Community Prosecutors

Anthony V. Alfieri
University of Miami School of Law, aalfieri@law.miami.edu

Follow this and additional works at: https://repository.law.miami.edu/fac_articles

Part of the Criminal Law Commons, and the Law and Society Commons

Recommended Citation
Community Prosecutors

Anthony V. Alfieri†

INTRODUCTION

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

† Professor of Law and Director, Center for Ethics and Public Service, University of Miami School of Law. An earlier version of this article was presented at the 2002 Conference of the Working Group on Law, Culture, and Humanities at the University of Pennsylvania Law School. I am grateful both to the workshop participants and to Kathy Abrams, Adrian Barker, Susan Bandes, Naomi Cahn, Richard Delgado, John Ely, Michael Fischl, Clark Freshman, Hilary Gershman, Ellen Grant, Patrick Gudridge, Amelia Hope, Dan Kahan, Susan Klein, Debra Livingston, Tracey Meares, Carol Sanger, Jonathan Simon, Karen Throckmorton, Martha Umphrey, and Frank Valdes for their comments and support.

I also wish to thank Porpoise Evans, Christina Farley, and the University of Miami School of Law library staff for their research assistance, as well as Alexander Haas, Margaret Thomas, Ian Eliasoph, Gabriela Gallegos, and the staff of the California Law Review for their editorial judgment and dedication to this Colloquium.

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

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

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

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

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

3. Id.
4. Id. at 325.
5. By communities of color, I mean communities where people of color (e.g., Black, Latino/a, Asian, Native American) comprise a majority of the population. For a resource that maps the experiences of diverse communities of color, see Race and Races: Cases and Resources for a Diverse America 91-428 (Juan F. Perea et al. eds., 2000).
6. "Race-ing" describes the coloring of identity in law, culture, and society. It occurs through speech and conduct, finding expression in symbol, performance, and text. See Charles R. Lawrence, If
Situated at the intersection of poverty, segregation, and crime, the community-prosecution movement offers the opportunity to challenge prosecutorial silence in matters of race. Meeting that challenge requires tolerance for ambiguity in the treatment of identity and narrative in legal agency, as well as skepticism about the use of pragmatism and necessitarian logic in advocacy. Most importantly, it requires scholars to cast aside traditional accounts of racial identity and racialized narrative, an act of rebellion that upsets dominant visions of the racialized subject and race-neutral representation.

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

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

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


8. For a useful history of the Black-rage defense, see Paul Harris, Black Rage Confronts the Law 1-80 (1997).


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

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

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

---


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

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

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

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

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

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


Crafted to discern the meaning of community prosecution in the context of race-contaminated poverty, crime, and violence, this Essay extends the social meaning turn emerging in contemporary criminal-law scholarship and policy research. For historical background on the evolution and content of normative theory and social-meaning research, see Bernard E. Harcourt, After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis, 34 Law & Soc'y Rev. 179 (2000).
antecedent community-policing programs and community drug courts. Part IV evaluates objections to community-based models of criminal prosecution from the standpoints of ethics, institutional function, and political legitimacy. Finally, Part V considers the application of community norms and practices in the prosecution of racial violence. The Essay concludes with an effort to distill and transform the sociolegal meaning of race, community, and criminal justice into a pedagogy of practice for prosecutors.

I

COMMUNITY PROSECUTION

A. Locating Community in Prosecution

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

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


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

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

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


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

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

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

\textsuperscript{25} See Bruce A. Green, Why Should Prosecutors "Seek Justice"?, 26 Fordham Urb. L.J. 607, 612-25 (1999); Alan Vinegrad, The Role of the Prosecutor: Serving the Interests of All the People, 28 Hofstra L. Rev. 895, 897-902 (2000).


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

B. Locating Prosecution in Community

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


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


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

Id. at 31-32.


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

Id. Gansler likewise states:

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

Gansler, supra note 34, at 31.
postulates that local quality-of-life crimes contribute to neighborhood blight and escalate criminal violence. Accordingly, it endorses community outreach through public-private ventures between government and non-governmental organizations and through need-specific local prosecutorial case and neighborhood assignments. Proponents of this neighborhood-based assignment system laud "sending assistant district attorneys into the streets as a way of making a highly visible statement against the stubborn persistence of neighborhood crime and minor urban disorder."

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

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

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

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

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


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

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

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


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

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

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


50. See Thompson, supra note 2, at 354-55.
interaction of prosecutors with the police, victims, offenders, and neighborhood groups. For Thompson, even the best of the decentralized and well-integrated community-prosecution experiments suffer from the absence of a unifying vision. What vision exists, he observes, "remains inchoate in virtually every sense of the word: just beginning to develop; lacking structure; even chaotic."51

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

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

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

51. Id. at 360.


53. See Robin S. Golden, Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing, 17 YALE L. & POL'Y REV. 527, 529-35, 555-61 (1998); see also Jan Stokley & Anthony
well-worn norms and practices of group representation onto the arenas of civil rights and poverty law. Deploying a mix of legal remedies and social reforms, community lawyers tend to assert political rather than cultural commitments. Community representation of individuals and groups, however, melds political and cultural practices, particularly in indigenous communities. At this level, legal action acquires the form of cultural action. Culture holds particular bearing for the goal of empowerment. Doubtless the notion of empowerment suffers from conceptual elusiveness. In fact, empowerment takes different forms: cultural, sociolegal, and political. Often these forms converge and must be addressed as a whole; at other times they break apart or must be disentangled.

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

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


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


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

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

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

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


61. See John Braithwaite, A Future Where Punishment Is Marginalized: Realistic or Utopian?, 46 UCLA L. Rev. 1727, 1743-50 (1999); Robert B. Coates, Victim-Offender Reconciliation Programs in North America: An Assessment, in Criminal Justice, Restitution, and Reconciliation 125-34 (Burt Galaway & Joe Hudson eds., 1990); Laura Nader & Elaine Combs-Schilling, Restitution in
such as reintegrative shaming ceremonies. And it gives meaning to community-based crime prevention and criminal justice. Having outlined the normative base and organizational structure of community-prosecution programs, this Essay turns next to their jurisprudential underpinnings.

II
COMMUNITY JURISPRUDENCE

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

A. Liberal Theory

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


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

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

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

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

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

64. Crudely fashioned for the limited purposes of this Essay, this distillation of political principals resembles the classical version of liberal contractarianism espoused by Rawls. See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 95-96 (Erin Kelly ed., 2001).
qualified faith in community representation, even when common interests run thin.

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

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

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


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

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

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

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

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

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

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

B. Feminist Theory

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


92. See Tosha Yvette Foster, From Fear to Rage: Black Rage as a Natural Progression from and Functional Equivalent of Battered Woman Syndrome, 38 WM. & MARY L. REV. 1851, 1858-69 (1997); Renée Heberle, Disciplining Gender; Or, Are Women Getting Away with Murder?, 24 Signs 1103 (1999); Holly Maguigan, Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?, 70 N.Y.U. L. Rev. 36, 43-60 (1995); Andrea C. Westlund, Pre-Modern and Modern Power: Foucault and the Case of Domestic
deciphers the coercive forces impinging upon women, as in cases of domestic violence and prostitution, and it fashions a different posture toward criminal-law advocacy and adjudication. The feminist posture increasingly infuses the lawyering process, litigation strategy, and the legal profession with a more activist participatory sensibility applicable to individual clients, groups, and communities. Further, it instills a feminist-practice ethic of care and caretaking vital to fostering democratic community through group formation and interplay. This caretaking ethic connects to feminist ideals of agency, trust, and reciprocity.

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


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

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

C. Critical Race Theory

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

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

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

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

\begin{footnotesize}


\end{footnotesize}
bring only a momentary halt to internal dissent. Nonetheless temporary cessation may prove imperative to community-building objectives.

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

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

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

---

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


\footnote{120} See, e.g., David Harris, Law Enforcement’s Stake in Coming to Grips with Racial Profiling, 3 Rutgers Race & L. Rev. 9, 12-19 (2001) (discussing overinclusion in racial profiling); Frederick M. Lawrence, Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes, 67 Tul. L. Rev. 2113, 2200-23 (1993) (discussing underenforcement in prosecuting civil-rights crimes).


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

III COMMUNITY ANTECEDENTS: POLICING AND DRUG COURTS

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

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

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

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

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

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

A. Community Policing

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


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

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

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

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


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

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

B. Community Drug Courts

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


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

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

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

---


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

IV

Objections to Community Prosecution

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

A. Ethics

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


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

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

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

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

148. See David Luban, Are Criminal Defenders Different?, 91 Mich. L. Rev. 1729, 1730-52
149. Recent race cases are predominantly criminal. See Peter Margulies, Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense, 51 Rutgers L. Rev. 45, 52-73, 113-38 (1998).
narrative dichotomy will only reproduce stereotypes.\textsuperscript{153} The ethic also demands that serious notice be paid to empowerment, embraced as much for its transformative potential as its liberating ambiguity.\textsuperscript{154} Admittedly, under liberal, feminist, or critical-race canons, neither the yearning of potential nor a single transformative event secures a racially constructive outcome. Contemporary examples of racially reconstructive outcomes include the South African Truth and Reconciliation Commission and the Japanese American reparation movement.\textsuperscript{155} Nor does the freedom implied by ambiguity pledge reconstructive results. At the same time, nothing in this embrace contemplates more than a halting movement toward community racial reconciliation. That seems like a small adjustment in a juridical process left otherwise intact.

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

\textbf{B. Institutional Function}

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

\begin{itemize}
\item \textsuperscript{156} See Model Rules of Prof'l Conduct R. 3.8 (2001) (enumerating affirmative and declination duties); Model Code of Prof'l Responsibility DR 7-103 (1969) (citing duties in charging and timely disclosure); cf. \textit{Standards for Criminal Justice} 3-1.3-3-6.2 (1993) (amplifying regulatory force and specificity of prosecutorial duties).
\end{itemize}
initially out of organizational theory and the sociology of bureaucracy.\textsuperscript{159} Put crudely, it is difficult to realign the practical facts of ensconced norms and institutions, particularly when bound up in the arms of the state and its pronouncements of law and order.\textsuperscript{160} Considerations of competence bolster this objection. Organizational competence and efficiency may very well decrease in the realignment of the prosecution function. Resources may be diverted and reallocated. New investigative, charging, and trial procedures may be formulated. Novel labor-intensive alliances and collaborations may be pursued. To be sure, resource redistribution and procedural revision are not tantamount to the abdication of function. Nonetheless, concession should be made for practicability.

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


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

\textsuperscript{161} See generally Martha Minow, Between Intimates and Between Nations: Can Law Stop the Violence?, 50 Case W. Res. L. Rev. 851, 859-60 (2000).


\textsuperscript{163} See Martha Minow, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence 9-24 (1988); Jeffrie G. Murphy & Jean Hampton, Forgiveness and Mercy 14-34, 162-86 (1988); B. Douglas Robbins, Comment, Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation, 149 U. Pa. L. Rev. 1115, 1151-68 (2001); Jill Stauffer, Seeking the Between of Vengeance and Forgiveness: Martha Minow, Hannah Arendt, and the Possibilities of Forgiveness 1, 17 (May 2001) (unpublished manuscript, on file with the California Law Review) (arguing that Minow’s account of forgiveness "lacks the futural orientation that allows Arendt to figure forgiveness as a remembrance that allows humans to learn from the past without being trapped in its repetition").
Unfortunately, in the crucible of violence, the most creative sanctions may fail to heighten civic participation, heal pain, or cure looming threats.  

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

C. Political Legitimacy

The objection from political legitimacy to race-conscious community prosecution springs from public mistrust of law, diversity-based justice initiatives, and restorative-justice models. The political legitimacy of the prosecution function is bound to the expressive purposes of even-handed law enforcement and fairly-warranted punishment. Ordinarily,
prosecutorial legitimacy is not linked to the encouragement of democratic deliberation or the arbitration of disagreement.\textsuperscript{172} Matters of political deliberation and disagreement usually are left to civic engagement instead of state criminal supervision. But crime and democracy are closely intertwined.\textsuperscript{173} Crime stunts participation in civic life by suppressing individual action and oppressing community activity. Intermixed with race and poverty, crime animates racial-identity coloring, thereby hindering opportunities for democratic inclusion. Unvarnished discrimination accomplishes the same result.

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

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


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

\textsuperscript{178} Id. at 139-40. Forst complains that prosecutors are spending scarce resources on a loosely defined set of interventions having to do with "community outreach" and "cooperation" without the benefit of empirical evidence validating that some are really more effective than others, or indeed that any of those usually associated with community prosecution are useful for achieving the goals of prosecution.

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

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

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

\section{Community Prosecution and Racial Violence}

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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{179} See Thompson, supra note 2, at 350-60.
\item \textsuperscript{180} Id. at 367-71.
\item \textsuperscript{181} Id. at 360-67.
\item \textsuperscript{182} See Kathleen Daly, Restorative Justice: The Real Story, 4 PUNISHMENT \& SOC’Y 55 (2002).
\item \textsuperscript{183} Id. at 58-67, 71-73.
\end{itemize}
\end{footnotesize}
movement engenders citizen participation, institutional decentralization, and local accountability in federal and state prosecution, it offers to kindle citizen-state modes of collaboration and ignite grassroots justice initiatives. Both the community-policing and community-court movements represent positive modes of citizen-state collaboration in the criminal-justice system. The restorative-justice movement and the community-lawyering tradition demonstrate that citizens, their legal agents, and state institutions can participate in that collaborative process with beneficial results. In theory, community-based collaboration by prosecutors, victims, offenders, and neighborhood groups around criminal-justice initiatives may help alleviate the conditions of poverty and repair the structures of political empowerment in communities of color.

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

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

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


185. See Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 YALE L.J. 2107, 2125-30 (1991) (discussing the way interpretive violence is fueled by the lawyering practices of marginalization, subordination, and discipline).
closing arguments or alluded to in jury selection, is less bold but no less derogatory. Physical violence, by comparison, denotes a raw material brutality. Hate crimes of assault or murder are blunt exemplars of blatant racial violence.

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

A. Prosecutorial Norms

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


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

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

---


B. Racial Norms

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

The virulence and tenacity of stereotypes in the criminal-justice system frustrate the prosecution of racial violence depicted in police brutality cases under criminal and civil-rights statutes in federal and state courts from New York City to Los Angeles. Frustration stems from law as well as narrative. Both police brutality and drug trials illustrate the impact of narrative. The rhetoric of race in the thinly veiled jury narratives of such trials evokes racial identity and race-coded relations of hierarchy in law
and society. This intractable hierarchy, and the explosive fears of its toppling, fuels the racial violence of hate crimes.\textsuperscript{206}

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

\begin{flushright}
\end{flushright}
CONCLUSION

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

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

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


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

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


218. See Roberto Mangabeira Unger, What Should Legal Analysis Become? 184 (1996) (“The overriding task in the design of arrangements conducive to practical progress is therefore always to imagine and establish the arrangements for cooperation, in the small and in the large, that are least likely to prevent permanent innovation.”).


220. See Patricia Ewick & Susan S. Silbey, The Common Place of Law: Stories from Everyday Life 233-34 (1998) (noting that “resistance involves a recognition that power is not something that is removed from and merely enframes social relations, but that power is something that circulates in and through everyday interactions”).

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

222. See Amy Gutmann & Dennis Thompson, Democracy and Disagreement 52-94, 128-64 (1996); Marie A. Fallinger, Face-ing the Other: An Ethics of Encounter and Solidarity in Legal Services Practice, 67 Fordham L. Rev. 2071, 2110-19 (1999).
deficiencies in public reason.223 These deficiencies heighten the importance of public accountability for a discourse of community and inclusion.224

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

The proposal—to burden prosecutors with color-conscious policies that respect community identity and narrative integrity—reaches for a deeper account of political liberalism under democracy.228 Broadening that account enriches our understanding of race, its distinctive epistemology, and its interpretation. The inclusion of race into the public dialogue and reasoning of criminal law is an experiment that may go awry. Likewise, community prosecution is described as "an evolving experiment in organizational change that is proceeding step by step and neighborhood by neighborhood in response to citizen complaints"229 of fear and injustice that too may fall skewed.230 Ironically, both enterprises mirror the evolving
tensions between modern and postmodern jurisprudential movements in law and race.\footnote{231}{See Angela P. Harris, The Jurisprudence of Reconstruction, 82 CALIF. L. REV. 741, 759-66 (1994).}