70th Precinct, as well as the larger New York City Police Department, Carter unveiled what James Scott terms a “hidden transcript” of collective racial hierarchy, rather than the usual “public transcript” of isolated individual or group racial animus disclosed in incidents of police brutality and in criminal prosecutions under civil rights and hate crimes statutes.²⁷⁰ The symbolic import of that public exposition by one among a small handful of federal prosecutors of color deserves note in a culture rich in the racial symbolism of crime and punishment, as the recent revival of the chain gang²⁷¹ so vividly demonstrates.

266. Pier M. Larson, “Capacities and Modes of Thinking”: *Intellectual Engagements and Subaltern Hegemony in the Early History of Malagasy Christianity*, 102 AM. HIST. REV. 969, 970 (1997).

267. *Id.* Larson also notes that “people at the periphery of the European empire could only understand what was new to them by analogy to what they already knew.” *Id.* He adds: “By filtering European discourses through their own orders of meaning, ‘subalterns’ limited the potential of those discourses to rule effectively in the service of colonial power.” *Id.*

268. *Id.* at 971.

269. *Id.* at 998.

270. JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* 1-16 (1990) (elucidating relationships of power in transcripts of social life).

271. Tessa Gorman describes chain gangs as “a mode of punishment that is both a cruel barb and an unusual indignity to the class of persons most likely to suffer the penalty.” Tessa M. Gorman, Comment, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 458 (1997) (discussing the history and revival of chain gangs). For Gorman, chain gangs present “a loaded symbol . . . evok[ing] the horror of countless racial indignities, from slave ships to forced labor.” *Id.*

Symbolically and practically, the Louima case signals a break from the historical pattern shaping the federal prosecution of racially motivated violence. That pattern, characterized by inaction and spare enforcement, tracks the failure of the federal government to enforce civil rights during the Reconstruction era,²⁷² despite widespread post-bellum Klan violence.²⁷³ Acts of violence, whether motivated by politics or race, spanned both “political sides” during that era.²⁷⁴ Where politi-

272. See David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 839-40 (1998) (citing federal government's post-Reconstruction failure to protect the rights of African-Americans as “one of the great tragedies of American history”); David Bernstein, Note, *The Supreme Court and “Civil Rights,” 1886-1908*, 100 YALE L.J. 725, 726-33 (1990) (observing that the Supreme Court upheld “explicitly discriminatory race and gender-based regulations” while it struck down “facially neutral restrictions” but arguing that the latter “substantially advanced the economic prospects of Blacks, women, and immigrants”).

273. See Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910*, 70 CHI.-KENT L. REV. 439, 461-66 (1994) (discussing this history); see also John A. Carpenter, *Atrocities in the Reconstruction Period*, in LYNCHING, RACIAL VIOLENCE, AND LAW 36, 48 (Paul Finkelman ed., 1992) (mentioning “an unusual amount of atrocities, deprivations of rights, and other forms of illegal treatment” of blacks during the Reconstruction era); Lee W. Formwalt, *Petitioning Congress for Protection: A Black View of Reconstruction at the Local Level* 119, 132, in 7 AFRICAN AMERICAN LIFE, 1861-1900: BLACK FREEDOM/WHITE VIOLENCE, 1865-1900 (Donald G. Nieman ed., 1994) [hereinafter AFRICAN AMERICAN LIFE] (citing Freedman's Bureau records of violent attacks—murders and assaults with intent to kill—on blacks in Georgia during 1868); Otto H. Olsen, *The Ku Klux Klan: A Study in Reconstruction Politics and Propaganda*, 232 *passim*, in AFRICAN AMERICAN LIFE, *supra* (noting Klan atrocities and vigilante terror campaigns during Reconstruction).

274. KENNETH C. BARNES, WHO KILLED JOHN CLAYTON? POLITICAL VIOLENCE AND THE EMERGENCE OF THE NEW SOUTH, 1861-1893, at 131 (1998) (tracing the relationship of political violence to the rise of “New South politics” and citing the murder of Clayton as an example of how “violence was used consistently to attain political goals”); GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 1-15 (1984) (depicting causes of postbellum political violence and disorder); BERTRAM WYATT-BROWN, HONOR AND VIOLENCE IN THE OLD SOUTH 154-213 (1986) (explicating ritualistic community violence of lynching, vigilantism, and charivaris).

Barnes comments that “Union soldiers and guerillas had been ruthless to local rebel families during the Civil War.” BARNES, *supra*, at 131. Indeed, he explains that “[b]lack and white Republicans organized into paramilitary bands in 1868 to protect the civil rights of freedmen and to combat the terror of the Ku Klux Klan.” *Id.* Overtaken by the same zeal, Barnes continues, Republicans “again responded with a show of arms in the 1890 election in an attempt to ensure a fair vote.” *Id.* Nonetheless, he concludes, Democratic elites “relied most on the use of violence as a political weapon,” and moreover, “used it most effectively.” *Id.* Cataloguing the “marauding attacks on freedmen in 1867 to Klan terrorism in 1868 and 1885, to the long list of victims in the late 1880s and early 1890s,” Barnes finds that “Democrats established a pattern of physical violence used to intimidate their political opposition.” *Id.* When intimidation proved inadequate, he shows that “the violence spilled into the polling place with theft of ballots at gunpoint and ultimately murder.” *Id.*; see also CHRISTOPHER WALDREP, NIGHT RIDERS: DEFENDING COMMUNITY IN THE BLACK PATCH, 1890-1915, at 140-60 (1993) (de-

cal progress advanced, Supreme Court-led federal court nullification ended its march.²⁷⁵

The violence of the Reconstruction era encompassed economic, legal, and extralegal forms designed to maintain the southern antebellum order through the disenfranchisement of blacks,²⁷⁶ the enactment of Jim Crow laws,²⁷⁷ and the threat of sexual violence (e.g., rape)²⁷⁸ and lynching.²⁷⁹ Lacking presidential leadership,²⁸⁰ the federal role in prosecuting these forms of racially motivated violence appears minimal, at least when judged by its civil rights enforcement history.²⁸¹

scribing vigilante violence); JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 180-223* (1984) (surveying white violence manifested in lynchings and rioting during the Reconstruction era); GEORGE C. WRIGHT, *RACIAL VIOLENCE IN KENTUCKY, 1865-1940: LYNCHINGS, MOB RULE, AND "LEGAL LYNCHINGS" 19-60* (1990) (documenting various forms of racial violence during the Reconstruction era such as lynchings, "legal lynchings," and mob rule).

275. See Girardeau A. Spann, *Proposition 209*, 47 *DUKE L.J.* 187, 284 (1997). Pointing to recent events, Spann asserts that "racial minorities have had some success protecting their interests before the political process, but have often had their political victories nullified by the Supreme Court—just as the Supreme Court nullified minority political victories during the eras of *Dred Scott* and Reconstruction." *Id.* He stresses that for "both the past and the present, the political process has been a better friend to racial minorities than the Supreme Court has been." *Id.*

276. See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 45-82 (1974) (tracking the use of fraud registration and literacy tests as means to disenfranchise African-Americans).

277. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

278. See Crooms, *supra* note 231, at 474-79; Roberts, *supra* note 235, at 364-67.

279. See BRUNDAGE, *supra* note 194, at 1-85; see also JAMES R. MCGOVERN, *ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL 1-15* (1982) (providing a general overview of the occurrence of, and responses to, lynching); HOWARD SMEAD, *BLOOD JUSTICE: THE LYNCHING OF MACK CHARLES PARKER 3-58* (1986) (describing one example of ritual lynching); STEWART E. TOLNAY & E. M. BECK, *FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930*, at 1-201 (1995) (discussing lynching as a form of popular justice and social control).

280. See EARL OFARI HUTCHINSON, *BETRAYED: A HISTORY OF PRESIDENTIAL FAILURE TO PROTECT BLACK LIVES* (1996). Hutchinson explains that "Presidents and attorneys general generally ignored or sparingly used the federal statutes to prosecute criminal civil rights abuses." *Id.* at 214. This manner of neglect arose less out of "the personalities, individual preferences, or even racial bigotry of the men and women in the White House and DOJ" and more out of "political expediency." *Id.* In point of fact, Hutchinson remarks, this historical line of presidents seemed "determined not to offend the politically powerful South." *Id.* Bolstered by a jurisprudence of federalism, they broke from this determined orthodoxy only "when a violent act triggered a major riot, generated mass protest, or attracted major press attention." *Id.* Yet even in such cases, Hutchinson adds, "black leaders had to pressure the federal government to take action." *Id.*

281. See BRIAN K. LANDSBERG, *ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 6-22, 23-59* (1997) (discussing the evolution of the U.S. Attorney General's authority to prosecute civil rights violations, exploring the federal government's role in enforcement, and describing various models of enforcement).

This meager showing may be attributable to the bureaucratic organization of the Justice Department's Civil Rights Division,²⁸² the acquiescence of the Solicitor General's office,²⁸³ and the Department's onerous and antiquated criminal-civil distinction.²⁸⁴ Whatever the causal explanation, the anti-Klan trials of the late nineteenth century²⁸⁵ and the voting rights initiatives of the middle part of the twentieth century²⁸⁶ stand out as exceptions to the lackadaisical enforcement record otherwise accrued by the Civil Rights Division. Although this record makes no mention of southern state court defiance, it raises similar doubts about judicial independence and impartiality that besieged those state courts during the Reconstruction and post-*Brown* eras.²⁸⁷

In contrast, the current prosecution of violence against women points out the potentially activist role of prosecutors²⁸⁸ in the enforce-

282. See *id.* at 77-154 (explaining Civil Rights Division practices of priority setting, resource allocation, and litigation policymaking).

283. Compare Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 817-52 (1987) (discussing and celebrating the role of the Solicitor General's office in the civil rights movement), with Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938, 1942 (1987) (arguing that Elman "misallocates credit" for the legal struggle against segregation between 1930 and 1960).

284. See LANDSBERG, *supra* note 281, at 56 (mentioning that the "blurring of the line between civil and criminal sanctions may lead to confusion as to the role of the government attorney responsible for such litigation").

285. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 425-59 (1988); ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 53-115 (1985); ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* 383-418 (1971); LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872*, at 40-130 (1996); Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921, 924-49 (1984).

286. See John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 13 (1997) (describing the early frustration of voting rights enforcement litigation in the South by federal court "delay and obfuscation").

287. See Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817 (1998). Bright argues that ignoring the historical neglect of state court transgressions and the "wishful" incantation of judicial independence "will not make independence a reality." *Id.* at 857. For Bright, the juridical community, comprised of "[c]itizens, judges, lawyers, and public officials, must recognize the lack of independence, acknowledge the historic role the courts have played in defiance of the law, explore the influence of that history on the present, and realize how far the courts have to go to reach independence." *Id.*

288. See Machaela M. Hoctor, Note, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 695-97 (1997) (noting that prosecutors often determine how the criminal justice system addresses domestic violence).

ment of both statutory and common law rights. Epitomized by increasingly aggressive policies of prosecuting battering partners,²⁸⁹ such as “no-drop” trials,²⁹⁰ compelled victim testimony, and victim-uncorroborated trial proceedings,²⁹¹ this role suggests a more affirmative stance toward domestic violence that leaves the character of the victim unblemished.²⁹²

A similar upsurge of affirmative efforts seems detectable in the prosecution of violence against gays and lesbians under statutes proscribing “hate crimes.” Employed in part as a means of combating such violence,²⁹³ the statutes offer a broad definition of hate crimes²⁹⁴ delineating the elements of prejudice and causality, the nature of the substantive offense, and the availability of sentence enhancement. Confirming this breadth of coverage, reporting statutes indicate that hate crimes radiate beyond the circle of race to incorporate ethnicity, religion, and sexual orientation.²⁹⁵ To be sure, certain categories of identity resist easy classification.²⁹⁶ The theoretical insufficiency of hate crime classifi-

289. See Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 90-94 (1997).

290. See *id.* Cochran explains: “No-drop policies require that prosecutors go forward with bringing the batterer to trial despite the battered victim’s reluctance to do so. This is accomplished by prosecuting either without the victim’s trial testimony or with the victim’s compelled trial testimony.” *Id.* at 113.

291. See *id.* at 96-99.

292. Joan Meier, *Domestic Violence, Character, and Social Change in the Welfare Reform Debate*, 19 J.L. & POL’Y 205, 218-30 (1997) (discussing the denigration of battered women’s “morality” choices).

293. See GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 31-94 (1991) (reviewing empirical data on victims and perpetrators); VALERIE JENNESS & KENDAL BROAD, HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE 49-73 (1997) (tracing the history of homophobic violence against gays and lesbians, along with the emergence of antiviolence projects).

294. See James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, in 22 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 5-9 (Michael Tonry ed., 1997) (describing various types of hate crimes laws). See generally JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 29-44 (1998) (describing a wide range of federal and state hate crimes statutes); LU-IN WANG, HATE CRIMES LAW (1994) (compiling federal and state statutes addressing hate- or bias-motivated crimes).

295. John Finnis argues that the judgment of moral condemnation toward homosexual conduct “need not be a manifestation of mere hostility to a hated minority, of purely religious, theological, and sectarian belief, or of prejudice.” John Finnis, *Law, Morality, and “Sexual Orientation”*, in SAME SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY 33 (John Corvino ed., 1997) [hereinafter SAME SEX]. For Finnis, that judgment “can be supported by reflective, critical, publicly intelligible and rational considerations.” *Id.*

296. See John Boswell, *Revolutions, Universals, and Sexual Categories*, in SAME SEX, *supra* note 295, at 185, 201 (dismissing arguments for “a single system of sexual categorization” in

cation schemes²⁹⁷ spawns the risk of prosecutorial deployment against common hate crime victims, namely people of color. The danger of disproportionate statutory enforcement against people of color²⁹⁸ corresponds to the bleak history of civil rights law enforcement.²⁹⁹ Thus far, the risk of selective prosecution seems unsubstantiated, though underreporting may cloud the record.³⁰⁰

B. *Regulating the Prosecution of Racially Motivated Violence*

The task of regulating the prosecution of racially motivated violence falls to the American Bar Association, the Justice Department, and to bar associations acting under state court supervision. Unlike conventional inspections, this regulatory inquiry charts a path outside the usual terrain of prosecutorial misconduct and the ordinary range of matters concerning, for example, the timely and complete disclosure of exculpatory evidence.³⁰¹ Instead, it focuses on the prosecutorial function as a state-structured institutional expression of public and private hierarchical relationships that are contingent upon racial subordination. Encased in its own sheen of normativity, racial hierarchy acquires a kind of "structured invisibility"³⁰² in the prosecutorial setting. Peripheral only because of the "tendency to 'forget' or overlook racialized and subordinated others,"³⁰³ the conventional prosecu-

Western history); Carla Golden, *Diversity and Variability in Women's Sexual Identities*, in *SAME SEX*, *supra* note 295, at 149, 150 (describing "enormous diversity and variability in women's self-defined sexual identities" contrary to social definitions).

297. See Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 *NW. U. L. REV.* 1015, 1032-80 (1997).

298. See Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 *N.Y.U. L. REV.* 564, 606-07 (1998). Remarking on this danger, Maroney notes that the neutral gloss of hate crime laws and policies, exemplified in categorical generality rather than particularity, "can be used to penalize bias-motivated crimes lacking historical pedigree." *Id.* at 606 (footnotes omitted). By way of example, he points to statutory invocation "against an African American person who attacks a white person, or against a gay person who attacks a heterosexual, even though such crimes are neither the most common sort nor the kind that spurred the development of anti-hate measures." *Id.* at 607.

299. See MANN, *supra* note 23, at 115-65; see also *id.* at 160 (arguing that the law and legal system maintains "an ingrained system of injustice for people of color").

300. See Maroney, *supra* note 298, at 607 (citing the absence of empirical research tending to support or refute the claim of selective prosecution).

301. See Christopher Slobogin, *Having It Both Ways: Proof That the U.S. Supreme Court Is "Unfairly" Prosecution-Oriented*, 48 *FLA. L. REV.* 743, 754 (1996) (discussing the lack of procedural sanctions when confronted by prosecutorial bad faith in the conduct of discovery).

302. Angela Woollacott, *"All This Is the Empire, I Told Myself": Australian Women's Voyages "Home" and the Articulation of Colonial Whiteness*, 102 *AM. HIST. REV.* 1003, 1007 (1997).

303. *Id.*

tion of racially motivated violence implies a false neutrality and unity of white/black relations.

The canons of race-neutrality and racial unity may be found ideologically embedded in the ABA's regulatory ethics clusters. Regulation adopts the form of rules and standards.³⁰⁴ Together, they govern the normative exercise of prosecutorial discretion.³⁰⁵ This regulatory framework applies equally to federal prosecutors, despite claims of federal preemptive authorization.³⁰⁶ The composition of that framework conveys a pervasive sense of discretion interlacing the charging decision, as well as plea bargaining and sentencing.³⁰⁷ Despite checkng mechanisms³⁰⁸ and administrative channeling,³⁰⁹ discretionary decisions often suggest the appearance of inpropriety³¹⁰ and stir charges of inadequate enforcement and discipline.³¹¹ Attributable in part to the dynamics of the adversarial system,³¹² prosecutorial dis-

304. See H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1148-63 (1973) (noting the inconsistency and vagueness of multifactor ethical standards regulating prosecutors).

305. See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 671-91 (discussing the standards and factors affecting prosecutorial charging discretion); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 736-59 (1996) (remarking on the prosecutorial enjoyment of largely unreviewed discretion under administrative, legislative, and judicial oversight).

306. See Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors*, 65 FORDHAM L. REV. 355, 378-427 (1996) (defending limited Justice Department preemption of state regulatory authority over federal prosecutors); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429, 431-62 (1996) (assessing the Justice Department's preemption of state ethics regulation of federal prosecutors).

307. See Misner, *supra* note 305, at 750 (citing the charging decision as "the basic source of prosecutorial authority" but noting the enhancement of that power "by the prosecutor's role in plea bargaining and by recent trends in sentencing").

308. See Wayne A. Logan, Note, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695, 1719-27 (discussing federal and state controls on prosecutorial discretion).

309. See Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 490-505 (1976) (proposing administrative law regulation of pretrial prosecutorial procedures).

310. See Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 704-19, 728-39 (1998) (exploring the history, impact, and content of the ethical standard regulating the appearance of prosecutorial impropriety).

311. See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 77-94 (1995) (surveying formal and instrumental grounds of prosecutorial misconduct and institutional mechanisms of federal and state disciplinary review).

312. See Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include*

cretion may rapidly breach the restraints³¹³ and responsibilities³¹⁴ of ethics rules. Breaches may occur during preliminary investigation,³¹⁵ plea bargaining³¹⁶ and negotiation,³¹⁷ pretrial discovery,³¹⁸ trial,³¹⁹ sentencing,³²⁰ and even non-adversarial proceedings.³²¹ Such transgres-

the Non-Adversarial Roles of Federal Prosecutors, 37 B.C. L. REV. 923, 927-62 (1996) [hereinafter Flowers, *A Code of Their Own*] (noting the adversarial nature of the ethics codes and the unguided quality of the non-adversarial role of the federal prosecutor); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 50-85 (1991) [hereinafter Zacharias, *Structuring the Ethics*] (analyzing the prosecutorial role in the context of adversarial trials when equality premises fail). See generally Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126 (1988) (highlighting the importance of the defense counsel's role in ensuring fairness of prosecutorial conduct within an adversarial system).

313. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1537-45, 1560-72 (1981) (mapping the external and self-imposed limits on the scope of prosecutorial discretion to enhance accountability to legislative and judicial authorities).

314. See John S. Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 U. RICH. L. REV. 511, 513-37 (1983) (parsing federal prosecutorial responsibilities in the fields of investigation, charging, grand jury proceedings, discovery, plea bargaining, trial conduct, and publicity).

315. See Beimet L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 395-405 (1992). Gershman relates increased prosecutorial use of "more imaginative and intrusive undercover tactics both to investigate persons suspected of crime—a legitimate goal—and to test the integrity of persons not suspected of any crime—an illegitimate goal." *Id.* at 400.

316. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52-85 (1968) (remarking that prosecutorial plea negotiations may thwart fairness goals of procedural rules); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 42-54 (remarking on the prosecutorial dominance and leverage over defense attorneys during plea bargaining); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 449-52 (1971) (citing the trial prosecutor's unchecked discretion in plea bargaining process).

317. See Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 915-22 (1997). Experience may fail to mitigate the effect of such bias. Indeed, Babcock and others assert that "to mitigate the [self-serving] bias and promote settlement, two conditions must be met: negotiators must become aware of the bias, and such awareness must have the effect of reducing the bias." *Id.* at 921. Neither of these conditions, they add, "is likely to be satisfied in practice." *Id.*

318. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 708-16 (1987) (discussing prosecutorial misconduct in the suppression of exculpatory evidence and presentation of false evidence).

319. See Zacharias, *Structuring the Ethics*, *supra* note 312, at 85-102 (delineating the causes of failure in the adversarial trial process).

320. See Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 724 (mentioning that "prosecutors possess some discretionary power to influence sentencing outcomes through charging decisions and plea negotiations"); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1723-24 (1992) (attributing disparity in the sentencing process to federal prosecutorial discretion); Cynthia K. Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 216-39

sions may stem from both good³²² and bad³²³ institutional incentives, or social status.³²⁴ Moreover, they may advance the cause of "rough justice"³²⁵ or degenerate into racist misconduct.³²⁶ Whatever the outcome, prosecutorial discretion may have little effect on deterring private or public acts of racially motivated violence associated as here with police brutality and misconduct.³²⁷

The absence of meaningful ethical rule restraints rests on the pragmatic rationality animating prosecutorial discretion. The logic of that rationality assumes the colorblind unity of white-black relations. This regulative ideal imposes a colorblind harness on prosecutorial conduct that is predicated on the normative race-neutral priority "to see that justice is done."³²⁸ Originally announced in the ABA Canons,

(1997) [hereinafter Lee, *From Gatekeeper*] (discussing advantages and disadvantages of federal prosecutorial power over substantial assistance departures in sentencing); see also Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 149-73 (1994) (locating overzealous adversarial incentive in the discretionary power of prosecutors to participate in federal sentencing guidelines). Citing evidence of prosecutorial discretion in the sentencing function, Lee mentions that "prosecutors play a defining role in determining whether a defendant receives a downward departure based on substantial assistance." Lee, *From Gatekeeper*, *supra*, at 235. Hence, she adds, "the authority to veto a substantial assistance departure is a significant power in light of the fact that such departures constitute the bulk of all departures and an increasing percentage of all Guidelines sentences." *Id.*

321. See Flowers, *A Code of Their Own*, *supra* note 312, at 962-74 (describing a lack of federal prosecutorial guidance and regulation in the area of non-adversarial investigation).

322. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 873-89 (1995) (proposing a financial-incentives model of monetary awards to control prosecutorial discretion).

323. See Kenneth Bresler, "I Never Lost a Trial": *When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 540-44 (1996) (probing prosecutorial incentive to engage in the practice of conviction-rate scorekeeping).

324. See Debra S. Emmelman, *Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures of Court-Appointed Defense Attorneys*, 22 LAW & SOC. INQUIRY 927, 936 (1997) (observing that "it is not a person's social status *alone* that affects her case but the social conditions associated with her status, how or whether those conditions enter as evidentiary facts in the case, and most important, how convincing those facts are within the cultural framework of common sense").

325. James A. Trowbridge, *Restraining the Prosecutor: Restrictions on Threatening Prosecution for Civil Ends*, 37 ME. L. REV. 41, 42 (1985) ("In either the false arrest or brutality situation, the prosecutor may believe that exchanging a dismissal or grant of nolle prosequi for release from civil liability constitutes rough justice.").

326. See BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 4.3(a)-(d), at 4-16 to 4-23 (1998); Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1221-42 (1992).

327. See H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA 158 (1996) (remarking that prosecutors "can do little" to control police brutality or perjury).

328. CANONS OF PROFESSIONAL ETHICS Canon 5, *supra* note 261, at 19.

this normative priority echoes in the commentary accompanying the Model Rules. That commentary recognizes the prosecutorial responsibility to serve as “a minister of justice.”³²⁹ The ABA Standards for Criminal Justice confirm this ministerial obligation by reiterating the prosecutorial duty “to seek justice, not merely to convict.”³³⁰ Indeed, the Standards recognize the “critical role” the prosecutor plays in the criminal justice system.³³¹ This role confers a quasi-judicial position, endowing the prosecutor with the duties of an “administrator of justice.”³³² Guided by the interests of justice and liberated by broad discretionary powers, the prosecutor may expand his reign over the administration of the criminal justice system to improve the quality of criminal justice itself.³³³

This race-neutral ministry receives the implicit approval of the *Restatement (Third) of the Law Governing Lawyers*.³³⁴ It garners additional support from Justice Department guidelines in cases where the pursuit of justice in a criminal civil rights matter serves the “national interest.”³³⁵ Pursuit of justice here may include the move to supersede an extant state prosecution. Normative approval triumphs because the reigning ethic of race-neutral, justice-based prosecutorial discretion “takes precedence, at least in principle, over any countervailing choice-supporting consideration that can arise at the level of choice of action within the context of a situation to which the rule is applicable.”³³⁶ In this way, ethics rules render the prosecutor a discretionary agent of the “neutral” state and a legislator of colorblind criminal justice policy.³³⁷ Examining the prosecution of racially motivated vio-

329. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8 cmt. (1999).

330. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION, Standard 3-1.2 (c).

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

332. *Id.*

333. *See id.*

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

335. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY MANUAL § 8-3.000 (visited Apr. 22, 1999) <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/>; *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). Morvillo and Bohrer explain that although “the Department of Justice has developed guidelines and regulations designed to centralize the exercise of discretion in some cases,” nonetheless “its role is seen more as setting boundaries rather than imposing restraint and moderation in individual cases in an age of increasing prosecutorial power and increasing public expectations.” *Id.*

336. Edward F. McCleimen, *Pragmatic Rationality and Rules*, 26 PHIL. & PUB. AFF. 210, 255 (1997).

337. *See* Misner, *supra* note 305, at 743. Citing the breadth of prosecutorial charging discre-

lence and its regulatory compass under ABA rules and Justice Department guidelines invites exploration of race-conscious, community-oriented prosecutorial duties.

IV. RACE-CONSCIOUS PROSECUTORIAL DISCRETION

This Part proposes a race-conscious, community-oriented model of prosecutorial discretion as an alternative to the dominant colorblind prosecutorial canon of race neutrality. Building out from an analysis of liberal models of discretion, it puts forward an alternative community-situated model emphasizing the centrality of racial identity and racialized narrative (e.g., racial slurs and violence) to the exercise of prosecutorial discretion. It also compares the proposed model to other race-conscious practices in the fields of environmental justice, transracial adoption, employment discrimination, and jury selection.

A. *Liberal Models of Discretion: Justice and Merit*

Liberal models of lawyer discretion inform ABA and Justice Department rules of ethics. Commonly framed, the rules share a similar form and content. As to form, the rules closely resemble the multifactor, context-specific standards found in postwar jurisprudence.³³⁸ As to content, the rules favor client- or state-centered calibrations of interest. In doing so, they relegate to a secondary plane other interests pertinent to law, courts, unrepresented third parties, and the public. Relegation systematically diminishes the weight of non-client considerations associated with the integrity of the law, as well as court officer responsibility and third party or community obligation. At the same time, both the form and content of the rules reserve space for the lawyer to exercise individual discretion. Vigilant of client or state interest, that exercise stems from autonomy-instilled, individualism norms that limit the scope of professional duty. These norms often accommodate discretionary judgments that neglect or reject considerations of collective racial or interracial harmony.

Definitionally, the rules operate at a fairly high level of generality.³³⁹ Taken at this level, the grant of individual discretion renders the

tion, Misner contends that "prosecutorial decisions—such as whether to prosecute, how to prosecute, how long to sentence, and whether to dismiss charges—all contribute to the creation of the prosecutor as the real policy-maker within the criminal justice system." *Id.*

338. On the form of postwar legal standards, see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56-121 (1992).

339. See Alan H. Goldman, *Rules in the Law*, 16 LAW & PHIL. 581, 589 (1997) (arguing that

lawyer's independent judgment susceptible to race-marred decision-making.³⁴⁰ Contrary to the claim of "nonjudgmentalism" heard from some postmodern critics, liberal models of lawyer ethical discretion involve judgment and choice about the merit and justness of racial commitments to individuals and to communities.³⁴¹ Acting upon such commitments entails calculations of merit and justice unconfined by obligations to the mythic liberal subject manifested in the guise of the client, the state, or the lawyer himself. Construing the client, the state, and the lawyer-self as the freewheeling sovereigns of liberal myth underestimates the place of racial identity and narrative in machinations of client consent, state deliberation, and lawyer decisionmaking. The same construction overlooks the place of gender and sexuality in such machinations.³⁴²

Proponents of mythic liberal legalism and its orthodox constructions rely on the rhetoric of consent to justify client- or state-centered decisions that omit consideration of external factors, such as race and community.³⁴³ That justification posits a narrowly fixed meaning of consent unaffected by outside intervention. Yet lawyers regularly participate in the production of client consent and state policy. Their participation, however, raises few concerns about paternalism.³⁴⁴ By paternalism, I mean an outside act of intrusion in the decisionmaking process of a person or entity in order to promote the perceived end-goals of that person or entity.³⁴⁵ Even when conceded, proponents of

"genuine rules must be stated at a sufficiently broad level of generality so that their stated conditions are likely to recur, but not so broadly as to suggest that they should be read as principles against which other factors may always have to be weighed").

340. See MANN, *supra* note 23, at 180 ("For minorities, the inequities ensuing from this absolute and unrestricted authority center on the increased likelihood of being charged, overcharged, and indicted.").

341. See Paddy Ireland, *Reflections on a Rampage Through the Barriers of Shame: Law, Community, and the New Conservatism*, 22 J. L. & SOC'Y 189, 208 (1995) (arguing that the "new, 'radical', postmodern liberalism which has emerged embodies a non-judgmentalism, which, whatever its intent, ends up advocating individual choice while denying that any collective political choices have to be, or can be, made").

342. See Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 261-62 (1996) (discussing legal and nonlegal factors influencing prosecutorial discretion).

343. See Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 MICH. L. REV. 1, 13-25 (1997) (discussing the interaction of liberal justification and consent).

344. See Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 233-54 (1998) (asserting that paternalism is compatible with normative economics and justifiable under efficiency analysis).

345. See *id.* at 236 ("Paternalism is intervention in a person's freedom aimed at furthering her own good.").

client- or state-centered liberalism justify the intrusions of lawyer paternalism on the basis of localized efficiency and limited application.³⁴⁶

Functionalist justifications of lawyer paternalism inevitably run afoul of normative prescriptions. Although not without merit, the justification of heightened efficiency in carefully cabined circumstances of lawyer-arrogated ethical decisionmaking must acknowledge the resulting denial of client- or community-centered moral development, as well as the consequential deprivation of deliberative autonomy. Even when contextually tailored, the devaluation of autonomy³⁴⁷ denigrates the value and impedes the growth of citizenship. As such, it inhibits the fullness of deliberative judgment required in the choice of options and in the appreciation of their consequences in client-, victim-, or community-centered advocacy.

Liberal models of lawyer discretion suffer deep-seated internal tensions rankling the pursuit of client, lawyer, and community interests. The conflicting endorsement of client autonomy and lawyer independence under the same normative slate of liberal individualism works to the detriment of community conceptions of a higher collective good. That endorsement also gives little guidance to the lawyer-client analysis of options in light of their impact on individually joined community. Additionally, though the privileged position accorded to autonomy under a theory of liberal individualism seems clear-cut, the scope of the privilege falls unbounded. Indeed, liberal theory seems to waver in the "acceptance of autonomy as a desirable end in itself, rather than as a means to the attainment of the good."³⁴⁸ Similarly, it seems to falter both in asserting the neutral quality of liberal autonomy "irrespective of the use to which it is put,"³⁴⁹ and in accommodating the adverse consequences flowing to individuals and communities.

346. See *id.* at 233-34. Zamir explains that "efficiency attributes equal weight to the well-being of every person." *Id.* at 233. Following this attribution, Zamir reasons, "an act or a rule is efficient if the sum of the well-being (utility) it generates is greater than the sum of its costs (disutility)." *Id.* More expansively, in comparing normative theory, "efficiency analysis may focus on one or more objects of evaluation: particular actions, general rules, character traits, and so forth." *Id.*

347. See Alexander McCall Smith, *Beyond Autonomy*, 14 J. CONTEMP. HEALTH L. & POL'Y 23, 30 (1997) (arguing that "the non-autonomous person, the person for whom decisions are made by others, or who, for whatever reason, is unable to make decisions for himself, leads a poorer life").

348. *Id.* at 31.

349. *Id.* at 30; see also David A. J. Richards, *Rights and Autonomy*, 92 ETHICS 3, 12-20 (1981) (providing an autonomy-based interpretation of treating persons as equals).

Consider then an alternative account of autonomy tied to community interest and collective responsibility.³⁵⁰ Like the standard liberal vision, this account views lawyer discretion, and more specifically prosecutorial discretion, as an institutional necessity of the criminal justice system. Accepting that necessity, Angela Davis concedes the difficulty of “imagin[ing] a fair and workable system that does not include some level of measured discretion in the prosecutorial process.”³⁵¹ Whether the institutional incentives and disincentives driving that discretion may accommodate competing considerations of merit, justice, and racial community evades easy answer. By way of answer, however, consider first merit-based discretion.

The merit-based model of liberal ethical discretion seems well grounded in conventional ethics rules. In the criminal arena, for example, Model Rule 3.8 recognizes the function of merit in the exercise of prosecutorial decisionmaking.³⁵² Under that Rule, the demands of merit-based discretion strive to guarantee impartiality and state independence.³⁵³ Both elements are essential for legitimacy reasons. Here, the idea of legitimacy seems untouched by speculation of racial harm to the defendant or victim, and to the communities that may embrace each. Legitimacy remains undiminished because the theory of merit-based prosecution relies on colorblind claims of punishment fired by the race-neutral logic of instrumental and intrinsic reasoning.³⁵⁴ Driving the rationality of merit-based action, these claims ignore the fact that prosecutorial discretion presents “a major cause of racial inequality in the criminal justice system.”³⁵⁵

Causal neglect of this kind fosters the view of systemic racial inequality as a necessary cost of prosecutorial agency.³⁵⁶ The sociolegal in-

350. See ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 85-93 (1993) (sketching a nonaggregative conception of collective interests akin to the traditional natural law theory of the common good); JOHN KEKES, *AGAINST LIBERALISM* 69-87 (1997) (defending the moral requirement of collective responsibility).

351. Davis, *supra* note 263, at 20. Davis finds prosecutorial discretion deficient “in the randomness and arbitrariness of its application.” *Id.* Even where general policies constraining discretion are in place, Davis laments, “there is no effective mechanism for enforcement or public accountability.” *Id.* at 20-21. Furthermore, she discounts prosecutorial self-regulation as “largely nonexistent or ineffective.” *Id.* at 21.

352. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8 (1999).

353. See *id.* Rule 3.8 cmt.

354. For helpful discussion of these competing claims, see David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Good of Punishment*, 16 *LAW & PHIL.* 507 (1997).

355. Davis, *supra* note 263, at 17.

356. For a brief description of prosecutorial agency costs, see Fred C. Zacharias, *Justice in*

stitutions of the state tolerate that view. Curing the systemic racial inequality operating in criminal justice institutions requires community-based prosecutorial discretion. Converting institutional tolerance of systemic racial inequality into institutional condemnation under an ethical rationale of a community-oriented, racial justice-based model of prosecutorial discretion begins with a sense of moral activism.

Consider David Luban's notion of moral activism in evaluating this contemplated conversion. Luban argues that "morally activist lawyers should sometimes refrain from zealously advancing lawful client interests even when the threat to third parties is minimal or even intangible, and even when the benefit to the client may be substantial."³⁵⁷ Specifically, he urges avoiding the performance of "collectively harmful actions."³⁵⁸ Transmuting Luban's cautionary prohibition for civil justice into an exhortation for the use of prosecutorial power as a collective instrument of racial justice conforms to a community justice-based model of discretion. To that end, Angela Davis recommends deploying such power "to construct effective solutions to racial injustice."³⁵⁹ For Davis, prosecutors possess "the power, discretion, and responsibility to remedy the discriminatory treatment of African Americans in the criminal justice process."³⁶⁰

The community justice-based model of prosecutorial discretion proceeds from the premise of lawyers as morally independent agents within a system of adversarial justice.³⁶¹ This model struggles against

Plea Bargaining, 39 WM. & MARY L. REV. 1121, 1181-82 (1998) [hereinafter Zacharias, *Justice*].

357. David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 955 (1995).

358. *Id.* at 962.

359. Davis, *supra* note 263, at 17 (footnote omitted).

360. *Id.* at 18. Davis maintains that prosecutors, by virtue of their grant of discretion, "make decisions that not only often predetermine the outcome of criminal cases, but also contribute to the discriminatory treatment of African Americans as both criminal defendants and victims of crime." *Id.* This, in large part, privately exerted discretion, according to Davis, "gives prosecutors more power than any other criminal justice officials, with practically no corresponding accountability to the public they serve." *Id.* (footnotes omitted). On these grounds, Davis urges that prosecutors, guided by the "duty to pursue justice," accept "the responsibility to use their discretion to help eradicate the discriminatory treatment of African Americans in the criminal justice system." *Id.*

361. See Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47 (1997). Echoing this sense of procedural justice, Clark observes that "[a] basic tenet of a society maintaining tolerance of and support for lawyers representing persons charged with crime is that we believe in the moral independence of the lawyer from the client." *Id.* at 59. Independence comes in part from the fact that it is the client and not the lawyer who "is charged with or has committed the crime." *Id.* Indeed, Clark explains, the lawyer is not himself "involved in the crime—he or she

the competing roles and functions of prosecuting and defense attorneys in the criminal justice system.³⁶² Under its alternative template, the function of the prosecutorial role expands beyond the predicate state obligation to the public to encompass both victim and defendant communities.

In contrast to the usually obscurantist role of defense counsel,³⁶³ here prosecutorial role performance combines both intrasystemic and extrasystemic appeals to justice. Intrasystemic appeals invoke principles of justice embodied in the legal system and public morality.³⁶⁴ Appeals of this kind compel the prosecutorial duty to bargain justly.³⁶⁵ Conversely, they bar “prosecutorial reliance on tactical and resource considerations”³⁶⁶ in the exercise of ethical discretion. Informing both rehabilitative and punitive discretionary judgments, the appeals strive to achieve a retributive equity of blame and responsibility, hence to strike a balance of equitable attribution and blameworthiness,³⁶⁷ in spite of the ambiguity of criminal rehabilitation and punishment.³⁶⁸

only supplies representation.” *Id.* The act of representation itself, he insists, “should not be taken to signal support for the client’s past actions—only support for the due process right to a fair hearing.” *Id.*

362. See PAUL G. HASKELL, *WHY LAWYERS BEHAVE AS THEY DO* 75 (1998). Haskell puts forward a “justice theory of representation” that explains the lawyer’s role in terms of “achiev[ing] for the client only what the facts allow him under the law.” *Id.* On this explanation, the lawyer turns from a “zealous advocate” to “an instrument of justice.” *Id.* Haskell is quick to point out that this role transformation in no way “suggest[s] that the adversarial method be abandoned, but rather that it be limited to honest differences concerning facts and law.” *Id.*

363. Cf. Andrew G.T. Moore, II, *The O.J. Simpson Trial—Triumph of Justice or Debacle?*, 41 *ST. LOUIS U. L.J.* 9, 18 (1996) (commenting that where the defense counsel’s search for the truth “is lost or distorted, the adversarial system becomes useless as a means for determining guilt or innocence”) (footnote omitted).

364. See ROBERT F. SCHOPP, *JUSTIFICATION DEFENSES AND JUST CONVICTIONS* 178 n.70, 179 (1998) (explaining that “nullification serves as an intrasystemic corrective device” based on an appeal to conscience that extends beyond the principles of justice as these principles are embodied in the legal system).

365. See Zacharias, *Justice*, *supra* note 356, at 1161-63 (considering the role of equitable arguments in a prosecutor’s decision to plea bargain).

366. *Id.* at 1180. Zacharias argues that “[t]he sole issues for the prosecutor should be what the defendant has done and what the defendant’s situation is.” *Id.*

367. See Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 *LAW & HUM. BEHAV.* 597 (1997) (examining victim blameworthiness in attributions of accident fault and civil damage awards).

368. See Charles H. Logan & Gerald G. Gaes, *Meta-Analysis and the Rehabilitation of Punishment*, in *OFFENDER REHABILITATION: EFFECTIVE CORRECTIONAL INTERVENTION* 38 (Francis T. Cullen & Braudon K. Applegate eds., 1997) (“Meta-analysis of research on rehabilitation has not yet established that any particular method of treatment is significantly and reliably effective.”).

By comparison, extrasystemic appeals trigger principles of justice implanted in social and cultural community. Appeals of this sort animate victim-based theories of justice.³⁶⁹ Consider the victims' rights movement and the growing prosecutorial use of victim impact statements.³⁷⁰ In this way, extrasystemic appeals provide a prosecutorial form and forum for victim and community participation.³⁷¹ Surprisingly, the employment of victim impact statements as a means of curing prosecutorial and community inaction³⁷² may invite defendant-directed public mercy.³⁷³ The fostering of victim and community participation by defendant-specific appeals to mercy is relevant to the exercise of prosecutorial discretion. The best example of such relevance may be found in capital punishment proceedings.³⁷⁴ Other instances of equitable mercy may be seen in criminal sentencing,³⁷⁵ though for some juridical agents justice and mercy may lie distinct.³⁷⁶

369. See GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 177-206 (1995). Fletcher asserts that "it would be valuable in many criminal cases" to include a "procedure of a preliminary verdict that the act was a criminal violation of the victim's rights." *Id.* at 183.

370. See Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 235-48 (1991) (providing an overview of victim participation statutes); see also Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 105-13 (1997) (arguing that the admission of victim impact statements in capital sentencing hearings improperly influences prosecutorial and jury decisions).

371. See Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 143-49, 163-78 (1984) (discussing the potential conflicts between the interests of the state and the interests of victims in criminal cases, and advocating that victims be allowed an expanded role throughout criminal proceedings); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 547-58 (1982) (condemning prosecutorial prohibition on victim participation as historically unjustified and advocating that victims be considered parties with interests in both procedural and substantive case development).

372. See Stuart P. Green, Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488, 489-93 (1988) (proposing statutory authority for individuals to challenge prosecutorial inaction as a "direct, effective, and systematic means" of balancing prosecutorial discretion and victims' interests).

373. For a discussion of mercy and criminal justice, see JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162, 165-83 (1988).

374. See Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1009-33 (1996) (discussing the role of mercy in the penalty phase of capital sentencing); Malla Pollack, *The Under Funded Death Penalty: Mercy as Discrimination in a Rights-Based System of Justice*, 66 UMKC L. REV. 513, 550 (1998) (assailing the notion of "arbitrary mercy" in capital cases as violative of the "equal protection principle of distributive justice" and therefore incompatible with a rights-based justice system); Paul W. Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 393-408 (1989) (discussing the institutional status of and need for mercy in capital proceedings).

375. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal*

B. Post-Liberal Models of Racialized Discretion: Critical Race Theory

The alternative model of race-conscious, community-oriented prosecutorial discretion sets aside the colorblind conventions of advocacy and adjudication well known in the civil and criminal justice systems. Instead, this model seeks to employ critical race theory in developing race-consciousness. Before implementation, however, this model must first survive the threshold controversy over the meaning of race-consciousness.³⁷⁷

Race-based classification schemes present categorical dilemmas concerning the construction of racial identity and narrative. The dilemmas implicate Christopher Ford's notion of "administering identity."³⁷⁸ Ford reveals the strained coherence of racial differentiation in regulating race-administration systems.³⁷⁹ Like any assembly combining advocacy and adjudication, these systems labor under the added strain of race-layered interactions of power. In this respect, John Powell argues that the very "process of racial categorizing is a power struggle implicating structural, cultural, economic, and identity politics."³⁸⁰ A product of this struggle, the prosecutorial role under the proposed model of race-conscious discretion expands to recast the performative

Law, 96 COLUM. L. REV. 269, 366-72 (1996) (applying the tradition of mercy to the conviction and sentencing process); Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 330-43 (1993) (exploring the role and moral virtue of mercy in criminal sentencing).

376. See SCHOPP, *supra* note 364, at 180-83. Schopp observes that justice and mercy comprise "two distinct virtues" by ordinary understanding. *Id.* at 180. Virtuous persons, he explains, "might determine that they ought to temper justice with mercy or that they ought to exercise mercy rather than justice in some circumstances . . ." *Id.* For Schopp, dilemmas of this kind point out the deep-seated conflict between justice and mercy. *See id.*

377. See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 *passim* (arguing that race-consciousness helps to define modes of thinking about civil rights).

378. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1231-40 (1994). Ford argues that today's "laws and governmental regulations establish an enormously elaborate system of race-conscious policy." *Id.* at 1231-32.

379. *See id.* at 1240-62.

380. John a. Powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 U.S.F. L. REV. 789, 803 (1997). Denominating race as a social construction, Powell contends that "white and black has [sic] to be understood in relationship to each other." *Id.* So too, he adds, relationships of social and political power, together with their implications, "must be identified." *Id.* To Powell, there can be "no black without white" and "no white without black." *Id.* Powell maintains that "[i]n this sense we are all multiracial." *Id.* At the same time, he concludes: "We are also fractured racially not because of blood, but because we are mutually and continuously defining and constituting our race by what we include and exclude of the racial other." *Id.*

function of racial identity in role-specific moral decisionmaking. David Wilkins discerns this performative function in the role-specific behavior of the black bar during the civil rights movement.³⁸¹ Within such sociolegal movements, Wilkins contends, “race based ties have moral as well as social significance.”³⁸² For Wilkins, race consciousness of the self and of the other influences moral decisionmaking.³⁸³ That influence prompts several objections.

An opening objection concerns the integration of role, identity, and narrative. Challenging the presumption of epistemic access, the objection refers to the twin difficulty of accurately discerning and describing identity and narrative. Even when these epistemic obstacles may be surmounted (for instance by provisional forms of classification) the difficulty of designing prescriptive policies and practices that will advance “some conception of the good” may bar progress.³⁸⁴ While lauded in the abstract, contingent classifications produce ad hoc remedial policies and practices. Moreover, reliance on contingency in the categorical ordering of identity and narrative suggests that lawyers control the sociolegal epistemology of advocacy and adjudication and, therefore, must prevail on the claim of “truth-as-warranted-assertability”³⁸⁵ in the context of the adversary system.

A satisfactory answer to this epistemic access objection demands more than passing reference to the axioms of client consent and direction, at least as contemplated under the parameters of Model Rule 1.2, which governs the scope of representation.³⁸⁶ Careful answer recom-

381. See David B. Wilkins, *Social Engineers or Corporate Tools? Brown v. Board of Education and the Conscience of the Black Corporate Bar*, in RACE, LAW & CULTURE 137 (Austin Sarat ed., 1997); see also David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1985-2013 (1993) (positing black corporate lawyers' obligation to combat oppression).

382. David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1041 (1995). Wilkins asserts that “blacks are inextricably linked to each other in a manner that makes it predictable that the actions of individual blacks will affect the fate of the black community as a whole, and that ties the opportunities available to any individual black to the progress of the group.” *Id.*

383. See *id.*

384. Colin M. Macleod, *Liberal Neutrality or Liberal Tolerance?*, 16 LAW & PHIL. 529, 545-46 (1997) (discussing applications of the epistemic access argument to policy); cf. JOHN RAWLS, POLITICAL LIBERALISM 173-211 (1993) (connecting justice to the notions of right and good).

385. David Luban, *Lawyers Rule: A Comment on Patterson's Theories of Truth*, 50 SMU L. REV. 1613, 1626-27 (1997). To Luban, law “is a specialized medium for distributing the burdens of obligation; ultimately, law is concerned with mobilizing, demobilizing, or threatening to mobilize or demobilize the instruments of state violence.” *Id.* at 1625.

386. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(a) (1999). The Rule re-

mends introduction of the idea of interpretive consensus. This formative notion of consensus provides a kind of founding consent to be used both as an interpretive guide and as a means of ratification of an interpretive outcome.³⁸⁷

Ensnarled in the process of race- and group-based identity construction,³⁸⁸ even interpretive consensus may prove unable to solve the enigma of individual and group identity.³⁸⁹ Perplexed by this interpretive endeavor, Lisa Ikemoto offers to treat identity "in a way that reclaims essentialism as socially useful information."³⁹⁰ This reclaiming requires the act of privileging identity. Extending the work of Jacques Derrida, Madeleine Plasencia unburies the notion of privileging to locate an act of preference.³⁹¹ Plasencia explains that the act of "preferring certain concepts over others in order to ground one's theory privileges or elevates subject (self) over object, one concept over another."³⁹² Expressing ideological preference through prosecutorial acts of subject/object racial privileging implies the basic insecurity of identity. Common illustration of this unsteady quality may be seen in the confusion surrounding the admissibility of character evidence in civil and criminal trials due to the instability of personality.³⁹³

Further evidence of instability may be deciphered elsewhere in identity constructions. For example, consider the uneasy meaning of gender identity and role in the case of mothering. The same shifting

quires a lawyer to "abide by a client's decisions concerning the objectives of representation," and moreover, to "consult with the client as to the means by which they are to be pursued." *Id.*

387. See Crosby, *supra* note 244, at 867 (rejecting the constitutional notion that "founding consent" can guide interpretive outcomes because it is "inconsistent with Gadamerian legal hermeneutics").

388. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1757-77 (1993). Harris contends that "law's approach to group identity reproduces subordination, in the past through 'race-ing' a group—that is, by assigning a racial identity that equated with inferior status, and in the present by erasing racial group identity." *Id.* at 1761.

389. See JON MICHAEL SPENCER, *THE NEW COLORED PEOPLE: THE MIXED-RACE MOVEMENT IN AMERICA* 131-64 (1997) (noting the intermixing of ethnicity, culture, and class in racial identity); Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 WASH. & LEE L. REV. 381, 406-08 (1991) (relating the judicial struggle to define membership in racial groups).

390. Lisa C. Ikemoto, *The Racialization of Genomic Knowledge*, 27 SETON HALL L. REV. 937, 948 (1997).

391. See Madeleine Plasencia, *Who's Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions*, 21 SEATTLE U. L. REV. 215, 219-27 (1997).

392. *Id.* at 223.

393. See Miguel A. Méndez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 226 (1996) ("In the absence of a stable personality, character evidence is devoid of a valid predictive base and cannot be probative of an individual's conduct across diverse situations.").

quality afflicts the duality of the "good" and "bad" mother,³⁹⁴ and the identity-giving judgment delegated to prosecutorial discretion.³⁹⁵ A similar inconstancy affects the dynamics of ethnic,³⁹⁶ sexual,³⁹⁷ cultural,³⁹⁸ and even religious identity.³⁹⁹ For each category of identity, cultural and political contests entangle legal actors in a process of social construction.

The prevalence of identity-based prosecutions and defenses attracts a growing literature on the interrelationship of personal identity and law.⁴⁰⁰ Consider the social construction of race in criminal cases.⁴⁰¹ In the criminal justice setting, identity constructions contribute to the intuitive and the analytic construction of racial reality, not simply to

394. See Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 692-723, 741-61 (1998); see also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 101-42 (1995) (discussing deviant motherhood); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 945-54 (1997) (discussing the legal devaluation of and bias against black mothers).

395. See Murphy, *supra* note 394, at 719 (pointing out that prosecutors exercise decision-making discretion "against a backdrop of stereotypical good and bad mothers").

396. See generally Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995) (exploring the determination and treatment of ethnicity/ethnic groups under the Constitution).

397. See generally Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995) (assailing judicial use of sexual identifications as myths).

398. See generally Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 361-77 (1986) (discussing the history and philosophy of cultural identity in America); see also Rachel King, *Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska*, 77 OR. L. REV. 1, 5-20 (1998) (discussing the clash between the cultural mores of Native Alaskan communities and the institutional expectations of the adversarial system of criminal justice).

399. See Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 124-40 (1997) (discussing the similarities between racial and religious affiliation and identification). Yang asserts that race and religion rise to societal importance "not because of their underpinnings in biology or pure belief, but because of their cultural significance and social implications to the individual." *Id.* at 123. For Yang, both "are of similar importance because they play equivalent roles in the formation of an individual's conception of the self, sense of belonging, and value framework." *Id.* Therefore, he concludes, "they should be treated alike as a constitutional matter." *Id.*

400. See Wade L. Robinson, *Privacy and Personal Identity*, 7 ETHICS & BEHAV. 195, 204-05 (1997) (connecting personal identity with norms of dignity, autonomy, and moral agency).

401. See IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 138-46 (1996) (discussing unconscious racism in the criminal justice system); Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 355-59 (1996) (distinguishing biologically determined and socially constructed differences in racial classification).

the reification of an idea of color.⁴⁰² Concretely, this contribution affects the assessment of racial credibility.⁴⁰³ Doubtless, credibility presents a crucial evidentiary judgment in criminal prosecution. Sheri Lynn Johnson points out, for example, that prosecutors may very well “screen the credibility of witnesses in a racially biased way.”⁴⁰⁴

In the same way, prosecutors may grade the credibility of victims and defendants in a racially slanted way, particularly when the defense implicitly or explicitly avers racial provocation. Surveying the law of provocation, Victoria Nourse describes the evolving “personification” of the defense.⁴⁰⁵ This “inward move,” Nourse explains, shifts normative inquiry “inside the emotional life of one person.”⁴⁰⁶ Interior shifting of this kind “takes normative questions (which passions the law *should* protect) and puts them, in answer form, into the minds of the defendants.”⁴⁰⁷ Hence, Nourse adds, “the standard questions asked in provocation cases all focus on the emotional life of reasonable persons.”⁴⁰⁸ The job of overcoming a racial provocation defense pushes prosecutors to invade that emotional life, making judgments about the identity of the defendant and the victim, and then circulating those judgments in juridical narratives at trial.

Racialized identity judgments and narratives occur against the historical background of race-based disdain and exclusion by the legal profession.⁴⁰⁹ That history includes identity judgments that cross the lines of race, gender, and sexuality in demigrating lawyers, clients, victims, and communities.⁴¹⁰ Clients stand at great risk from racialized

402. For an intriguing critique of the concept of reification dominant in the literature of Critical Legal Studies, see Anthony J. Fejfar, *An Analysis of the Term “Reification” as Used in Peter Gabel’s Reification in Legal Reasoning*, 25 CAPITAL U. L. REV. 579, 596-610 (1996).

403. See Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 *passim* (1996) (describing the relationship between race and credibility).

404. *Id.* at 319 (mentioning the probable unreviewability of racially biased prosecutorial decisions).

405. Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1385 (1997).

406. *Id.*

407. *Id.*

408. *Id.*

409. See Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 SETON HALL CONST. L.J. 103, 120-32 (1996) (detailing legislative and judicial exclusion of aliens from state bar associations).

410. See J. Clay Smith, Jr., *Black Women Lawyers: 125 Years at the Bar; 100 Years in the Legal Academy*, 40 HOWARD L.J. 365, 372-79 (1997) (tracing the historical intersection of racial and gender hierarchies in the law); J. Clay Smith, Jr., *Introduction: Law Is No Mystery to*

judgments. Clark Cunningham observes that such identity judgments may inflict damage to client self-respect.⁴¹¹ The experience of self-respect inhabits both private and public spheres. The private sphere of self-respect grows out of self-perception. By contrast, the public sphere of self-respect arises out of “the historical and sociopolitical situatedness of individuals.”⁴¹² Interpreting self-respect as a sociopolitical construction, Robin Dillon argues that “it develops and plays out against the backdrop of social and political contexts,” and moreover, “that it is constituted by and reflects prevailing forms of social and political life.”⁴¹³ According to Dillon, the constitution and expression of self-respect “both at the level of individual experience and at the level of concept, is a function of social relationships and the structure and functioning of the social institutions among which we live.”⁴¹⁴

Evaluating the damage to client, victim, or community self-respect inflicted by lawyer identity judgments may be undertaken through narrative. Indeed, the form and content of narrative may furnish a rough measure of the damage to identity exacted from sociopolitical devaluation and subordination. Narrative acquires sociolegal power in the courtroom and in society despite its stylistic ambiguity.⁴¹⁵ The variable, heavily contingent quality of narrative does not diminish it as a resource for lawyers, clients, victims, and their communities. Admittedly, practitioners of the narrative form give strong reasons for skepticism.⁴¹⁶ Even the sympathetic puzzle over the

Black Women, in REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS 1, 6 (J. Clay Smith, Jr., ed., 1998) (mentioning that “the voices and the ideals of black women lawyers have evolved in spite of the jagged edges of social and legal culture that have attempted to assign her to historical oblivion by simply excluding her from the matrix of legal thought”).

411. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1325-28 (1992); see also Robin S. Dillon, *Self-Respect: Moral, Emotional, and Political*, 107 ETHICS 226 (1997).

412. Dillon, *supra* note 411, at 243.

413. *Id.* at 244 (footnote omitted).

414. *Id.*

415. See Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1212-19 (1997) (defending narrative as the best means of presenting unrepresented views of subordinated groups).

416. See David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 797, 800-10 (1998). Raising issues of concrete narrative application in criticism and public policy, Hyman asks: “[C]an one tell truth from fabrication? Are the unrepresentative stories ignored, and the representative ones embraced? How, if at all, is the frequency of an event factored into the equation? What is the baseline from which the stories are assessed?” *Id.* at 799 (footnote omitted).

accuracy, truthfulness, and representativeness of narrative.⁴¹⁷ Here, for example, the context of racial immigration and anti-immigrant bias shows the mystifying iterability of narrative in law, culture, and society.

Whatever the ambit of narrative in cultural and social texts, the forceful play of narrative imagery stands undeniable.⁴¹⁸ The criminal justice context provides a forum for the intersection of narrative image and text. That forum offers a fertile site for manufacturing stereotypes rooted in race, gender, and sexuality. Noting the narrative intersectionality of this sociolegal site may guide prosecutors in fashioning a race-conscious model of community-oriented discretion. But without more evidence of race-conscious community practices reliant on identity judgments and narrative performances, that guidance will go unchanneled. As a result, Carter and other prosecutors may adopt strategies that garner tactical appeal⁴¹⁹ but fail to dismantle or actively bolster entrenched structural hierarchies of race, gender, and economic subordination.⁴²⁰ To carve a path for such experimental discretion, prosecutors should assess several existing race-conscious practices, some flourishing, others faltering.

417. See *id.* at 809. Again, Hyman inquires:

Is the "flash of recognition" enough to ensure only "good anecdotes" become the basis for laws, or are additional safeguards necessary? Should we ignore narrative unless it is accompanied by an affidavit? Is a single affidavit sufficient, or should we require cross-examination and confirming witnesses? Is a statistical analysis which proves typicality and frequency necessary?

Id.

418. On the subjective love for the "living image," or social representation of the law, see Peter Goodrich, "*The Unconscious Is a Jurist*": *Psychoanalysis and Law in the Work of Pierre Legendre*, 20 LEGAL STUD. F. 195, 201 (1996). Goodrich observes that the law—"the images, symbols and rites around which law is identified and reproduced"—constitute "domains of attachment or subjects of love." *Id.* at 228. The function of the image, according to Goodrich, "is to incite attachment and to focus desire or love upon circumscribed social objects of affection or legitimate political sites." *Id.* On this analysis, the very "structure of social love is one of the great enigmas of political power and one of the most opaque of the features of the history of law." *Id.*

419. For an example of such strategies, see Kenneth Winchester Gaines, *Rape Trauma Syndrome: Toward Proper Use in the Criminal Trial Context*, 20 AM J. TRIAL ADVOC. 227, 230-32 (1996-97).

420. See Regina Austin, *Nest Eggs and Stormy Weather: Law, Culture, and Black Women's Lack of Wealth*, 65 U. CIN. L. REV. 767, 769-77 (1997) (noting institutional impediments blocking poor black women's ability to accumulate wealth, and advocating government macro-economic policy initiatives favoring such accumulation); Patricia Hill Collins, *African-American Women and Economic Justice: A Preliminary Analysis of Wealth, Family, and African-American Social Class*, 65 U. CIN. L. REV. 825, 829-51 (1997) (citing class reproduction of a racialized system of inherited privilege and disadvantage in explicating economic inequality of African-American women).

A glancing analysis of the fields of civil and criminal law uncovers a wide variety of race-conscious practices ranging from affirmative action programs to political referenda.⁴²¹ Similar analysis reveals an equally broad spectrum of gender- and sex-oriented practices.⁴²² For the limited purpose of this comparative inquiry, consider two diverse sets of fields where race-conscious practices seem to sustain expansion (e.g., environmental justice and transracial adoption) and to suffer contraction (e.g., employment discrimination and jury selection).⁴²³ Although in no sense exhaustive, the instant canvassing effectively demonstrates the far-reaching diffusion and the divergent tendencies of race-conscious practices in law and society.

Race-conscious practices emanate from the field of environmental protection through the development of the environmental justice movement.⁴²⁴ Evolving out of a multipronged critique of environmental protection, poverty,⁴²⁵ and race,⁴²⁶ the movement connects communities of color to the environment⁴²⁷ under an ideology of "re-

421. See Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1145-49 (1996) (examining the color-blind content of California's Proposition 209); L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 SEATTLE U. L. REV. 281, 290-311 (1997) (examining the constitutionality of California's Proposition 209).

422. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1205-29 (1998) (tracing the developing jurisprudence of sexual harassment); William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2456-73 (1997) (applying his earlier-developed jurisprudence of "coming out" to a variety of constitutional cases).

423. This truncated grouping omits a substantial number of criminal justice system practices, including pretextual stops and arrests, germane to future investigation. See Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 554-71 (1997).

424. See Robert D. Bullard, *Environmental Justice for All*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 3 *passim* (Robert D. Bullard ed., 1994) [hereinafter UNEQUAL PROTECTION] (tracing the evolution and politics of the environmental justice movement); Deeolyn Ferris, *A Call for Justice and Equal Environmental Protection*, in UNEQUAL PROTECTION, *supra*, at 298 *passim* (recommending federal environmental protection initiatives advancing the environmental justice movement).

425. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 641-54 (1992) (finding that mainstream environmental groups have failed to represent the poor with respect to environmental dangers).

426. See Regina Austin & Michael Schill, *Black, Brown, Red, and Poisoned*, in UNEQUAL PROTECTION, *supra* note 424, at 53, 53 (examining the "reasons why communities of color bear a disparate burden of pollution").

427. See Dorceta Taylor, *Can the Environmental Movement Attract and Maintain the Sup-*

source egalitarianism.⁴²⁸ Based on local traditions of community action and organization,⁴²⁹ people of color participating in the movement search for a more inclusive environmental coalition⁴³⁰ in a kind of democratization effort. In doing so, they “increase the movement’s size and power,” and “alter the environmental organizations themselves,”⁴³¹ consequently influencing environmental prosecutions⁴³² and criminal trials.⁴³³

The swift expansion of race-conscious practices in organizing communities of color around public and private legal initiatives in order to combat environmental crime and pollution-site discrimination contrasts with the harmful, more covert enlargement of race-conscious practices in the realm of the family. For illustration, consider the phenomena of transracial adoption⁴³⁴ and racial preference⁴³⁵

port of Minorities?, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 28, 41-42 (Bunyan Bryant & Paul Mohai eds., 1992) (noting the grassroots movement’s appeal to minorities in poor communities).

428. The theory of “resource egalitarianism” is based on the concepts of distributive justice for environmental resources. See Will Kymlicka, *Concepts of Community and Social Justice*, in EARTHLY GOODS: ENVIRONMENTAL CHANGE AND SOCIAL JUSTICE 30, 32-33 n.10 (Fen Osler Hampson & Judith Reppy eds., 1996).

429. For an example of community action and resistance in white and black communities, see PHIL BROWN & EDWIN J. MIKKELSEN, NO SAFE PLACE: TOXIC WASTE, LEUKEMIA, AND COMMUNITY ACTION 43-74 (1990) (discussing community organization in response to a childhood leukemia cluster in Woburn, Massachusetts).

430. See ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 110-17 (1990) (advocating a policy of inclusion and diversification in the environmental movement).

431. Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 987 (1998). Carlson adds that an environmental movement more inclusive in scope “could even alter the nature of the issues on which environmental groups focus.” *Id.* This alteration, she reasons, “could help environmental groups to rethink what environmentalism actually means and thus might help them see and embrace emerging environmental issues such as environmental justice or new methods of environmental problem solving that attempt to balance competing needs.” *Id.*

432. See Donald J. Rebovich, *Prosecutorial Decision Making and the Environmental Prosecutor: Reaching a Crossroads for Public Protection*, in ENVIRONMENTAL CRIME AND CRIMINALITY 77, 78-96 (Sally M. Edwards et al. eds., 1996) (probing factors influencing prosecutorial decisionmaking in cases of environmental crime).

433. See *id.* at 90. Commenting on environmental crime trials, Rebovich states:

[I]t is the intimacy that local prosecutors have with the local court politics, the immediate community affected by the offenses, and the local public’s comfort that the community has with its district attorney that is underscored as an invaluable determinant in gaining satisfying dispositions for the state. Local prosecutors argue that it is their identification with the local community—its customs, hopes, and anxieties—that make local prosecutors ideal for accurately gauging judge/juror levels of understanding of toxic dangers and fears associated with pollution.

Id.

434. See Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race,*

in adoption. Race-inferred variance in caregiving across cultural communities and subcultures⁴³⁶ quietly extends and reinstates the hierarchy of racial status subordinating black⁴³⁷ and ethnic⁴³⁸ identity in adoption determinations. Racialized status inferiority also materializes unmarked and unimpeded in the application of the relevant standards of adjudication in child welfare cases,⁴³⁹ as well as in racial-matching⁴⁴⁰ and placement⁴⁴¹ decisions.

Next, consider fields designated by narrowing race-conscious practices: employment discrimination and jury selection. Since the slow unraveling of the school desegregation decrees of the post-*Brown* era, no area of publicly administered racial classification⁴⁴²

and *Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 108-21 (1998) (identifying possible reasons for race-based hostility to transracial adoptions).

435. See Davidson M. Pattiz, Note, *Racial Preference in Adoption: An Equal Protection Challenge*, 82 GEO. L.J. 2571, 2600-05 (1994) (discussing the need for transracial adoption given the high percentage of black children in foster care).

436. See Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 358-60 (1996) (discussing the effect of acculturation on children's reactions to everyday separations).

437. See Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 945 (1994) (refuting "the argument that same-race placement is necessary" to "foster a positive racial identity in Black children").

438. See Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21 (1997) (considering legislation giving tribal courts jurisdiction over the adoption placement of Native American children in the hope of better serving the children's best interests).

439. See Gayle Pollack, *The Role of Race in Child Custody Decisions Between Natural Parents over Biracial Children*, 23 N.Y.U. REV. L. & SOC. CHANGE 603 (1997) (urging modification of the "best interests of the child" test to consider parental ability to foster positive racial identity). Pollack asserts that "[a] biracial child's ability to form a cohesive racial identity is important to her emotional development." *Id.* at 626. She cautions, however, that "even statutes which comprehensively enumerate factors to consider in determining the best interests of the child do not tell judges to consider parental ability to help a child form a positive racial identity." *Id.* Such an instruction, she emphasizes, "is important to a court's ability to determine the best placement for a biracial child." *Id.*

440. See Elizabeth Barthelet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1183-1245 (1991) (examining current racial-matching policies and their impact on minority children).

441. See Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 57-83 (1990-91) (examining the relationship between race and the "best interests of the child" test, and criticizing the test for permitting judges such broad discretion that issues of race may supersede other concerns such as a child's psychological well-being); Myriam Zreczny, Note, *Race-Conscious Child Placement: Deviating from a Policy Against Racial Classifications*, 69 CHI.-KENT L. REV. 1121, 1121 (1994) (observing that racial classification systems survive strict scrutiny in child placement cases).

442. See April Chou, *Racial Classifications, in RACE VERSUS CLASS* 45, 65-66 (Carol M. Swain ed., 1996) (arguing that government-sponsored racial and ethnic classification systems for data collection and public policy administration fail to represent the nation's diversity).

generates more rancor than the field of private and public employment. Yet, despite ongoing controversy, colorblind principles still enjoy muted legitimacy.⁴⁴³ Rooted in notions of “universalism and abstract individualism,”⁴⁴⁴ those principles survived the enactment of the Civil Rights Act of 1964 and the subsequent development of disparate-treatment theory. Over time, these changes modified the standard for weighing proof of discrimination and measuring the present effects of past discrimination in employment as well as in housing.⁴⁴⁵ Furthermore, they altered the concept of preferential treatment later elaborated in the policy of affirmative action.⁴⁴⁶ None of these developments, however confining, check the colorblind “aspiration”⁴⁴⁷ of liberal theory. Even within the closing ambit of race-conscious practices, none halt the essentialist construction of individual and group racial identity in employment discrimination cases. Bound up in the implied statutory precondition of racial immutability,⁴⁴⁸ essentialist identity construction suffuses disparate treatment cases.⁴⁴⁹ Moreover, the cases seem struck by court insistence of fixed neutrality in both rule and racial category.⁴⁵⁰ Citing this requirement, e. christi cunningham asserts that the category of race discrimination requires “the invention of a quality called ‘race’ and the collective treatment of peo-

443. See JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 34 (1996) (explaining that the “color-blind model was seen as legitimate and in the interests of blacks because [in the 1960s] it was unreflectively attached to a causal principle: it was believed to *result* in black equality, understood in terms of near equal participation in society”).

444. *Id.*

445. For a review of similar effects in the field of residential segregation, see Cindy Kam, *Residential Segregation, Racial Discrimination, and the Road to Reform*, in *RACE VERSUS CLASS*, *supra* note 442, at 207.

446. See Carol M. Swain, *Affirmative Action Revisited*, in *RACE VERSUS CLASS*, *supra* note 442, at 1, 3-13 (tracking the paradigm shift from equal opportunity to preferential treatment).

447. See PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933-1972*, at 7 (1997) (noting congressional embrace of colorblind principles in civil rights legislation); see also ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 7-21 (1992).

448. See Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 *TEX. L. REV.* 317, 328-32 (1997) (finding that courts’ assertion of immutability places limits on Title VII’s protection).

449. See e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 *CONN. L. REV.* 441, 496-500 (1998) (arguing that construing an individual’s identity based on race or gender limits that person’s opportunity for self-definition).

450. See Engle, *supra* note 448, at 353-57.

ple according to that invention."⁴⁵¹ The danger of race-cabined invention, cunningham explains, arises when "individuals, after years of shackling, out of habit, or out of political necessity, begin to identify themselves according to the ties that have bound their creativity rather than their own invention."⁴⁵²

Race-conscious jury selection practices also fit within a larger literature documenting the intersection of race, criminal law, and procedure.⁴⁵³ This intersection locates race-conscious practices in the courtroom, especially visible in the summoning and selection of jurors.⁴⁵⁴ Procedures governing jury selection, particularly concerning the regulation of peremptory strikes during voir dire, deserve special attention given the historical exploitation of the selection process to disadvantage people of color. Sheri Lynn Johnson comments, for example, that "the data on race and guilt attribution, coupled with an understanding of unconscious racism, compels the conclusion that what black defendants need is not purification of voir dire procedures, but black jurors."⁴⁵⁵ But the risk of juror bias in high profile cases where the potential jury pool may be exposed to prejudicial pretrial publicity⁴⁵⁶ rests unchanged by the improvement in black juror representation. Short of "affirmative selection" jury selection procedures,⁴⁵⁷ the task of accurately discerning and eradicating juror

451. cunningham, *supra* note 449, at 496-97 (footnote omitted).

452. *Id.* at 497.

453. See, e.g., Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 *passim* (1988) (mapping presence of unconscious racism in the reasoning of race and criminal procedure decisions).

454. See HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 5 (1993). The authors argue that notwithstanding changes, "a system still exists in which the legal and judicial structures continuously reproduce, maintain, and perpetuate the subordination of racial and ethnic minorities." *Id.* at 34. Moreover, they add that "[h]istorically, these minorities have been discouraged, if not prevented, from full participation in political structures, courts, and the judicial decision-making process." *Id.* On this assessment, it is labor-market and other socioeconomic inequalities that "serve to reinforce the poor representation of minority jurors." *Id.*

455. Johnson, *supra* note 453, at 1024 (footnote omitted).

456. See Gerald F. Uehnen, *Leaks, Gags and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943, 974 (1997) (noting that "media saturation coverage" of high-profile trials places the burden of ensuring fairness on the effective use of the traditional tools of "voir dire questioning of jurors, challenges for cause, change of venue, and sequestration").

457. José Felipé Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 392-99 (1998) (proposing a system of jury selection that would permit a defendant to trade peremptory challenges for affirmative selections of jurors).

bias may be, as Christopher Slobogin suggests, a “futile endeavor.”⁴⁵⁸ Permitting the defendant to trade peremptory challenges in order to seat qualified jurors believed to be favorable to his cause⁴⁵⁹ may easily turn pernicious, notwithstanding the admission of race-conscious motive. Ironically, given the narrowing of discretionary opportunities for lawyer facilitation of racial discrimination in jury selection, Christopher Smith and John Burrow mention that the Supreme Court’s ratification of pretextual, race-based peremptory challenges “enables attorneys to use their discretion in excluding jurors by race—so long as they do not admit their true motives.”⁴⁶⁰

The unsteady evolution of race-conscious practices under liberal models of ethical discretion comes to awkward fruition within post-liberal models of racialized discretion deduced from critical race theory. Together the models highlight the importance and uncertainty of racial identity and narrative to such normative determinations. In the Louima case, both racial identity and narrative seem to inform Carter’s decision to pursue a superseding federal prosecution and to refer the case to the Justice Department for a department-wide investigation of police brutality. The conduct involved in the Louima assault and its accompanying rhetoric seem plainly to evoke race and the continuity of state-sponsored sexualized racial violence in American history. Confronting this history, Carter made the following statement: “People of ordinary common sense, and people with a sense of history of the perceived and real police misuse of force in this country will understand the skepticism that many in minority communities have that police misuse-of-force allegations will be taken seriously.”⁴⁶¹ Furthermore, he offered: “You have to ask yourself this question: In the absence of a videotape, what was the likelihood of there having been a prosecution in the Rodney King case? This is part of our history.”⁴⁶² Historical resistance by communities of color to racial violence inflicted by private and state actors, taken together with still-developing race-conscious practices in varied civil and criminal law fields, allow for the discussion of race-conscious, community-based prosecutorial discretion.

458. Slobogin, *supra* note 301, at 749.

459. See *supra* note 426 and accompanying text.

460. Christopher E. Smith & John Burrow, *Race-ing into the Twenty-First Century: The Supreme Court and the (E)Quality of Justice*, 28 U. TOL. L. REV. 279, 289 (1997).

461. Firestone, *supra* note 17, at B2.

462. *Id.*

V. PROSECUTORIAL RACE- AND COMMUNITY-BASED DUTIES

This Part considers whether federal prosecutors ought to bear race-conscious and community-oriented duties to investigate and to prosecute cases of racially motivated violence. It endeavors to show that the foundation for such duties may arise from a battery of norms moored in constitutional precepts, citizenship ideals, professionalism values, racial traditions, and moral customs. Consideration of special, race-based prosecutorial duties warrants revisiting the general purpose of prosecution. Typically construed, the purpose of prosecution translates in terms of positive law sanction, moral retribution, and instrumental deterrence. Yet an alternative purpose of prosecution exists in the form of the heroic moral witness. On this construction, the prosecutor rises up as a historic witness to confront injustice. The idea of bearing witness in legal advocacy animates other areas of the profession, notably the conduct of death penalty defense practice.⁴⁶³ Applied to the facts of the Louima case, the idea urges a more expansive view of Carter as a heroic witness in the historical struggle for American racial dignity and equality.⁴⁶⁴

The "heroic witness" tradition militates against the denunciation of the prosecutorial function as a blunt instrument of white dominance.⁴⁶⁵ Casting that function in the starkness of racial hierarchy sends prosecutorial discretion veering far from the abolition or punishment of racism toward the manufacture and reproduction of sociolegal privilege. In cases of racially motivated violence, the re-entrenchment of dominance occurs in the state representation of the black body. For

463. See Michael Mello, *A Letter on a Lawyer's Life of Death*, 38 S. TEX. L. REV. 121, 168 (1997) ("We litigate for the historians, the sociologists, and the anthropologists, in addition to litigating for the courts."); Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353, 365 (1996) ("In their address to the present audience, death penalty lawyers serve as witnesses to injustice; in their address to the future, they serve as historians memorializing the injustices they witness.").

464. For a comparable discussion of the tendency to look for heroism in the historical development of racial equality, see Ronald K. Noble, *Between Complicity and Contempt: Racial Presumptions of the American Legal Process*, 72 N.Y.U. L. REV. 664, 681-83 (1997) (reviewing A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996)) (citing Judge Higginbotham's recognition of "heroes").

465. White dominance operates in a variety of juridical, cultural, and social dimensions through an identity-making process designating racial and ethnic difference. See generally DAVID R. ROEDIGER, *Whiteness and Ethnicity in the History of "White Ethnics" in the United States*, in *TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY* 181 (1994) (noting difficulty in applying standards of "whiteness" without contrast to "non-white" and "ethnic" groups).

the prosecutor, representation traditionally entails the defense of the victim's body, rather than the person or community of the victim. The notion of "representing the body"⁴⁶⁶ suggests an alienation or estrangement from not only the *person*, but also the *community* of the victim in criminal and civil rights prosecution.

The practice of victim- and community-estrangement is deeply embedded in the tradition of criminal prosecution. In the Louima case, this practice finds challenge from calls for federal prosecutorial intervention. These calls articulate an inchoate politics of prosecutor-instigated community organization and mobilization around claims of criminal and civil rights injustice. Such mobilization offers the promise of wider forms of community organization about issues relevant not only to crime and criminal justice, but also to education, equality, and economic development.

The creation of race-based victim- and community-affirming prosecutorial duties requires a move beyond "body-centered" advocacy to higher traditions of representation animated by the values of citizenship, professionalism, race, morality, and the Constitution. That move involves a jurisgenerative process of normative reconstruction in law and lawyering.⁴⁶⁷ Producing an account of special responsibilities in the prosecutorial setting of racial violence demands both normative and pragmatic review. On normative grounds, Samuel Scheffler argues that "special responsibilities need to be set within the context of our overall moral outlook and constrained in suitable ways by other pertinent values."⁴⁶⁸ Under a positive law regime, the values may be acquired by voluntary act, by office, or by rule. The offices, rules, and acts of prosecutors shape conceptions of racial fairness, social good, and community.

466. This phrase belongs to Lash LaRue. See Interview with Professor Lewis Henry LaRue, Washington and Lee University School of Law, in Lexington, Va. (Nov. 2, 1998).

467. See, e.g., Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 710-42 (1997) (conceptualizing mediation as a multivariant process of social norm formulation and implementation).

468. Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189, 207 (1997). Scheffler argues that these responsibilities may be constrained in three different ways:

Some [constraints] may affect the content of special responsibilities, by setting limits to the circumstances in which, and the extent to which, people are required to give priority to the interests of those to whom they have such responsibilities. Other constraints may affect the strength of special responsibilities, by supplying countervailing considerations that are capable of outweighing or overriding those responsibilities in various contexts. Still other constraints may affect people's reasons for valuing their relationships.

Id.

On pragmatic grounds, Brian Leiter urges that “theorizing should make a difference to practice (or experience).”⁴⁶⁹ Put differently, the task in founding a race-conscious prosecutorial politics of community outreach is to theorize about norms pragmatically. “Fruitful, pragmatic theory-construction,”⁴⁷⁰ according to Leiter, follows from the “recognition that the only possible criteria for the acceptance of epistemic norms—norms about what to believe—are pragmatic.”⁴⁷¹ For Leiter, the burden of undertaking pragmatic normative theorizing lies in the acceptance of “the epistemic norms that work for us—that help us predict sensory experience, that allow us to manipulate and control the environment successfully, that enable us to ‘cope.’”⁴⁷² Enlarging prosecutorial duties adds the further onus of pragmatic cross-racial collaboration in both integrated and segregated communities. Close study of the context of a local community persuade Michael Dorf and Charles Sabel that “workable, long-term collaboration can issue from, and aid the construction of, the institution of problem-solving deliberation itself.”⁴⁷³

A. *Constitutional Norms*

Constitutional norms may provide the foundation for prosecutorial race-conscious duties of community outreach in cases of racially motivated violence. That formulation stems from the federal prosecutor’s role as a constitutional officer. By constitutional grant under Article II, the President enjoys the power to appoint, subject to Senate confirmation, the Attorney General and the inferior posts of U.S. Attorney for each of the twelve judicial districts.⁴⁷⁴ Codified in subsequent congressional enabling legislation, the President thus appoints both the Attorney General and the U.S. Attorney for each of the re-

469. Leiter, *supra* note 246, at 304. Leiter defines pragmatism in terms of “a double commitment, pertaining, on the one hand, to the enterprise of theorizing itself, and on the other, to epistemology.” *Id.*

470. *Id.* at 304 n.161.

471. *Id.* at 307.

472. *Id.* To Leiter, pragmatic criteria present “the only possible criteria for the acceptance of epistemic norms precisely because we can’t defend our choice of any particular epistemic norm on epistemic grounds *ad infinitum*.” *Id.* Although undetermined, at a future point of analysis he insists, “we must reach an epistemic norm for which the best we can say is, ‘it works.’” *Id.*

473. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 322 (1998).

474. See U.S. CONST. art. II, § 2, cl. 2.

spective judicial districts.⁴⁷⁵ To this extent, Carter inhabits a constitutionally sanctioned position ratified by both the executive and the legislative branches of the federal government.⁴⁷⁶ This endorsement gives Carter constitutional and statutory sources of authority beyond the endowment of general oversight function over the federal criminal justice system within the Eastern District of New York. Along with the charge of district-wide administration of justice⁴⁷⁷ comes the duty to implement a general policy of nondiscrimination.

The principle of nondiscrimination mandates the equal treatment of all defendants, victims, and communities. The prosecutorial mandate of equal treatment extends to core, defendant-specific decisions to investigate, to charge, to go to trial, and to recommend sentence by plea or alternative means.⁴⁷⁸ But that mandate may collide at times with a revised set of obligations to secure victim and community justice. Moreover, because case-by-case conceptions of victim and community justice may compete and even conflict, the collision may rupture evolving commitments and outreach efforts to the victim, his family, and his community. The inherent vagueness of the notion of community intensifies that rupture.

The collision may also strain, in one of two ways, the obligation of prosecutors to obey the law. The first kind of strain arises from competing obligation either internal to the definition of the law or external to the law in culture and society. The second kind goes to the ability to comply with the proscriptions of statutory or common law. Both elements may be particularly acute at the investigative and pretrial stages of a case where overreaching seems most likely to occur. The Justice Department probe into prosecutorial misconduct in the Louima case illustrates the motives, incentives, and attendant risks of prosecutorial overreaching with respect to witness coercion and contemplated immunity deals. Similar risks attend the pretrial stage where exculpatory materials may be withheld, and the trial stage where inflammatory

475. See 28 U.S.C. §§ 503, 541(a) (1994).

476. Davis points to the position of federal prosecutors within the executive branch as an illustration of their "unique position" to exercise discretion "to eliminate many of the racial disparities in the criminal justice system." Davis, *supra* note 263, at 50.

477. Commenting on the prosecutorial administrative oversight function, Davis highlights the interrelated duties of insuring systemic fairness and efficiency by "recognizing injustice in the system and initiating corrective measures." *Id.* at 51.

478. See ANDREW R. KLEIN, *ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS AND PROBATION* 1-4 (2d ed. 1997) (discussing the historical and contemporary unequal treatment of minorities by prosecutors and judges with regard to both plea bargaining and sentencing).

statements may be pronounced in closing arguments. Even sentencing may be influenced, for example, when prosecutors improperly resist alternative forms of disposition or downward departure recommendations.

As in the Louima case, suspected prosecutorial infidelity to the law may feed criticism by defense counsel on the grounds of misconduct or partisanship and, more seriously, engender a public perception of illegitimacy. The turmoil of illegitimacy may be aggravated by the additional claim of unjust law enforcement. Defense counsel in the Louima case, for example, claim that Carter abused civil rights law in order to punish police misconduct. Proponents of this claim argue that the deployment of civil rights statutes to punish offending officers unfairly racializes otherwise neutral state conduct. They implicitly argue that such deployment undercuts positive law civil/criminal distinctions and violates the separation of law and morality in civil society. Nevertheless, by reinforcing the chief distinctions of positive law regimes in the defense of institutionally tolerated racial violence, proponents of the above claim threaten to stumble into the accommodationist posture of the antebellum period.⁴⁷⁹ Although a limited positivistic explanation may inadequately comprehend the full text of antebellum lawyer *and* judicial conduct, the neglect of extralegal considerations provided at least part of the animating force behind that conduct. Debate over the appropriate place and weight to be accorded extralegal considerations in the calculus of positive law and its enforcement continues unabated in American jurisprudence.⁴⁸⁰ The resurgence of interest in Holmes, for example, signals an enduring dissonance spurred by that debate and the controverted separation of law and morality.⁴⁸¹

B. *Citizenship Norms*

Citizenship norms likewise may advance the development of prosecutorial race-conscious duties of community outreach in cases of racially motivated violence. Early American history supplies a citizen-

479. Consider in this light the racial accommodation by the French legal community in Vichy France. See Philip Shuchman, *Vichy Law and the Holocaust in France*, 50 RUTGERS L. REV. 607, 629-41 (1998) (reviewing RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996)).

480. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 77-108 (1998) (framing the lawyer's duty to obey the law in terms of the jurisprudential tension between legal and nonlegal norms).

481. See Symposium, *The Path of the Law After One Hundred Years*, 110 HARV. L. REV. 989 (1997); Symposium, *The Path of the Law Today*, 78 B.U. L. REV. 691 (1998).

ship-inspired vision of a lawyer's role and duty.⁴⁸² Bruce Frohnen points out that the early American lawyer's responsibilities transcended narrow, professional interests to encompass a sense of public good and community integration.⁴⁸³ Indeed, Frohnen notes, the lawyer's sense of calling derived in part from the duties expected "of a citizen, a member of a church, a member of a family, and a pious man."⁴⁸⁴

The cultivation of prosecutorial race-conscious duties of community outreach gleans from this vision to create a "shared citizenship" of liberal constituents engaged in "self-restrained, moderate, and reasonable" conduct.⁴⁸⁵ Derivation of the notion of self-government from a private/public sense of civic virtue evokes Michael Sandel's work on liberalism and self-governance.⁴⁸⁶ Sandel remarks that "proliferating sites of civic activity and political power can serve self-government by cultivating virtue, equipping citizens for self-rule, and generating loyalties to larger political wholes."⁴⁸⁷ Local, decentralized proliferation of this sort conforms to the scheme of political pluralism, often defined in terms of group competition, relative truth, and limited state mediation. Yet pluralism may promote group isolation and disaggregation, and furthermore, encourage a false sense of civic consensus. To that extent, the pluralist paradigm may very well undermine citizenship norms, especially when that paradigm is suffused with an unyielding structure of racial hierarchy characterized by white dominance and black subordination.

In similar fashion, republican norms pose an obstacle to citizenship norms. The republican vision presents a weak and deformed conception of the racial other. In terms of citizenship, the other belongs to the minority group in politics and society. Denoted as inferior, the racial other is consigned to the margins of public participation in civic discourse and deliberative decisionmaking. Phylliss Craig-Taylor explains that the citizenship ideal falls partial and impoverished with re-

482. See Russel G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 250-58 (1992) (tracking early historical development of the republican vision of the lawyer's role).

483. See Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 933 (1995).

484. *Id.*

485. Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POL. THEORY 56, 59 (1998).

486. MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

487. *Id.* at 348.

spect to race.⁴⁸⁸ Searching out the normative content of citizenship, Craig-Taylor finds the devastation of servitude⁴⁸⁹ and the ideology of inferiority.⁴⁹⁰

To cure this poverty of exclusion, consider the alternative normative content available in the communitarian⁴⁹¹ values of cooperation, remorse, and moral accountability.⁴⁹² Surely race-sensitive cooperation and remorse over race-motivated competition render a firm normative basis for citizenship. Accountability for the sins of racial self-interest and rivalry strengthens that basis. But these values also generate epistemological doubts and gamble risks of manipulation.⁴⁹³ Further, they do nothing to diminish the hazard of discriminatory impact.⁴⁹⁴ Even in translating the idea of racial representation, the communitarian difficulty seems pronounced, for example, in the class action setting. Beset by unresolved intraclass conflicts over representation⁴⁹⁵ and undisputed doubts about procedural fairness,⁴⁹⁶ the communitarian alternative may fail as a viable framework for remedial prescriptions of citizenship.

For remedial purposes, consider citizenship tied to the notion of respect.⁴⁹⁷ This notion serves as the premise for the standard of the re-

488. See Phyllis Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER J. 45 (1998).

489. See *id.* at 55-56 (contending that "having begun life in America as property for other Americans, the citizenship status of 'free' African Americans was continuously problematic") (footnote omitted).

490. See *id.* at 56 (arguing that "in the wake of post-emancipation anxiety, intellectual and theological theories and social practice soon established the 'inherent inferiority' of African Americans in law and culture").

491. See Kraig James Powell, *The Other Double Standard: Communitarianism, Federalism, and American Constitutional Law*, 7 SETON HALL CONST. L.J. 69, 71-80 (1996).

492. See Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1510-23 (1997).

493. See *id.* at 1554-56.

494. See *id.* at 1548-53.

495. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (probing client-organization and client-counsel conflicts in class action litigation over school desegregation).

496. See Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN L. REV. 1183, 1221-62 (1982) (evaluating procedural mechanisms for coping with interest and value conflicts in institutional-reform class actions); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1644-80 (1997) (mapping individualist, democratic, expertise, and integrated models of procedural and ethical rules to promote democratic means of client goal setting and expertise-driven norms of attorney decisionmaking in group litigation).

497. See Amita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 482-506 (1997) (discussing the possibility of "respect as a legal standard for sexual harass-

spectful person.⁴⁹⁸ The source of this standard lies in ethical personal relationships. Its content draws from the obligations found in the evolving doctrine of sexual harassment law. The respectful person, according to Anita Bernstein, "is a standard that measures action rather than reaction."⁴⁹⁹ Under its terms, "the actor is charged with a duty to refrain from offending others by keeping his behavior within the boundaries of respect."⁵⁰⁰

Bernstein's conception relies on both common sense and respect.⁵⁰¹ Indeed, she propounds respect as a "commonsensical norm."⁵⁰² Implied here is the principle of equal respect familiar from political liberalism.⁵⁰³ That principle spawns problems of compliance and enforcement. To rectify these familiar problems, Bernstein departs from the standard of respectful conduct "encouraged by conventional reasonable person rules" to an elevated standard of respect under which a racially biased citizen "knows it is he, rather than his accuser, who will be held directly to the standard."⁵⁰⁴ In the *Louima* case, both the arresting and the conspiring officers comprise a racially biased citizen group. Their prosecution and investigation reaffirms the principle of equal respect and shared citizenship applied to communities of color in criminal justice enforcement.

C. Professionalism Norms

Professionalism norms similarly may aid the formulation of prosecutorial race-conscious duties of community outreach in cases of racially motivated violence. Long mired in partisanship and moral nonaccountability traditions,⁵⁰⁵ professionalism norms often give rise to amoral and immoral acts typified in the exploitative conduct of the

ment cases").

498. See *id.* at 507.

499. *Id.*

500. *Id.*

501. See *id.* at 521-24.

502. *Id.* at 521.

503. See Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 413 (1996) ("[F]or the government to treat its citizens with equal respect requires that it treat each citizen's interest in autonomy as equal, and that it respect and enhance the capacity of each citizen to choose her own ends and not have them determined or unduly influenced by others.").

504. Bernstein, *supra* note 497, at 507.

505. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 393-403 (1988) (binding the standard conception of the lawyer's role to the principles of partisanship and moral nonaccountability).

Holmesian-inclined advocate.⁵⁰⁶ To break from these traditions, consider the prosecutorial function as an expression of moral action. That expression flows not merely as an extension of legislative will or juridical power, but as an independent exercise of professional morality. The federal criminal justice system is replete with examples of prosecutor-exerted ethical discretion. The Federal Sentencing Guidelines, for instance, furnish a substantial discretionary opportunity in plea negotiation.⁵⁰⁷ This discretionary opportunity stretches to leniency as well.⁵⁰⁸ But that expanded reach also opens the opportunity for the imposition of disparate treatment.⁵⁰⁹

Avoiding discriminatory treatment and harnessing the opportunity to deploy professional norms as a means of deterring crimes of racialized violence⁵¹⁰ requires a model of ethical decisionmaking. For guidance, consider the work of Robert Cover on the process of judging,⁵¹¹ particularly his notion of a "dialectical environment."⁵¹² In his path-breaking study of antislavery judges and the adjudication of fugitive slave cases, Cover explains that the antislavery judge "acted amidst a dialectical process."⁵¹³ The process took two forms. One captured "the adversary proceeding before him."⁵¹⁴ Another enveloped "the sense of

506. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-60 (1897) (introducing a moral conception of the extralegal actor as a "bad man"); see also David J. Seipp, *Holmes's Path*, 77 B.U. L. REV. 515, 552-57 (1997) (discussing various contemporary reactions to Holmes's "bad man" standard). Robert Gordon assails Holmes for too often urging legal actors and decisionmakers "to defer to power even more than their role requires, to be passive instruments of society's or clients' ends rather than active forces to help refigure and transform those ends." Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1018 (1997). Gordon also condemns Holmes for discarding "the traditional roles for lawyers as seekers of justice, social mediators, and curators of the legal framework" whether performed in isolation or in collaboration with larger reform movements. *Id.*

507. See James B. Burns et. al, *We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)*, 91 NW. U. L. REV. 1317, 1326-35 (1997).

508. See David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 NW. U. L. REV. 1434, 1438-39 (1997).

509. See Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 577-80, 582-83, 608-10, 621-23, 630 (1998) (describing prosecutorial discretion and resulting sentencing disparities).

510. See Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2488 (1997) (arguing that "social influence can generate affirmative deterrence strategies that are both politically acceptable and morally appealing").

511. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

512. *Id.* at 211-16.

513. *Id.* at 211.

514. *Id.*

the larger struggle of ideological movements to which the proceeding often seemed related."⁵¹⁵

Cover enumerates three primary factors of influence comprising this juridical dialectical environment.⁵¹⁶ At the outset, he points to "the ideological basis of advocacy."⁵¹⁷ Unearthing this basis, he finds a shift to extralegal argument and militant advocacy. The Louima case displays the same "heightened moral intensity of advocacy."⁵¹⁸ This intensity seems to shun settlement and to discount pecuniary gain in favor of moral struggle, whether against state-sponsored slavery or police brutality. In fact, Cover notes that "both ideological poles had a distaste for settling the fugitive case, preferring to see it as symbolic of the struggle between inconsistent moral demands rather than as a simple matter of pecuniary interest."⁵¹⁹

At the same time, Cover cites "the presence of, or potential for, extralegal action (civil disobedience or resistance)"⁵²⁰ in the composition of a dialectical environment. To Cover, the growing "presence or threat of resistance and disobedience" acted to intensify the dialectical environment in several ways.⁵²¹ He mentions, for example, that "it operated to bar a formal resolution as ultimately determinative."⁵²² Additionally, it raised the level of local political intensity, escalating both repression and antislavery propaganda.⁵²³ Acts of resistance further in-

515. *Id.*

516. *See id.*

517. *Id.* Cover observes:

To a large extent, the judge could control what was said in his courtroom. But, he could not control the public meetings, the demonstrations, and the ideological press. Nor could he easily ignore them when they were the principal news of the day. The fugitive slave cases of the 1840's and 1850's led to organized, militant representation, which in the West included direct appeal to the judge as responsible to a morality above the law.

Id. at 211-12.

518. *Id.* at 212.

519. *Id.* at 214.

520. *Id.* at 211.

521. *Id.* at 214.

522. *Id.* Cover adds:

The refusal to abide the results of the formal apparatus was a threat to the viability of that structure and a direct assertion that the moral values of antislavery were of higher priority than those underlying fidelity to legal process. On a more personal level, the readiness of others to go beyond the formal set of obligations was an invitation to the judge to consider his own priorities. The judge, in confronting the resister, had to be prepared not only to enunciate the law, but also to justify it. In the process of so doing, he confronted his own doubts and hesitations.

Id.

523. Cover mentions that strong instances of resistance "may lead to escalation in suppres-

tensified the reigning moral environment, according to Cover, “by generating a literature exploring the bases for obligation to law.”⁵²⁴ This literature, he comments, “directly engaged and challenged the protective ‘professional role’ justification for complicity in slavery.”⁵²⁵

Cover also refers to “the sympathetic qualities of the potential victims of injustice.”⁵²⁶ For Cover, the juridical act of envisioning the victim of the Fugitive Slave Acts enabled the judge “to understand, though not justify, the act of resistance.”⁵²⁷ Without gainsaying judicial victim-specific empathy toward slave and fugitive, Cover concedes that “almost every slave” counted as “a sympathetic victim to a man morally opposed to the institution.”⁵²⁸ Nonetheless, he underscores that intuitive sympathy and empathy added to “the general and pervasive elements of conflict.”⁵²⁹

The dialectical environment of the antebellum period gave rise to the proposition, heralded by resisters, that “if the moral ends of anti-slavery were to be served, they would have to be served at the expense of, or in preference to, the formal obligations of law.”⁵³⁰ Out of this proposition emerges ideological practices of race-conscious advocacy and adjudication. Professionalism norms cast grave suspicion on such practices, especially when discovered in a prosecutorial setting. When located in that and related legal settings, Cover observes, “the avenues for traditional representational forms and the prerequisites for traditional respect for the institutional structures” of the law and the state collapse.⁵³¹

At first blush, Cover’s historical notion of race-conscious advocacy and adjudication seems incompatible with the role of the prosecutor in the federal criminal justice process. Whatever attraction the role and

sion and a further round of asking whether the formal system is indeed worth the cost.” *Id.* at 214-15.

524. *Id.* at 215.

525. *Id.* (footnote omitted). Cover comments: “By taking seriously the explicit judicial excuse of role fidelity, the Garrisonians came up with a widespread demand for resignation.” *Id.* In this way, Cover concludes, “they pushed the judge beyond the stage of reiteration of role definition.” *Id.*

526. *Id.* at 211.

527. *Id.* at 216.

528. *Id.* Cover explains: “Playing upon the potential for empathy, the abolitionists always tried to personify the victims; to stress the personal, dire consequences of an impersonal rule; to relate the victim’s life story; to introduce the familial and vocational context from which he was torn.” *Id.*

529. *Id.*

530. *Id.* at 217.

531. *Id.* at 220.

function of the antislavery judge might hold in retrospect,⁵³² particularly in seeking to avoid or to mitigate “harsh moral-formal conflicts,”⁵³³ the contemporary federal prosecutor seems far removed from the imagined role of conciliator. Yet, racial reconciliation serves a crucial policy function in the prosecutorial maintenance of the criminal justice system. For reconciliation to succeed, it must bring together the stalwart defenders and active resisters of racist ideology. Like the antislavery judge-as-regulator, the prosecutor must “depend on his ability to communicate with ideological resisters.”⁵³⁴ He also must address the appropriate audience⁵³⁵ among an array of adversaries, colleagues, courts, victims, and communities. Performance of this reconceived prosecutorial role demands fidelity to a different set of professional norms. This differential fidelity enables prosecutors vigorously to engage what Cover calls the “moral-formal battle” over race.⁵³⁶

D. Racial Norms

Racial norms also may spur the development of prosecutorial race-conscious duties of community outreach in cases of racially motivated violence. Several sites provide norms. Civil rights law offers a still evolving antidiscrimination norm. More recently, critical race theory advances an antisubordination norm. Historically, conservative black nationalism posits a black fundamentalist norm.⁵³⁷

Consider first the antidiscrimination norm trumpeted in civil rights law reform. At the core of the antidiscrimination principle lies the axiom of colorblindness. To many, that axiom encourages and tolerates

532. Cover asserts:

The judge confronted the ideological advocate or resister and was a potential spokesman for the values underlying fidelity to law. He was also in a position to change the law or, if the formal costs seemed too high, to alleviate its harsh application by manipulating procedural components; by encouraging consensual settlements or washouts; by nondecision techniques to avoid further doctrinal divergence.

Id. at 223-24.

533. *Id.* at 224.

534. *Id.* Cover remarks that information plainly “is not only factual, but also rhetorical.” *Id.* On rhetorical grounds, “the eloquence of the judge was a factor to be considered.” *Id.* Indeed, the judge “had not only to state the values underlying the formal system that were threatened, but he had to convince.” *Id.*

535. Cover notes that the antislavery judge served to advance his regulative function “so long as he convinced enough people of the intolerable costs to formal values to isolate a relatively helpless, suppressible elite.” *Id.*

536. *Id.* at 225.

537. See Manning Marable, *Black Fundamentalism: Farrakhan and Conservative Black Nationalism*, 39 RACE & CLASS 1, 9-14 (1998).

subordination, separation, and segregation.⁵³⁸ Indeed, for critics, colorblindness presents a cultural process of white hegemony. Accordingly, the discursive and material enforcement of a colorblind precept in the prosecution of race cases indicates a “nested and processual paradigm of hegemony.”⁵³⁹

Since midcentury, the colorblind paradigm of race-neutral prosecutorial discretion has evolved to become part of the state’s “remedial responsibility”⁵⁴⁰ to eradicate race discrimination. Angela Davis delineates a cluster of misleading race-neutral factors commonly deployed in prosecutorial decisions concerning initial charging and plea bargaining. Consider first the seriousness of the offense. Neutrality notwithstanding, the assessed gravity of an offense may hinge on the comparative racial worth of the defendant and the victim.⁵⁴¹ Similarly, the defendant’s prior criminal record, including arrests and convictions, may be infected by discriminatory police policies and practices, such as race profiles.⁵⁴² Likewise, the victim’s punitive, deterrent, or retributive interest in prosecution, especially when bolstered by the supplemental interests of the public, may prove race-susceptible, particularly to the extent it relies on the evaluation of a defendant’s dangerousness.⁵⁴³ Furthermore, the strength of the evidence, coupled with the likelihood of conviction, both may depend on the assessment of racial credibility and preference.⁵⁴⁴ Finally, the availability of alternative dispositions at sentencing, such as rehabilitation, dictates an estimate of rehabilitative potential that is frequently race-pervaded.⁵⁴⁵ Even the alternative of resti-

538. See, e.g., David Kairys, *Unexplainable on Grounds Other Than Race*, 45 AM. U. L. REV. 729, 748 (1996) (arguing that “color-blindness has become a code word not for inclusion or integration—words and ideas not heard much lately—but for the separation and segregation that increasingly characterize American society as we move toward what looks like a developing American apartheid”).

539. Larson, *supra* note 266, at 1001.

540. Angela Davis insists that prosecutors rightly bear the burden of “remedial responsibility to eliminate racism in the criminal process, even though inappropriate or illegal considerations of race may occur at the arrest stage, often before prosecutorial participation in the process.” Davis, *supra* note 263, at 31.

541. See *id.* at 34-35 (arguing that “otherwise legitimate, race-neutral factors” such as the seriousness of the offense “may be permeated with unconscious racism”).

542. See *id.* at 37 (contending that the existence of an arrest record for “a black defendant who lives in a designated ‘high crime’ area . . . may not reflect relative criminality in black and white defendants”).

543. Cf. *id.* at 36 (“[T]he prosecutor may legitimately dismiss the case based on the victim’s feelings, especially if she believes that the defendant does not pose a danger to society . . .”).

544. See *id.* at 34.

545. See *id.* at 37.

tution, based on the ability to pay, demonstrates the intersection of class and race in the criminal justice system. Together, these factors muster only the pretense of race-neutral prosecutorial discretion.

In contrast, the antisubordination norm emanates from the recognition that people of color inhabit a position of inferiority that permeates the structures of not only politics and economics, but also culture and society.⁵⁴⁶ Deeply entrenched, that position materializes in discourse, imagery, and public and private space.⁵⁴⁷ Discursively articulated in the overt slurs and covert disdain of race-talk, the language of inferiority crops up in the cultural and social assignment of character traits associated with *natural* or *learned* incompetence and infirmity.⁵⁴⁸ Semiotically expressed in the cultural artifacts of advertising, the media, and the visual and performing arts, the image of inferiority molds a way of seeing people of color as morally and even genetically defective.⁵⁴⁹ Spatially exhibited in the boundaries of segregation, the walls of prison, and the deprivations of poverty, the concrete fixtures of inferiority shape the dimensions of public and private space.⁵⁵⁰ Founded to oppose the discourse, image, and spatial representation of inferiority, the antisubordination norm may be applied both to expose and to abolish the trope of inferiority. It also may be used to fashion an alternate vision of color that restores dignity and power to people and communities of color. Counterposing antidiscrimination and antisubordination norms fails to resolve whether colorblind and color-conscious prosecutions may in fact open up the hegemonic process of subordination to create transformative opportunities.⁵⁵¹ Often times

546. See DARYL MICHAEL SCOTT, *CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880-1996 passim* (1997).

547. See THOMAS ROSS, *JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS passim* (1996).

548. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 202-45 (1997) (tracing assignment of racialized cultural myths of family irresponsibility, economic sloth, and state dependency in the American welfare system).

549. See MAROUF ARIF HASIAN, JR., *THE RHETORIC OF EUGENICS IN ANGLO-AMERICAN THOUGHT* 51-71 (1996) (discussing the "genetic defectiveness" of people of color); EDWARD J. LARSON, *SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH* 155-57 (1995) (describing racism among southern eugenicists in the 1930s).

550. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844 (1994) (asserting that "the position and function of jurisdictional and quasi-jurisdictional boundaries" promote inequality, specifically racial inequality).

551. See Larson, *supra* note 266, at 1001. Larson comments that once "hegemonic processes are conceptually opened to the meaningful contribution of subalterns, it should not be surprising that in some cases subalterns articulate languages of hegemony that constrain the elite,

these opportunities are forged from historic experiences. For example, as a student at Cornell University in 1969, Carter was an active participant in campus civil rights demonstrations and defended the legitimacy of such political engagement.⁵⁵²

E. Moral Norms

Moral norms additionally may stoke the development of prosecutorial race-conscious duties of community outreach in cases of racially motivated violence. The subject of moral norms brings attention to keenly debated matters of extraprofessional regulation. It also prompts revisiting the settled formalist separation of law and morality.⁵⁵³ Returning to that separation proffers a choice between intrinsic and extrinsic venues for moral sustenance. An intrinsic choice to embrace the law itself for moral guidance in defiance of the law/morality separation relies on the disclosure of moral character. Look, for example, to the character standards for state bar admission,⁵⁵⁴ standards that are reiterated in the Model Rules⁵⁵⁵ and the Model Code.⁵⁵⁶ These standards prevail despite the often ad hoc and reprehensible application of character tests.

To search out additional intrinsic sources of moral character, consider the substantive content of legal doctrine. Criminal law doctrine, for example, reflects a strong substantive commitment to moral val-

rather than merely disputing, reworking, or transforming languages introduced by the politically dominant." *Id.* Subalterns, Larson maintains, "may dominate the intellectual field of force without a conscious struggle." *Id.* Yet, though "providing for the contributions of non-elites to a common cultural hegemony," he notes that "the concept of struggle is especially problematic in the field of popular culture." *Id.* Indeed, according to Larson, people "do not necessarily see the ways in which they transform ideas and practices as purposeful contests with a confining force." *Id.*

552. See Firestone, *supra* note 17, at B2.

553. For a discussion of the Anglo-American jurisprudential roots of the distinction between law and morality, see Morton J. Horwitz, "Why Is Anglo-American Jurisprudence Unhistorical?" 17 OXFORD J. LEGAL STUD. 551, 581-83 (1997).

554. On moral character as a prerequisite to bar admission, see Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 494-554 (1985); Richard R. Arnold, Jr., Comment, *Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Character Standards for Bar Applicants*, 1997 UTAH L. REV. 63, 64-68; Maureen M. Carr, Note, *The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Admissions Standards*, 8 GEO. J. LEGAL ETHICS 367, 374-90 (1995).

555. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.1 (1999) (prohibiting attorneys from making false statements).

556. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 1 DR 1-101(B) (1980) (citing character as a relevant attribute for qualified admission to the bar).

ues.⁵⁵⁷ A like commitment, evidencing a moral or at least theological disposition, reverberates in the prosecutorial use of religious appeals, notwithstanding their purported prejudicial effect⁵⁵⁸ or their applied ethical asymmetry.⁵⁵⁹ Because moral claims echo a premodernist faith,⁵⁶⁰ they draw objection from separationist and neutrality⁵⁶¹ principles. As demonstrated below, that objection shadows the attempt to practice racial morality and, accordingly, to abide by the antidiscrimination principle in government prosecutorial activity.⁵⁶²

The confrontation of faith, race, and neutrality hinders the search for an objective moral standpoint in prosecutorial decisionmaking. Contemplating objectivity in both its weak and strong senses mitigates the force of this confrontation and may evade the furor over moral objectivity. Although this distinction may ease the tension between morality and neutrality, the absence of transcendent possibility and the prevalence of moral uncertainty hamper any effort to reconfigure the meaning of objectivity. For R. George Wright, objectivity in a “weak sense” demands “only something like transcending some particular specified bias, authoritativeness, a standard external to the decision-maker whether that standard is authoritative or not, or a matter of judgment disciplined and constrained by some standard-setting com-

557. See Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 137-44 (1997) (attaching legal moralism to the position that “[m]ost individuals know how to live law-abiding lives without ever consulting their community’s criminal code . . . because they assume that the criminal law tracks certain basic moral norms”).

558. See Brian C. Duffy, Note, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors’ Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335, 1356-59 (1997) (maintaining that the power of religious arguments is likely to bias a jury against a defendant).

559. See *id.* at 1379-82 (arguing that prosecutors, but not defense attorneys, should be barred from making religious arguments).

560. See Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1394-1417 (1997) (contending that eighteenth- and nineteenth-century legal science presupposed the existence of an objective moral order). Feldman finds premodernism to be defined by “an abiding faith in nature or God as a stable and foundational source of meaning and value.” *Id.* at 1389. Consistent with this faith, Feldman explains, both discrete individuals and societal groups “seemed to belong to, rather than exist separately from, nature and God.” *Id.* Within this “metaphysical unity,” Feldman continues, “human access to meaning and value always remained immanent in ourselves and in the world.” *Id.* Based on this metaphysical logic, “humans seemed capable of directly accessing and knowing eternal and universal principles that arose from or within nature or God.” *Id.* at 1389-90.

561. See Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 73 (1997) (arguing that “[s]eparation is consistent with substantive neutrality”).

562. See *supra* notes 301-37 and accompanying text.

munity rules.”⁵⁶³ In contrast, objectivity in a “strong sense” entails “the fuller transcending of bias or of mere group conventional norms, or the transcending and correction of what might be called appearances.”⁵⁶⁴

To fill the breach in a unified sense of moral objectivity, Alasdair MacIntyre offers the notion of norm-embedded practice traditions.⁵⁶⁵ For MacIntyre, practice traditions express normative standards through narratives.⁵⁶⁶ Yet neither professional norms nor rules may accommodate personal moral values.⁵⁶⁷ In fact, the bureaucratic organizational settings and hierarchical work relations predominant in prosecutorial offices render “expectations of moral assertiveness” unreasonable.⁵⁶⁸ Nonetheless, significant historical precedent for moral invocation exists. Segregationists, for example, “engaged in highly discursive strategies of resistance that facilitated continued discrimination by recreating the way in which the law defined African-Americans.”⁵⁶⁹ These strategies recirculate in the modern rhetorical tactic of “substituting abstract classifications of morality for race.”⁵⁷⁰ In the same way, the segregationist discursive tendency of “substituting the quality of blackness for the characteristic of immorality”⁵⁷¹ equally “transformed blacks from the victims of wrong, to the agents of it.”⁵⁷² The false depiction of Louima as a promiscuous homosexual, with a preference for

563. R. George Wright, *Is Natural Law Theory of Any Use in Constitutional Interpretation?*, 4 S. CAL. INTERDISC. L.J. 463, 481 (1995) (footnotes omitted).

564. *Id.*

565. *See generally* ALASDAIR MACINTYRE, *AFTER VIRTUE* 187-225 (2d ed. 1984).

566. *See id.* at 187. MacIntyre remarks:

By a ‘practice’ I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.

Id.

567. *See* Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 20-21 (1997) (exploring tensions between professional norms and personal moral values in lawyer decisionmaking).

568. Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 1012 (1998).

569. Anders Walker, Note, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399, 405 (1997).

570. *Id.*

571. *Id.* at 423.

572. *Id.*

rough-and-tumble nightclub sex, rather than as a victim of perverse police brutality, nicely illustrates this point.

Invoking the ideal of the heroic prosecutor under morality- or virtue-based norms⁵⁷³ may work simply to refashion race-neutral discourse in order “to disguise racial discrimination as moral reform.”⁵⁷⁴ The alternative resort to personal moral and religious norms offers no panacea. Bruce Green points out that personal moral values and religious beliefs present a double-edged sword—“they have the potential either to ameliorate or to exacerbate the deficiencies of the professional norms.”⁵⁷⁵ In an effort to modulate this tension, Green sketches a middle course remedy—the exercise of moral judgment on an “ad hoc basis.”⁵⁷⁶ This course of action, however, fails to guide discretion in the encounter with a legal system rendered unjust by racial animus or by the pursuit of immoral objectives. Channeling prosecutorial discretion in these circumstances based on ethical duties fashioned from norms rooted in constitutional, citizenship, professionalism, racial, and moral landscapes confronts a battery of objections to a race-conscious, community-based ethic of prosecutorial discretion.

VI. OBJECTIONS

This Part enumerates four main objections to the proposed race-conscious, community-based ethic of prosecutorial discretion. The first protests the constitutional incompatibility of race-conscious standards of prosecutorial discretion under equal protection principles. The second assails the same standards as unworkable, pointing to the mutability of racial identity and the incoherence of racialized narratives. The third cites to the expressive or representational harm inflicted on white-majority communities when governmental prosecutorial action favors minority interests. And the fourth complains of the injury to voluntary, cross-racial community when prosecutorial

573. See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 215-54 (1988) (arguing that, beyond acting as a mere adversary, a prosecutor should perform a “quasi-judicial” function of impartially seeking the truth).

574. Walker, *supra* note 569, at 423.

575. Green, *supra* note 567, at 57.

576. *Id.* at 59. Green adds: “Much as conflicts between professional norms and common morality might occasion lawyers to reevaluate the professional norms, conflicts between professional norms and personal values might occasion lawyers additionally to reevaluate the relevant personal beliefs; to determine whether their beliefs are clear, fundamental, and deeply held” *Id.* at 59-60 (footnote omitted). For Green, such reevaluation might eventually prod lawyers “to make a judgment whether to follow conscience or professional norms.” *Id.*

intervention intended to remedy the effects of interracial violence displaces community-based, citizen-led modes of racial reconciliation.

A. *Constitutional Incompatibility*

Like state-enacted race-conscious procedures and remedies, prosecutor-espoused race-conscious standards of discretion strain against the axioms of liberal jurisprudence and the constitutional tradition of colorblind adjudication. And yet, because of the difficulty in contemplating “the idea that the legacy of racial injustice can be rectified by ‘color blind’ political policies,”⁵⁷⁷ color-conscious approaches to racial inequality persistently resurface in statutory regulation, administrative rule, and judicial decree. Nevertheless, the direction of contemporary constitutional doctrine in the field of equal protection runs counter to such approaches. Equal protection principles increasingly condemn race-conscious procedures in the criminal law area of peremptory challenges while tolerating the invidious posture of color-coded strikes.⁵⁷⁸ The same principles rebuke race-conscious remedies in the arena of capital punishment.⁵⁷⁹

Applied to the criminal justice system, constitutional objections to race-conscious procedures and remedies may produce nothing more than a kind of “procedural republic.”⁵⁸⁰ But it is unclear whether this form of government, a byproduct of liberal republican constitutional theory, would secure what James Fleming and Linda McClain describe as the basic liberties undergirding the conditions for self-government: deliberative democracy and deliberative autonomy.⁵⁸¹ For Fleming and McClain, deliberative democracy involves citizens in the exercise of the capacity to picture “a conception of justice” while “deliberating about the justice of basic institutions and so-

577. Lyons, *supra* note 187, at 49.

578. See, e.g., Purkett v. Elem, 514 U.S. 765 (1995) (per curiam) (tolerating prosecutorial use of peremptory challenges to strike two black men appearing in long hair, mustaches, and beards); Hernandez v. New York, 500 U.S. 352 (1991) (plurality opinion) (permitting prosecutorial use of peremptory challenges to disqualify Spanish-speaking Latinos).

579. See McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting petitioner’s statistical claim of racially discriminatory sentencing).

580. James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic*, 76 TEX. L. REV. 509, 511 (1997) (reviewing SANDEL, *supra* note 486, and CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996)).

581. See *id.* at 511-12.

cial policies.”⁵⁸² Deliberative autonomy, on the other hand, entails exerting the capacity to imagine “a conception of the good” while “deliberating about and deciding how to live their own lives.”⁵⁸³

To the extent that race-conscious, community-oriented prosecutorial discretion opens up previously segregated public and private space, it enhances the collective sphere of deliberative democracy and the individual sphere of deliberative autonomy. Insofar as newfound openness in the political space available for democratic exchange induces race-related forms of speech regulation abutting pretrial and trial narratives, however, spatial desegregation may encroach on the constitutional freedom of speech. Moreover, while expanding the boundaries of egalitarian space, such desegregation may trample constitutionally protected property rights and traditions.⁵⁸⁴

Out of obedience to a race-conscious mandate, prosecutors may adopt formal rules or informal habits of self-restriction in charging decisions, pretrial statements, trial tactics, and sentencing recommendations. Consider, for instance, prosecutorial self-restrictions on the form and content of trial narratives in race cases or, conversely, adversarial restrictions on criminal defense narratives in the same set of cases. Restrictions of either variety likely will spur complaints of unconstitutional incursions on First Amendment freedoms. Ongoing legislative and administrative efforts to promulgate such restrictions in the regulation of hate crimes and hate speech⁵⁸⁵ encounter precisely this complaint from those who argue that curbing individual freedom of expression will thereby inhibit autonomy-based freedoms of self-determination and self-realization.⁵⁸⁶ Common to protests against anti-hate speech theories founded on critical race theory and feminist antipornography theory,⁵⁸⁷ this accusation universally assails hate

582. *Id.* at 511.

583. *Id.* at 512.

584. See Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 318-25 (1998) (evaluating impact of egalitarian republicanism on traditional property rights and allocation).

585. See Steven J. Heyman, *Hate Speech and the Theory of Free Expression*, in 1 HATE SPEECH AND THE CONSTITUTION: THE DEVELOPMENT OF THE HATE SPEECH DEBATE FROM GROUP LIBEL TO CAMPUS SPEECH CODES at ix, ix-xci (1996).

586. See Gary Goodpaster, *Equality and Free Speech: The Case Against Substantive Equality*, 82 IOWA L. REV. 645, 671 (1997) (“The relationship of autonomy to the free speech guarantee is apparent, at least to the degree that autonomy contemplates freedom of inquiry, and the freedom of self-expression through communication.”).

587. See Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1508-16 (1996).

speech and hate crime regulation, even with regard to sentencing enhancement. Constitutional defenders of the First Amendment charge that “expression that cannot constitutionally be made criminal when standing alone should not be made the cause of additional punishment simply because of its manifestation during the commission of a separate crime.”⁵⁸⁸ That charge introduces the asserted distinction between criminal intent and hateful motive,⁵⁸⁹ and, by extension, the democratic dilemma of the well-intentioned speaker whose speech is harmful.⁵⁹⁰ For race-conscious prosecutors, the “tragic dilemma” of protecting freedom of speech “only by sacrificing other important values” requires moral commitment.⁵⁹¹ Honoring even constitutionally based political obligation in the face of “outrageous, deeply entrenched, systematic injustice” bound up in racialized narrative signifies a form of “culpable indifference” and, thus, an expression of moral failing.⁵⁹² To dislodge the ingrained presumption of colorblind obligation impeding prosecutorial moral reasoning demands the formulation of generally applicable standards of racial identity, narrative, and speech restriction.⁵⁹³

B. *Unmanageable Standards*

The second objection to race-conscious prosecutorial discretion attacks color-conscious standards of discretion as unworkable,

588. Robert S. Peck, *Deciding When Speech Isn't Speech*, 20 N.Y.U. REV. L. & SOC. CHANGE 667, 673 (1993-94) (reviewing FRANKLYN S. HAIMAN, “SPEECH ACTS” AND THE FIRST AMENDMENT (1993)). Peck warns that “[t]he First Amendment’s protection of ideas, speech, and associations—including those that society deems morally contemptible—should not be limited to preventing these thoughts and utterances from being the basis of a crime; it should also prevent them from being the basis of additional punishment.” *Id.*

589. See Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 363-68 (1991) (discussing the legal distinction between “intent” and “motive”).

590. See Adler, *supra* note 587, at 1563-65 (critiquing the attempts of scholars Mari Matsuda and Catharine MacKinnon to reconcile the speaker’s intent and the harm to the victim in examining hate speech and pornography).

591. Heyman, *supra* note 585, at xv.

592. Lyons, *supra* note 187, at 48. Lyons draws this conclusion based on the proposition that “political obligation cannot coexist with significant, systematic injustice that is deeply entrenched.” *Id.* at 35-36.

593. See *id.* at 49. Lyons uproots the presumption of political obligation under the leverage of racial insensitivity. He reasons: “The judgment of those of us who took political obligation for granted—despite the obvious existence of intolerable, deeply entrenched, systematic injustice against clearly identified groups within our society—was distorted by inadequate sensitivity to the palpable impact of the oppression, especially on those of color.” *Id.* at 48.

pointing to the mutability of racial identity and the incoherence of racialized narratives. The Louima case shows racial identity shifting into the mutable categories of color, race, ethnicity, nationality, and sexuality. It also demonstrates the inconsistency of racialized narrative enunciated by prosecutors, defense attorneys, defendants, victims, and judges. In addition to categorical inconstancy, racial identity and narrative suffer from the redundant inscription of a white/black dichotomy that is ill-suited to mixed-race classification and racial gradation across divergent groups and subgroups.⁵⁹⁴ That central dichotomy arises in both high- and low-profile trials, though it seems most pronounced in “criminal trials that have generated intensive and prolonged *local* media attention.”⁵⁹⁵

The prosecutorial management of racial identity and narrative notorious for their protean quality and group divergence⁵⁹⁶ seems especially onerous in a criminal justice system already burdened by excessive caseloads.⁵⁹⁷ The further onus of regulatory monitoring and enforcement shared among prosecutors, defense attorneys, and judges is doubly vexing, notwithstanding the duty—shared jointly by attorneys and judges—to report misconduct.⁵⁹⁸ In fact, reporting generates additional problems of nonuniformity in a decentralized federal and state system of ad hoc disciplinary sanctions. The perception of bias stemming from evidence of nonuniformity⁵⁹⁹ should anticipate no rescue from black judges.⁶⁰⁰ Nothing in the black judicial role en-

594. See Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 887, 895, 903-06 (1996).

595. Peter L. Arenella, *Televising High Profile Trials: Are We Better Off Pulling the Plug?*, 37 SANTA CLARA L. REV. 879, 882 (1997); see also William L. Howard, *Televised Trials: Can the Government Market Electronic Access?*, 49 S.C. L. REV. 55, 56 (1997) (“Not surprisingly, the expanded television coverage of trials has increased debate over the appropriateness of procedural safeguards implemented to protect a defendant’s due process right of a fair trial because these same safeguards potentially restrict media access to the court proceeding in violation of First Amendment protection.”) (footnote omitted).

596. See AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP 2*, 127-49 (1995) (describing judicial difficulties in trying to define membership in, among other things, ethnic or racial groups).

597. See Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761, 763-66 (1996).

598. See Leslie W. Abramson, *The Judge’s Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 755-78, 763-66 (1997).

599. See *id.* at 782.

600. See THOMAS M. UHLMAN, *RACIAL JUSTICE* 63-76 (1979). Uhlman argues that “[b]lack and white judges differ little in determining both guilt and the punishment a defendant ‘deserves’ for committing a crime . . .” *Id.* at 71.

suers racial justice⁶⁰¹ given the paucity of empirical evidence of “systematic behavioral differences between the black and white judicial elite.”⁶⁰²

The erection of an identity- or narrative-based system of federal and state sanctions might benefit federalism interests in fostering the equal protection of people of diverse races.⁶⁰³ To the extent that such sanctions include victim-compensation schemes, prosecutorial discretion may also advance restitution goals in cases of racial violence. Here too, however, judicial supervision comes into play.⁶⁰⁴ Although not unmanageable, judicial supervision over compensatory sanctions once more implicates courts in the definition of the political community of race.⁶⁰⁵ Because identity and narrative derive from and create racial community, determining the breadth of individual and group authorship and the protection to be afforded such discursive standing remains unclear.⁶⁰⁶

On the basis of the unfinished record in the Louima case, to infer that sanctionable prosecutorial misconduct in the form of witness coercion or evidence tampering necessarily accompanies a race-

601. See *id.* at 63. Uhlman points to the black judicial role as “frequently more than symbolic.” *Id.* at 63. Discerning “a sensitivity to a variety of inequities observed within their courtrooms,” he observes that “black judges see themselves as educators, reformers, and advocates for social change.” *Id.*

602. *Id.* at 72. Uhlman also states that in “[c]haracterizing the trial bench of a major urban court, only minor variations distinguish the behavior of black and white judges at the critical points where guilt is determined and punishment meted out.” *Id.*

603. For a discussion of the historical interplay of race and federalism, see Robert J. Kaczowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015 (1997) (exploring race-informed theories of constitutional federalism).

604. See Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 EMORY L.J. 163, 200 (1998). Commenting on the efficacy of judicial supervision, Barton observes:

Even where problematic aspects can be parsed out, the law generally fails to deliver a solution that does anything more than compensate one party for the breach or dissolution of the relationship. The law cannot make children love or respect their parents, inspire a group member to greater institutional commitment, or do much to prompt more authentic communication between employer and employee. But even on a behavioral level, effective legal solutions in these contexts would imply a level of supervision over the relationship which seems impractical or undesirable.

Id.

605. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 534-35 (1997) (discussing the judicial difficulties of defining the legislatively declared borders of political community).

606. See generally Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997) (applying philosophical and legal pragmatism to investigate the moral rights of authorship and copyright).

conscious, community-oriented model of prosecutorial discretion proves too much. But coercion, when spurred by community outrage and racial passion, may prove to be a byproduct of such a decision-making model. Long viewed as an "entirely discretionary" matter of decisionmaking,⁶⁰⁷ the prosecutorial charging decision, and its undergirding investigation, acquires added weight in the prosecution of interracial crime, whether black-on-white or, as here, white-on-black. This is not to say that intraracial forms of crime hold no consequence. In fact, Michael Tonry laments that "a failure by the state to take crimes by blacks seriously depreciates the importance of victimization of blacks."⁶⁰⁸ Here, the charging decision gains even greater importance because it comes at the expense of federal-state jurisdictional redundancy, traditionally favored when the incident invites both criminal and civil rights prosecutions. The logic of this redundancy, expressed in the availability of successive state criminal and federal civil rights proceedings, flows from the efficacy and, at times, necessity of overlapping state-federal prosecutions.⁶⁰⁹ Although federal prosecution may harbor distinct advantages over parallel state prosecution in evidentiary and remedial matters, it seems unclear whether race cases may easily succumb to common federal "managerial strategies of rationalization"⁶¹⁰ and, moreover, whether such cases may effectively accommodate the constraints on federal courts in the management of caseloads, procedures, and institutional resources.

C. *Expressive and Representational Harm*

The third objection to race-conscious prosecutorial discretion refers to the expressive or representational harm inflicted on white-majority communities when governmental prosecutorial action favors

607. Angela Davis explains that prosecutorial discretion survives independently of the doctrinal predicate of probable cause. Even with evidence of probable cause, Davis remarks, "the prosecutor may decide to dismiss the case and release the suspect." Davis, *supra* note 263, at 21. Alternatively, Davis adds, the prosecutor may "file a charge that is either more or less serious than that recommended by the police officer, as long as there is probable cause to believe the suspect committed the crime." *Id.* at 21-22.

608. MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 50 (1995).

609. Similar claims of efficacy and necessity advance the argument for redundant prosecution in the federal system. See Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625, 628-40 (1995) (discussing sources of repeat prosecution in the federal system).

610. WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* 123 (1990).

minority interests, as sometimes found in racial gerrymandering. The theory of expressive or representational harm applies equally to white-majority and black-minority communities, though the focal point here leans toward the meaning or expectation of harm experienced by the dominant racial group. Race-conscious prosecutorial action that favors minority interests invites objection not simply because of the threatened risk of community stigma harm,⁶¹¹ and the correlative danger of the internalization of and conformity to that concept of harm,⁶¹² but also because of the threatened loss of public faith in government.⁶¹³

Extracted from Christine Desan's study of the early American republic, the notion of public faith is crucial to the testing of a race-conscious, community-oriented model of prosecutorial discretion. Desan's study reveals that public faith in the early republic emerged from "the need to maintain a viable political community—a matter effectuated by politics in its narrow sense, but gauged as well by public actors' ability to ensure the public credit and to maintain, at least minimally, the broader public's recognition and its continued participation in the life of the colony."⁶¹⁴ In the *Louima* case, the instant objection speaks to the issue of public faith and the consequences of its perceived loss. On this criticism, loss of public faith follows from

611. By community stigma harm, I mean the cultural marking of "outsiders." The demarcation of a group or a community as an unwanted other denies a sense of belonging. See RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 191-235 (1993); cf. Alex Geisinger, *Nothing but Fear Itself: A Social-Psychological Model of Stigma Harm and Its Legal Implications*, 76 NEB. L. REV. 452, 475-82 (1997) (discussing stigma in the context of environmental contamination of property). With respect to the effects of stigma, Geisinger notes:

[A]lthough it is possible that a contamination event may endure much longer at a community level than at a state or national level, it is also very likely that the stigma associated with any event may be temporary, and proof of this may itself be the most difficult obstacle to prevailing on a stigma damage claim.

Id. at 494. For a further discussion of stigma harm, see Eric S. Schlichter, Comment, *Stigma Damages in Environmental Contamination Cases: A Possible Windfall for Plaintiffs?*, 34 HOUSTON L. REV. 1125 (1997) (challenging damage claims that allege stigma by proximity to contaminated property).

612. See Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2457-61 (1997).

613. See Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1390, 1481-94 (1998). Desan adds that historically relevant "terminology evoked the idea of trusteeship that Americans had used to define the legislative role." *Id.* at 1482. To Desan, this "image sanctified the responsibility that representatives owed to their constituents: they had to enforce, indeed exemplify, norms of right and justice." *Id.*

614. *Id.* at 1483.

Carter's asserted failure to fulfill the obligations of colorblind government. Cast here as a kind of prosecutorial representative of national government, Carter's highest obligation purportedly runs to the preservation of a viable political community. Viability, on this reasoning, depends on white-majority participation in the life of that community.

Like the harm attributed to excess state speech regulation,⁶¹⁵ the injury of expressive and representational harm may escape individual display. Instead, generalized to community, it may better resemble a process injury resulting from unwieldy state intervention. In this sense, the public and private distinction often separating individual and common realms of interest bears less relevance here.⁶¹⁶ More compelling in this case is the implicit claim of contractual breach in the government covenant of equal citizenship. By contractualizing "human moral and political relationships"⁶¹⁷ and staking its legitimacy on popular consent and sovereignty, liberal theory produces the "perverse effect" of inflicting expressive and representational harm upon white-majority communities disfavored by prosecutorial discretion, while stoking "the fires of racism with resentment and hostility toward the 'favored,'" and, thus, reinforcing "racist stereotypes."⁶¹⁸

D. *Voluntary, Cross-Racial Community*

The fourth and last objection to race-conscious, community-oriented prosecutorial discretion complains of the injury to voluntary, cross-racial community when prosecutorial intervention intended to remedy the effects of interracial violence is favored over alternative community-based, citizen-led modes of racial reconciliation. Wedded to the normative value of individual and collective action, this objection enlarges the concept of autonomy beyond claims of legal right⁶¹⁹ and political deliberation⁶²⁰ to embrace the mission of

615. Richard Abel contends that state speech regulation fails to silence harmful speech and instead perversely "encourages, valorizes, and publicizes it, transforming offender into victim and offense into romantic defiance or fundamental right." RICHARD L. ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* 244 (1998).

616. See Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 59 (1997) (discussing the "schism between a public realm of equality, inclusivity, and common interest, and a private realm of difference, exclusivity, and individual will").

617. Stephen Mulhall, *Promising, Consent, and Citizenship: Rawls and Cavell on Morality and Politics*, 25 POL. THEORY 171, 192 (1997).

618. THOMAS POWELL, *THE PERSISTENCE OF RACISM IN AMERICA* 302 (1992).

619. See Jolm P. Safranek & Stephen J. Safranek, *Can the Right to Autonomy Be Resusci-*

collective diversity.⁶²¹ Espousing that mission, the objection offers a narrative of community and national unity.⁶²² Like the meaning of citizenship,⁶²³ the meaning of community “membership” is frequently contested.⁶²⁴ Central to this contest are the issues of inclusion and exclusion. Describing the “distinctively American struggle for equal membership in the political community,”⁶²⁵ Keith Bybee refuses to reduce the struggle over community membership to “fixed categories of inclusion and exclusion.”⁶²⁶ To Bybee, “the politics of representation is constitutive in nature, drawing on competing notions of whom ‘the people’ are and turning on questions of how self-government ought to be achieved.”⁶²⁷

Explicating community membership and self-government under pluralist⁶²⁸ and deliberative⁶²⁹ conceptions of democracy reveals seri-

tated After Glucksberg?, 69 COLO. L. REV. 731, 736 (1998) (cataloguing scholarly “attempt[s] to justify the autonomy of the individual to engage in certain acts free from state strictures”).

620. See generally James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 6-56 (1995).

621. See Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 765 (1997) (arguing that diversity “has no inherent meaning and cannot be a compelling interest unless we ask the prior question: diversity to what purpose?”).

622. See HENRY A. GIROUX, *FUGITIVE CULTURES: RACE, VIOLENCE, AND YOUTH* (1996). Commenting on narratives of national identity, Giroux writes:

[N]ational identity is structured through a notion of citizenship and patriotism that subordinates ethnic, racial, and cultural differences to the assimilating logic of a common culture, or, more brutally, the “melting pot.” Behind the social imaginary that informs this idea of national identity is a narrowly defined conception of history that provides a defense of the narratives of imperial power and dominant culture and legitimates an intensely narrow and bigoted image of what it means to be an American.

Id. at 190.

623. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 3-23 (1995).

624. See Keith J. Bybee, *Essentially Contested Membership: Racial Minorities and the Politics of Inclusion*, 21 LEGAL STUD. F. 469, 471 (1997) (“Too often the struggle for inclusion in the community of citizens is recounted without devoting much attention to what counts as inclusion in the first place.”).

625. *Id.*

626. *Id.* at 472.

627. *Id.* (“To understand the development of American citizenship it is not enough simply to keep track of insiders and outsiders, for it is within representational politics that the conundrums of membership are posed and resolved.”).

628. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 83 (1985) (explaining that “the notion of a distinctive common good becomes tyrannical or mystical” under the pluralist understanding of politics and governance); see also Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1433-45 (1997). Primus explains that “an interest-based conception of democracy views institutions of government as forums in which attorney-like representatives try to advance the interests of the particular constituencies they represent.”

ous and enduring barriers to cross-racial communication and consensus.⁶³⁰ Communication through the traditional forum of public debate may in fact either distort racial identity and narrative or reinforce racially deformed conceptions of identity and narrative.⁶³¹ Moreover, consensus itself may prove impossible without a sense of cross-racial citizenship. In cases of racially motivated violence, that sense of citizenship very well may serve as a basic "precondition of criminal liability."⁶³²

The proliferation of sects, subgroups, and subcommunities,⁶³³ documented in a growing constitutional literature,⁶³⁴ poses the addi-

Primus, *supra*, at 1433. This conception of interest-based democracy, he notes, "tends to view human nature as atomistic." *Id.* The conception "says little about how preferences are formed," and moreover, "is skeptical about whether there can exist a public interest distinct from the aggregated interests of individuals." *Id.*

629. See BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 150-55 (1984); Primus, *supra* note 628, at 1445. Primus indicates that deliberative conceptions of democracy urge "a more dynamic view of decisionmaking." Primus, *supra* note 628, at 1445. This view "imagines people coming to their opinions through a process of discussion with others," rather than through a decisionmaking process arrived at "by aggregations of individuals whose interests and preferences are formed and fixed in advance." *Id.*

630. Sunstein notes that "social, political, and economic inequalities will have significant consequences for the potential of rational deliberation." Sunstein, *supra* note 628, at 84. Indeed, for Sunstein, "a deliberative politics is an imperfect guarantee of public-regarding outcomes." *Id.*

631. See R. Richard Banks, *The Political Economy of Racial Discourse*, 9 *YALE J.L. & HUMAN.* 217, 237-38 (1997) (reviewing HARLON L. DALTON, *RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES* (1995)). Banks argues that public dialogue about racial issues, however celebrated, "may neither further participation in democratic self-government nor promote the discovery of truth to the extent that many would like to believe." *Id.* at 244 (footnote omitted). Such racial dialogue, according to Banks, "may promote the illusion that public debate is free from racial bias and equally open to members of all groups." *Id.* In reality, because "prevailing attitudes about black Americans may serve to limit speech that questions racial assumptions," public and private dialogue "may not lead to truth." *Id.* Unfortunately, "conversation may indirectly reinforce underlying assumptions about race and racial differences." *Id.* As a consequence, critical "[i]deas that contradict the widely held assumptions that frame public debate may never be heard." *Id.*

632. R. A. Duff, *Law, Language and Community: Some Preconditions of Criminal Liability*, 18 *OXFORD J. LEGAL STUD.* 189, 202 (1998). Duff also adds:

[O]ne account of the moral conditions of the obligation to obey the law, and of being answerable through the courts, is expressed in terms of community. The defendant is obligated to obey the law in virtue of his membership of a community whose law it is; and he is answerable through the courts to his fellow members of the community for his alleged breaches of that law. . . . [This account raises] questions about the conditions for the existence, and for membership, of a community of the appropriate kind.

Id. at 197.

633. See Jonathan Boyarin, Note, *Circumscribing Constitutional Identities in Kiryas Joel*, 106 *YALE L.J.* 1537, 1554-59 (1997).

634. See, e.g., Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 *COLUM. L. REV.* 1, 8-16, 57-82 (1996) (discussing how the U.S. Constitution enhances the rights of sub-

tional barrier of tolerance toward diversity and plurality.⁶³⁵ Here, calls for tolerance extend to community self-governance and self-actualization.⁶³⁶ Yet, however isolated the community, self-governance inevitably must impinge on state demands of normative integration. Because integration involves coercion,⁶³⁷ the liberal ideal of state neutrality comes under strain.⁶³⁸ More than the differential application of state power to voluntary as compared to fortuitous associations, the key to the objection at hand concerns state-commanded group or community coercion.

Gerald Frug recommends curing coercion through the nurturing process of "community building."⁶³⁹ In cases of racially motivated violence, as here, community-building also requires a politics of identification. Formulated originally in the work of Regina Austin,⁶⁴⁰ the politics of identification guides the transformative reconstitution of communities of color under a framework of common experience and

communities in the context of *Board of Education of Kiryas Joel Village School District v. Grumet*); Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. 1, 8-17 (1995) (same).

635. See Veit Bader, *The Cultural Conditions of Transnational Citizenship: On the Interpretation of Political and Ethnic Cultures*, 25 POL. THEORY 771, 774 (1997) (arguing that neither republican nor pluralist models of civil society require "ethnic-cultural assimilation as a precondition for integration into the political community").

636. See Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1141 (1998) (arguing that "political perfectionists should be allowed the opportunity to govern themselves in some sub-federal sovereigns so they can self-actualize in accordance with their views of what self-actualization requires").

637. Jonathan Boyarin points out that "[t]he term 'sect,' even where it is not pejorative, focuses on the feature of individual belief and occludes the genealogical dynamic, while 'subgroup' and 'subcommunity' imply 'outsider' status." Boyarin, *supra* note 633, at 1559. As such, Boyarin suggests, "these categories draw subtly coercive circles." *Id.*

638. See Colin M. Macleod, *Liberal Neutrality or Liberal Tolerance?*, 16 LAW & PHIL. 529, 530 (1997) (asserting that "[e]mbracing neutrality has . . . generated significant tensions within liberal theory").

639. Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 36 (1998). Frug denies that his use of the term "community" intends "to invoke the romantic sense of togetherness often generated by the image of cities as voluntary associations." *Id.* By his usage, the term instead refers "to the experience, characteristic of fortuitous associations, of being part of a group composed of people different from oneself." *Id.* Frug postulates that the goal of community building is "to increase the capacity of all metropolitan residents—African American as well as white, gay as well as fundamentalist, rich as well as poor—to live in a world filled with those they find unfamiliar, strange, even offensive." *Id.*

640. See Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1799-1817 (1992) (describing ways in which members of the black community engage in informal and occasionally illegal economic activity as a form of community development).

struggle.⁶⁴¹ The goal of that struggle is community empowerment in law, politics, and economic development. Expanding this framework, Lisa Crooms maintains that the politics of identification demands that the black community “reconstitute itself according to community-developed criteria” that may fall outside mainstream norms and conventions.⁶⁴²

Part of this reconstitution may obtain from voluntary, local, citizen-led modes of racial reconciliation. Like community forms of charity, alternative modes of racial reconciliation may belong more properly to individuals and groups than to state entities and enterprises.⁶⁴³ The chances of reconciliation hinge on racial empathy and forgiveness. Stephen Morse points out that the “capacity for empathy is not the sort of characteristic one can easily ‘work on’ and alter.”⁶⁴⁴ But forgiveness, having earned a place in criminal justice sentencing systems,⁶⁴⁵ affords more hope. Indeed, the criminal justice system concedes the prosecutorial role in dispensing “institutional or official forgiveness.”⁶⁴⁶

Talk of voluntary, cross-racial community and reconciliation may amount to nothing more than folly given private market forces⁶⁴⁷ and American populist histories.⁶⁴⁸ Although specific to the context of late-nineteenth century political culture, the racial tensions and po-

641. See Lisa A. Crooms, *Stepping into the Projects: Lawmaking, Storytelling, and Practicing the Politics of Identification*, 1 MICH. J. RACE & L. 1, 3 (1996) (remarking that “marginalization provides a common experience that binds virtually all Black people across lines of class, sex, ethnicity and sexual orientation”).

642. *Id.* at 9.

643. See Jennifer Roback Morse, *The Modern State as an Occasion of Sin: A Public Choice Analysis of the Welfare State*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 531, 541-48 (1997) (analyzing the moral relationship between donors and donees in a welfare state).

644. Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 61 (1997).

645. See Richard Lowell Nygaard, *On the Role of Forgiveness in Criminal Sentencing*, 27 SETON HALL L. REV. 980, 1019-20 (1997) (arguing that the “criminal justice delivery system should set an example for society, assist to condition citizens to desire progress, guide them to seek positive healing results, and not remain mired in hatred or their dark desire for revenge”).

646. *Id.* at 1020.

647. The history of segregation in interstate commerce and transportation suggests that private-market entities may revert to bias without outside state intervention. See Joseph R. Palmore, Note, *The Not-So-Strange Career of Interstate Jim Crow: Race, Transportation, and the Dormant Commerce Clause, 1878-1946*, 83 VA. L. REV. 1773, 1815-16 (1997).

648. Both nineteenth- and twentieth-century populist movements adhered to the doctrine of white supremacy. See MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 14-15, 23-24, 40-41, 227-42 (1995).

litical limits of that era⁶⁴⁹ endure, giving shape to the unruly conceptions of community-based, popular justice current today.⁶⁵⁰ This decayed conception, together with the objections of constitutional incompatibility, practical unmanageability, expressive and representational harm, and compromised voluntary, cross-racial community dim the prospects of promoting a race-conscious, community-oriented model of prosecutorial discretion.

CONCLUSION

The daunting prospects confronting the instant race-conscious model of prosecutorial discretion under the above objections in no way halts the advance of the larger project underway here. My hope in undertaking this series of case studies is to convince the bar and bench to reconsider the ethical responsibilities of prosecutors in racially and politically charged cases like the assault of Abner Louima, and moreover, to persuade interdisciplinary scholars of American law and society to comprehend the importance of integrating theory and practice in their analysis of both high- and low-profile race cases. In these interlocking ways, the Article may contribute to a greater understanding of the place of racial identity, racialized narrative, and race-neutral representation in law, lawyering, and ethics.

To facilitate this contribution, consider an outline of strategic maneuvers potentially capable of overtaking some of the objections enumerated here. Outside of the magical "creation of metaphysical entities that make certain worldly events come out the way one desires,"⁶⁵¹ the reigning metaphysics of colorblind, race-neutral prosecutorial discretion seems certain never to deliver racial harmony to American law and society. The deliverance of harmony requires something more than an aspirational metaphysics to succeed. To the extent that law repre-

649. See PETER H. ARGERSINGER, *THE LIMITS OF AGRARIAN RADICALISM: WESTERN POPULISM AND AMERICAN POLITICS 2* (1995) (asserting that "[p]opulist decisions and actions, if not completely determined, were definitely limited" by the cultural and structural components of political context).

650. See Timothy Lenz, *Popular Law and Justice*, 20 *LEGAL STUD. F.* 387, 387 (1996) (explicating the contemporary populist challenge to the autonomy of courts and the separation of law from politics).

651. Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 *CAL. L. REV.* 427, 437 (1997) (reasoning that to "engage in magical thinking, one simply posits a thought that will make things come out the way one desires and one then affirms that the thought is or refers to something that is ontologically real and ontologically effective").

sents "a concrete social form embedded in institutional practices,"⁶⁵² the practical reform of racialized law and sociolegal practices warrants a project more boldly prescriptive than the cryptonormative⁶⁵³ style routinely assailed by postmodernist scholarship.⁶⁵⁴

The project of fashioning a race-conscious, community-oriented model of prosecutorial discretion requires integrating the considerations of racial identity, racialized narrative, and interracial community into the function of federal and state prosecution. That function applies to the prosecutorial decisionmaking process as a whole. At the outset of each case, from the charging decision on, prosecutors must look to evidence of racial identity and racialized narrative, and moreover to the potential for community protection and mobilization. The Louima case embroils racial identity both as to color and alienage. It also involves racialized narrative in the use of racial slurs. Additionally, it implicates community, both black and immigrant. Applied to the Louima case, the function of federal and state prosecution properly expands to protect communities of color against police brutality and to mobilize those communities around the norms of racial dignity, equality, and justice.

But more than the charging decision is at stake. Once the decision to charge arises, prosecutors next must look at the reallocation of investigative and trial resources. From charging and institutional resources, prosecutors also must turn to the nature of pretrial publicity and the related discursive issues concerning narrative tactics in trial strategy. These issues encompass narrative content in opening statements, direct- and cross-examination, objections, expert testimony, and closing argument. They extend as well to sentencing recommendations.

The inquiry does not end there. Reconfiguring the charging decision, reallocating institutional resources, and reconceiving the narrative purpose of the criminal trial and the sentencing process are not

652. *Id.* at 440.

653. See Ronald K.L. Collins, *Outlaw Jurisprudence?*, 76 TEX. L. REV. 215, 263 (1997) (reviewing DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA (John D. Caputa ed., 1997)).

654. Postmodern scholars denounce traditional legal scholarship for its prescriptive style, a style that is manifested in both overtly normative and covertly cryptonormative forms. See Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991).

enough. The prevention of identity-based violence dictates police training and community outreach. The goal of outreach should be to establish monitoring, compliance, and enforcement structures within communities of color. Community work, undertaken in collaboration with local churches, community centers, and schools, offers a starting point for this prosecutorial project.

To be sure, the very act of imagining such a project implies that the law and legal agents are susceptible to racial reason and to normative persuasion. The goodness of well-placed normative intention, however, fails to answer how the application of racial reason and normative persuasion will resolve the enigmatic qualities of racial identity and narrative, even without the added complexity of criminal and civil adversarial proceedings. It also leaves uncertain the practical utility of critical race theory, intimating that the development of an alternative race-conscious community approach to the prosecution of cases incited by racially motivated violence may fall outside of a single theoretical school. Nonetheless, any approach will pose the stubborn challenge of theoretical integration and practical application. Hard fought and perpetually resisted, integration of this sort involves the painstaking work of continuing the critical race theory-led effort to formulate an analysis of the role of the modern state in constituting the subordinate public and private status of people of color.

Extending that analysis in the instant context of the criminal justice system dictates the ongoing investigation of the relationship between the state prosecutorial function, racial ideology, and the sociolegal order. As the Louima case illustrates, the state prosecutorial function contains both entrenched and transformative ideologies. Channeling that function to articulate or rearticulate transformative racial ideology linked to the "creation of new identities, new racial meanings, and a new collective subjectivity" entails a political project advanced in conjunction with an oppositional movement.⁶⁵⁵ In this regard, Michael Omi and Howard Winant explain that the attempted

655. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 90 (2d ed. 1994). Omi and Winant add that "disorganization of the dominant racial ideology, the construction of a new set of racial meanings and identities, the transition from political project to oppositional movement, is a complex, uneven process, marked by considerable instability and tension." *Id.* at 90-91. Although change may be demanded, they argue that "any change in the system of racial meanings will affect all groups, all identities." *Id.* at 91. They stress that rising up to challenge "the dominant racial ideology inherently involves not only reconceptualizing one's own racial identity, but a reformulation of the meaning of race in general. To challenge the position of blacks in society is to challenge the position of whites." *Id.*

“rearticulation of pre-existing racial ideology is a dual process of *disorganization* of the dominant ideology and of *construction* of an alternative, oppositional framework.”⁶⁵⁶

Conceiving the prosecutorial function as a political project dedicated both to dismantling hierarchical structures of racial identity and narrative, and to building oppositional forms of advocacy that liberate subordinate images and discourses, pushes prosecutors into a model of community participation. Here the community at stake travels far outside local boundaries to countenance a historical community connected by common issues of racially subordinated identity and narrative. Relevant models of community participation may be found in prior instances of identity-based criminal violence, even when confounded by the crosscutting categories of race, ethnicity, and gender that reflect the individual and group diversity of color.⁶⁵⁷ The failure to recognize the historical intersection of gender, ethnicity, and class⁶⁵⁸ in race cases permits the continued manipulation of stereotypical images “in the service of political or economic expediencies.”⁶⁵⁹

Ending the state manipulation of stereotypical imagery demands a study of race as a political and cultural project. In the Louima case, this overlapping project involves a process of sociolegal reimagination specific to the black male body. For Michael Uebel, undertaking a recasting of the signifying male body introduces “a political enterprise, aimed at producing new solidarities and exposing the bounds of the dominant and ‘normal’ as fragile and subject to revision.”⁶⁶⁰ Recasting directs the mapping of identities in terms antagonistic to “colonial fantasy and the iconography of racial masculine bodies.”⁶⁶¹ From this mapping, theoretical models may emerge “that are aimed at supplanting reductive

656. *Id.* at 89.

657. See Jenny Rivera, *Intimate Partner Violence Strategies: Models for Community Participation*, 50 ME. L. REV. 283, 294 (1998) (asserting that “Latinas recognize that in order to actualize participatory representation of women and the Latino community generally, Latinas must develop community-based organizations and entities that allow for intragroup discourse by different Latina subgroups”).

658. See Hope Lewis, *Global Intersections: Critical Race Feminist Human Rights and International Black Women*, 50 ME. L. REV. 309, 319 (1998) (pointing to legal literature that “overlooks the roles that race, ethnicity, class, and gender play in the experiences of Black female immigrants”).

659. *Id.*

660. Uebel, *supra* note 220, at 7.

661. *Id.*

accounts of identity formation at the intersection of race and masculinity.⁶⁶²

The Louima case illustrates the performative intersection of race and masculinity. In demonstrating that the identity categories of race, sexuality, and nationality may be readily “defined less as fixed identities rooted in bodies, normative sexuality, nature, or geography, and more as dynamic and dramatic modes, the sum of one’s cultural practices,”⁶⁶³ the Louima assault shows that the cultural politics of race and masculinity play out in the sociolegal context of the criminal and civil justice systems. The play of racial masculinities in the Louima case highlights the “dynamic modes of cultural practice” in legal advocacy and adjudication.⁶⁶⁴ Evidence of this dynamic, divulged in “shifting, repeating sets of performances” with no “fixed or essential subject category,”⁶⁶⁵ compels the investigation of white/black masculinity “as a revisionary process, a constitutive performance”⁶⁶⁶ that inscribes race and masculinities within the cultural politics of performativity.⁶⁶⁷ The juridical inscription of racial and masculine subjectivities in the Louima case through the contextualized performance of criminal and civil advocacy constitutes a “politics of representation” that manufactures its own social and political existence.⁶⁶⁸

Confronting the harsh reality of that racially oppressive and segregated existence, and its animating politics of legal representation, commences a gradual process of ethical *positioning* for prosecutors, victims, and communities of color.⁶⁶⁹ This process involves the move toward the prosecutorial exercise of race-conscious, community-oriented ethical judgment accompanied by joint victim/community acts of moral solidarity. In these ethical moments,⁶⁷⁰ prosecutor, victim, and

662. *Id.*

663. *Id.*

664. *Id.*

665. *Id.*

666. *Id.*

667. *See id.*

668. *Id.*

669. *See id.* at 11. Uebel explains that racial masculine identities “describe a process of positioning: they name the ways raced men position themselves in relation to the past that has shaped them and to the future they will shape.” *Id.* For Uebel, such identities “possess a history, but also the power to perform, or transform, that history.” *Id.* Transforming that history, he adds, indeed the very “power of transformation, the ways in which power is exercised or undermined, and the choices power necessitates and depends upon, all require a postulation of what *ought* to be, a recognition of the obligation the future places on the individual subject.” *Id.*

670. *See id.* Uebel asserts:

community collectively acknowledge that the discursive and symbolic systems of meaning that configure race, sex, class, and nation may be constructed and deconstructed by the force of human agency.⁶⁷¹ Here, deconstruction refers to the contest over the performative space in law and legal advocacy where identity categories become constituted.⁶⁷² Unsurprisingly, the construction and negotiation of identity brokered in this space occurs “against a complex historical matrix of alterities, against a web of differences” signified by race, class, gender, and sexual orientation.⁶⁷³

Admittedly, the notion of state-sponsored prosecution may fit uneasily with egalitarian forms of interracial community-building. But the political project at issue here depends on the reconfiguration of state prosecutorial power applied throughout widely divergent communities of color.⁶⁷⁴ Properly channeled to shape racial consciousness in a way that eradicates hierarchical images of racial identity and narrative,⁶⁷⁵ prosecutorial initiatives at both federal and state levels may forge bonds between victims of racial violence and their communities. The strength of those bonds rests on the inclusive breadth of community⁶⁷⁶ and the ability to instill a common sense of mutual victim/community obligation.⁶⁷⁷

Certainly the activist presence of the state in the company of the other—victim or community—may cause ambivalence and even fear.⁶⁷⁸

If the categories race and masculinity crucially depend upon the dialectics of what *is* (bodies, the other, the past) and what *will be* or what is in process (desire, performance, the future), then we cannot, and ought not, disengage our readings of racial masculinities from an attention to the responsibilities and commitments demanded in the ethical moment.

Id.

671. *See id.*

672. *See id.*

673. *Id.* at 12.

674. *See* Joseph Erasto Jaramillo, Comment, *The Community-Building Project: Racial Justice Through Class Solidarity Within Communities of Color*, 9 LA RAZA L.J. 195, 233-42 (1997) (discussing the challenge of linking the disparate interests of various communities of color).

675. *See id.* at 239. Jaramillo remarks that “[t]o summon and forge obligations that bind people within a larger community of color across class lines, local communities of color, whether they be neighborhoods, professional organizations, community-based organizations, churches, or youth organizations, need to ‘identify’ with each other in a meaningful way.” *Id.*

676. *See id.* at 240 (advocating efforts to create a “larger community of color” that is more inclusive and more sensitive to the interests of the most disadvantaged).

677. *See id.* (urging “‘community-building’ in a way that forges stronger bonds and feelings of mutual obligation among people of color across socioeconomic divisions”).

678. Uebel remarks: “In the presence of the other, the subject is intensely ambivalent, poised between desire and fear, incitement and interdiction, mastery and anxiety.” Uebel, *supra* note 220, at 5-6.

Still, state-sanctioned community-building no longer appears utopian, even in marginalized collectivities, such as gay and lesbian communities⁶⁷⁹ or communities of color.⁶⁸⁰ To be sure, some political philosophers, like David Lyons, seem unpersuaded that such collectivities can muster an effective challenge to institutionalized forms of injustice. Indeed, Lyons questions the societal potential for the development of collective action "calculated to overcome the significant, deeply entrenched, systematic injustice that remains."⁶⁸¹ The vivid "memories of oppression"⁶⁸² evoked by reflection on the historical struggle over the wielding of prosecutorial power against people of color and native peoples⁶⁸³ merely reinforces this sense of despair. For communities of color, prosecutorial forms of insurgence may prove too romantic a vision of state violence.

679. See COMSTOCK, *supra* note 293, at 10-14, 25-30 (describing forms of political organizing in gay and lesbian communities).

680. See Amy Waldman, *Diallo Case Tests Bronx Prosecutor*, N.Y. TIMES, Mar. 17, 1999, at B1 (noting that the Bronx district attorney Robert T. Johnson tries to maintain "a strong bond with his constituents" and "attends countless community events").

681. Lyons, *supra* note 187, at 49.

682. JOSEPH TILDEN RHEA, *RACE PRIDE AND THE AMERICAN IDENTITY* 126 (1997). Because of "memories of past oppression," Rhea asserts that "many may feel marginal even among populations which respect and value their heritage." *Id.* He acknowledges the open question as to "whether minority groups can simultaneously assert their memories of oppression and also feel at home with the majority." *Id.* at 126-27. Accordingly, he concludes, "[i]f minority identities are to be other than oppositional, minorities themselves will have to grapple with the anxieties and fears that their past oppression can easily inspire." *Id.* at 127.

683. See JOHN WILLIAM SAYER, *GHOST DANCING THE LAW: THE WOUNDED KNEE TRIALS* 217-32 (1997) (viewing conviction of Native American activists for their actions during the 1973 Wounded Knee uprising as a "retelling" of the history of whites and Native Americans).