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ESSAYS

Race Prosecutors, Race Defenders

ANTHONY V. ALFIERI*

INTRODUCTION

For more than a decade, I have searched the ethics of the lawyering process for the place of identity, narrative, and community, initially looking to poverty law practice and more recently turning to criminal law representation. From the outset, race figured prominently in this search. During the last five years, the figurations of race have grown to occupy a central part of what is now an ongoing study of lawyers and ethics in cases of racially motivated violence. The purpose of this continuing project is to understand the nature and meaning of racial identity, the sound and substance of racialized narrative, and the form

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and ethical content of race-neutral representation for both prosecutors and defense lawyers in the criminal justice system.

To that end, the project has focused, perhaps errantly, on high-profile criminal race cases drawn from contemporary American legal history. Constructed from transcripts, court records, and media reports, these trials of racial violence bristle with the rhetoric of race. The discourse and imagery infusing the prosecution and defense of racial violence revive the controversy over our vision of the good lawyer in race trials. At stake in this controversy are the status of racial dignity and community in American law and the norms of moral nonaccountability and race-neutrality in legal advocacy and ethics. Instead of the promise of resolution, the project proposes the modest accommodation of reconciling racial dignitary and community interests with the duties of effective representation in criminal prosecution and defense by curbing the use of racialized narratives in race trials.

This mid-course Essay seeks to advance the purposes of both jurisprudential and practical reconciliation through an investigation of race-conscious, community-regarding methods of representation culled from conventional and alternative models of criminal prosecution and defense. The Essay is divided into six parts. Part I examines the current posture of prosecutors and defenders in race cases. Part II analyzes the prosecution of racial violence. Part III sets forth a race-conscious community ethic of prosecution. Part IV evaluates the defense of racial violence. Part V puts forward a race-conscious defense ethic of representation. Part VI assesses new advocacy models for the integration of identity, community, and race, and assays critiques of that proffered integration. The Essay concludes with a meditation on harnessing advocacy and race in legal theory and practice.

I. PROSECUTORS AND DEFENDERS

Like prior endeavors aimed at the profession, this Essay attempts to uproot the normative and empirical premises underlying the settled traditions of legal representation and ethical responsibility. Uprooting the theoretical and practical foundation of legal advocacy tests the logic and value of lawyering traditions dominant in the fields of private and public law. The field of criminal justice develops out of the practice traditions of prosecutors and defense lawyers. Dense with penal statutes, punitive norms, and disciplinary institutions, and crosscut by the adversary system, the field provides the context for the prosecution and defense functions. Neither function receives full exposition in isolated acts of advocacy. Only the accumulation and intertwining of such acts amid the

4. Logic in legal practice is constituted by both coherence and efficacy. Coherence is a property of the internal structure of lawyer practices, such as interviewing and counseling. Efficacy relates to the external impact of lawyer practices on clients and communities, for example in the delivery of legal services. Value pertains to the normative substance of community practices. Norms reverberate in the character of identity and the content of narrative.
adversarial tension of everyday representation give whole expression to the meaning of prosecutorial and defense conduct. That meaning is enmeshed in culture and society.

The actions of prosecutors and defense lawyers reflect and refashion cultural artifacts (caste and color) and social norms (character and community). Acting as sociolegal agents, prosecutors and defenders infuse legal discourse with images and tropes gleaned outside the law, inscribing cultural and social meaning into law. At the same time, they apply a juridical gloss to such images and tropes, restyling popular meaning by force of law. Through this semiotic and iterative process, prosecutors and defense lawyers acquire the role of double signifier. Not only do they translate social meaning into law, but they also construct social meaning out of law. Whether inside the courtroom or outside the courthouse, prosecutors and defense lawyers are interpretive agents engaged in sociolegal construction.

The scope of lawyer interpretive engagement in the criminal justice system is far reaching. The boundaries of that engagement are laid down by constitutional text, statutory provision, and common-law doctrine. Within those boundaries, lawyers exercise substantial discretion. For prosecutors, discretion is ubiquitous and profound, for example, in charging and plea-bargaining. For defense lawyers, less pronounced discretion survives, flourishing in pretrial tactics (suppression and venue motions) and trial strategies (jury selection and cross-examination). For both interpretive agents, the discretion captured in narrative and storytelling serves to mold the individual identity of defendants and victims, as well as the collective identity of their families and communities.

Recognition that the discretion of prosecutors and defenders exerts an impact beyond the courtroom challenges the practice traditions that historically insulate the prosecution and defense function from interpretive, and consequently, moral accountability. Prosecution traditions claim a narrow realm of interpretive discretion familiar to the jurisprudence of legal formalism, confining interpretation to the discovery of fact and the application of law. Defense traditions, by comparison, claim a broader domain of interpretive discretion resembling the freewheeling policy and sociological machinations of legal realism. Under this more modern framework, interpretation employs public policy and social science to reassess fact and revise law.

Two jurisprudential developments in liberal theory challenge these long-standing practice traditions. The first comes out of the law and narrative movement in the form of discourse ethics.\(^5\) The second originates in the civil rights and critical race movements in the figure of race ethics.\(^6\) Discourse ethics

\(^5\) The law and narrative movement enlivens clinical and nonclinical scholarship. See generally THOMAS ROSS, JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS (1996); LAW STORIES (Gary Bellow & Martha Minow eds., 1996); LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996).

\(^6\) Critical race movements include Critical Race Theory, LatCrit Theory, Native American, and Asian American theory. See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed.,
demands the moral accountability of legal actors when the voice or figure of the “other” (defendant, victim, or community) is portrayed in narrative and story. The actors include lawyers and judges. Their performative narratives and stories encompass trial arguments, appellate briefs, and judicial opinions. Derived from the liberal mandate to enlist and respect the “other” in dialogue, discourse ethics asserts that legal translation and reinscription carry truth-telling responsibility. That responsibility is partially encoded in procedural and regulatory rules.7 It extends to adversaries, courts, clients, and third persons.

Race ethics enlarges the discursive responsibility encased in procedural and regulatory rules to take account of reconciliation and reparation norms. Deduced from the American experience of racial violence, the ethics system contends that dignitary and equality norms impose a heightened responsibility in advocacy to honor the racial identity of the defendant and victim and, moreover, to promote interracial community participation through education and outreach. This responsibility is likewise partly entrenched in procedural and regulatory rules.8 It also runs to adversaries, courts, clients, and third persons.

Burdening the prosecution and defense functions with normative, indeed transformative, responsibilities challenges the traditional place of legal advocacy in the criminal justice system. Allied with that system, the prosecutor customarily stands as public sentinel, and the defense lawyer as constitutional guardian. Assignment of the additional onus of textual accountability for word and image compels changes in prosecution and defense habits of interpretation and advocacy. Here, as elsewhere, race-conscious change provokes controversy and often condemnation.9 The cry of heresy leaps quickly when the intrinsic commitments and the instrumental rationales of advocacy fall under attack. Yet, out of that same provocation sometimes comes reform.

The instant project sounds a call for reform in the hope of racial progress. Progress is judged not by the measure of prosecutorial conviction or defense acquittal rates but by the normative standards of racial dignity and interracial community. To be sure, these standards are undeveloped and sharply contested. In fact, their very vagueness invites quarrel. The quarrel is cast in deontological terms. It concerns the nature of a lawyer’s duty in race trials.

2d ed. 2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (Juan F. Perea et al. eds., 2000); see also CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997) (discussing the critical race movement and feminism).


Unlike more conventional treatments of the prosecution and defense functions in the criminal justice literature, prior works in this project addressed the duty of race-trial representation in terms of racial identity, racialized narrative, and color-conscious advocacy. That multifaceted inquiry is absent from the surprisingly sparse literature discussing the roles of prosecutors and defenders in local communities. Sketched impressionistically rather than empirically, the instant inquiry discloses lawyer tendencies to construct racial identity, deploy racialized narrative, and configure race-coded modes of representation deeply entrenched in criminal advocacy.

Lawyers operating inside the criminal justice system construct racial identity in the routine acts of daily advocacy. Prosecutors, for example, compile investigative targets, rank jury profiles, estimate flight risks in calibrating bail, formulate sentencing recommendations, and pronounce judgments of wrongdoing in indictments, trial statements, and appellate arguments. Granted, these acts establish neither a clear racial imprint nor a deliberate racial intent. But taken together and accrued over time, they evoke images of color and character that bear the mark of race and the inference of racial consciousness. For example, between 1991 and 1997, racialized legal tactics pervaded the successive New York state criminal and federal civil rights prosecutions of Lemrick Nelson and Charles Price for the 1991 killing of Yankel Rosenbaum and the incitement of four days of interracial violence in Crown Heights, Brooklyn. Additional tactics and imagery permeated the federal criminal civil rights prosecution of five white New York City police officers on charges of assaulting Abner Louima at a Brooklyn station house in 1997. They also saturated the 1990-91 Central Park Jogger sexual assault trials in New York City and the 1998-99 James Byrd murder trials in Texas.

Criminal defense lawyers similarly exploit the imagery and rhetoric of race in advocacy. Race informs their arguments and objections, direct and cross-examinations, and proposed jury instructions. The symbolic and rhetorical presence of race is magnified in cases of racially motivated violence, both black-on-white and white-on-black. The defense of Damian Williams and Henry Watson on charges of beating Reginald Denny and others during the 1992 South Central Los Angeles riots, for example, demonstrated that black criminal de-

11. See Alfieri, Race Trials, supra note 2, at 1323-39.
12. See Alfieri, Prosecuting Race, supra note 2, at 1164-85 (discussing the feasibility and legitimacy of a race-conscious model of federal prosecution).
13. See Alfieri, Prosecuting Violence, supra note 2, at 818-31 (exploring the nature of prosecutorial norms and narratives, their cultural and social significance, and their impact on interracial community in the aftermath of racial violence).
defense stories present historically pernicious as well as transformative visions of racial identity and racialized narrative. Likewise, the criminal and civil trials of the Alabama Ku Klux Klan in the 1981 lynching of Michael Donald showed that white criminal defense stories embody identity claims and narrative constructions that mimic and thereby reinforce racial caste structures of inequality.

The interconnection of race, law, and legal representation is unsurprising in a nation founded on de jure and de facto racism. The historical presence of race and racism in American law gives rise to claims of color and character that shape reputation and endow privilege through image, interpretation, and narrative. The upshot is a racial identity molded by legal agents and litigation, and further, declared as truth. Whatever the alchemy of advocacy and adjudication, identity remains unstable, disrupted by class, gender,

14. See Alfieri, Defending Racial Violence, supra note 2, at 1301-20 (proposing a race-conscious ethic of professional responsibility appropriate to the defense function in race cases).
15. See Alfieri, Lynching Ethics, supra note 2, at 1063-65 (investigating subordinating racialized defense strategies in criminal and civil trials of white-on-black violence).
18. See Barbara E. Armacost, Race and Reput...
sexuality, and the multiple racial categories of culture and society. Despite its unsteady quality, racial identity subjects individuals and whole communities to suspicion, notwithstanding state affirmative intervention, speech regulation, and hate crime legislation. Combating suspicion in the spirit of diversity, multiracial coalition, and good will falters against the force of criminal law advocacy.

The traditional function and structure of criminal law persist in spite of
quarrels over procedure, inequality, crime, and federal intercession. Criminal law organizes and legitimates state authority to enforce debts of wrongdoing through violence. In the post hoc reconstructions of the courtroom, state violence and legal authority are social facts of coercion and punishment.

Reexamination of the advocacy roles of prosecutors and defenders in the criminal justice system requires an analysis of punishment as an instrument of violence. Intimately tied to punishment, violence is basic to American politics, culture, and society. Both punishment and violence harbor competing values: justice, liberty, atonement, rehabilitation. When linked to deterrence, punishment demands blame, commensurate with commonsense and public morality.

In accounting for the victims and agents of private and public violence, the norms of criminal responsibility and punishment usually overlook differences in culture and community. Merely acknowledging the interrelation among difference, crime, and community, however, fails to eradicate bias in the criminal justice system, in advocacy, adjudication, or policing. Racial contamination of the criminal law in the sway of bias and discrimination is well documented.
Neither hate crime legislation$^{60}$ nor affirmative action$^{61}$ posits a corrective. Furthermore, resort to the deliberative judgment of the nullifying jury$^{62}$ or to alternative jurisprudential movements$^{63}$ provides little recompense. The quandary of race contamination vexes the prosecution of racial violence.

II. PROSECUTING RACIAL VIOLENCE

First-blush analysis of the prosecution of racial violence suggests an upsurge in high-profile criminal and civil rights trials at federal and state levels. The significance of this first impression is augmented by a mounting literature on the prosecution function,$^{64}$ criminal justice norms,$^{65}$ and federal-state regulatory


authority.\textsuperscript{66} The prosecutorial literature tends to focus on the scope of lawyer discretion,\textsuperscript{67} though the import of race\textsuperscript{68} and narrative,\textsuperscript{69} and the realms of hate crime,\textsuperscript{70} capital punishment,\textsuperscript{71} and domestic violence\textsuperscript{72} attract growing attention. Increasingly, the spotlight of attention shifts to the victim\textsuperscript{73} and community,\textsuperscript{74} rather than to prosecutorial misconduct\textsuperscript{75} or civil rights enforcement.\textsuperscript{76}

The prosecution of racial violence typically tramples the defendant and victim, as well as their affiliated communities. In the status distinctions and hierarchies of race trials, defendant, victim, and community become enshrouded in racial identity, racialized narrative, and race-coded representation. On the surface, the shroud is color-blind. In fact, the prosecution of race trials adheres to a color-blind narrative of law and policy. Allegations of factual guilt and innocence join this narrative. While its content may veer from the covert


color-coded insinuation of racial animus to the overt race-conscious assertion of invidious stereotype, still the narrative appeals to neutrality. Narrative neutrality differs from nonpartisanship. Within the adversarial system, prosecutors serve as partisan representatives of the state, but strive to maintain the pretense of race-neutrality. The formality of trial and appellate procedures, and the physical impartiality of the courtroom, fortify this pretense.

Rationalizing racialized modes of civil and criminal advocacy as race-neutral depends on naturalist and necessitarian justifications. These twin justifications rely on three overlapping modes of reasoning: objectivity, form, and process. The logic of objectivity fastens racialized narrative to empirical fact, suggesting that a racialized narrative merely describes a naturally racialized world. Description in this sense is a simple, value-neutral activity undisturbed by the histories of racial caste and conflict. As such, it is a dispassionate means of rendering the world of race discoverable.

Prosecutors routinely apply the logic of objectivity in charging, pretrial motions, and trial argument. In the case of Charles Price, for example, federal prosecutors charged Price with incitement in fueling black community protest and violence against Hasidic Jews in Crown Heights, Brooklyn. By definition, the charge of incitement asserts both the individual power to control or manipulate others and a group receptivity to exhortation or impassioned plea. On these terms, the charge implies the universal corruptibility and vulnerability of human nature. That sense of universality appears color-blind, extending equally to white and black. Applied to the conduct of a black man in the context of a race-religious riot, however, the charge acquires a color-coded meaning that signifies race and racial character. Historically situated, the charge against Price demonizes the black insurgent, alluding to the antebellum culture of slave suppression and revolt. It also caricatures the black mob, evoking the antebellum culture of primitive slaves in tribal frenzy. Inured to the racial tropes of naturalist objectivity and convinced of their own conscious neutrality, federal prosecutors regarded their cultural performance in charging and trying Price as color-blind and impartial.

The logic of form links racialized narrative to overt bias and prejudice. This linkage requires proof of discriminatory intent. Without proof of intent, there can be no bias. Limiting racialized narrative to intentional discrimination cabins the regulatory ambit of ethics rules to conscious bias and prejudice, leaving unconscious forms of prosecutorial bias and prejudice safely beyond the reach of bar supervision and court sanction.

Prosecutors likewise employ the logic of form in their charging, pretrial, and trial practices. In the case of Lemrick Nelson, for instance, New York state prosecutors charged Nelson with four counts of second-degree murder and manslaughter. At trial, in their opening statement and closing argument, the

77. See Alferi, Race Trials, supra note 2, at 1335.
78. See id. at 1329.
prosecutors contended that Nelson "got caught up in the frenzy of the moment." Nelson, they insisted, "was exactly the type of person who you would expect to get caught up in the mindless mob violence." At the time of his arrest, Nelson was a sixteen-year-old black male with no prior arrest record. Like millions of young black juveniles in impoverished, segregated communities, he suffered the physical and mental privations of a childhood wrought by deficient public education, inadequate health care, and family dysfunction. Yet, none of these circumstances clearly predisposed Nelson to racial "frenzy." In fact, nothing in the evidentiary record rendered him "exactly the type of person who you would expect to get caught up in the mindless mob violence." State prosecutors, however, charged and treated Nelson as a blackfaced sociopath even though medical evidence of pathology and disorder appeared sparse and vague. The conflation of race and deviance in the charging and trial narratives of the Nelson state prosecutors occurred within a logic of form that provided succor to bias and prejudice. Absent proof of conscious motive and discriminatory intent, that logic offered ethical containment for unconscious racial transgression in the prosecution of Nelson's case. The logic of process attributes racialized narrative to instrumental forces outside the law and the adversary system. On this premise, it is unruly external forces (politics, economics, culture, and society) that intrude upon the impartiality of the law and the legal process. Left to operate under the rule of liberal legalism, so the argument goes, the internal structure of the law (its rules, agents, and institutions) would maintain a race-free, or at least race-neutral, environment.

Prosecutors utilize the logic of process in charging and trial practice as well. In the case of James Byrd, for example, Texas state prosecutors charged three young white male defendants, two of them Klansmen, with capital murder under the legal process dictates of equal treatment. Adverting to the egalitarian symmetry of liberal legalism, the prosecutors interpreted Texas criminal law to compel the charge of capital murder even in the setting of white-on-black racial violence. Their admission that "no Klansman had ever been convicted of harming a black man," bolstered the egalitarian logic and constitutional neutrality of the charging process in the Byrd trials. "Now they see," the
prosecutors exclaimed in a paean to the rule of law, “that a white man can be given a death sentence for killing a black man.”

The logics of objectivity, form, and process apply equally under naturalist and necessitarian rationales. The naturalistic justification of racialized prosecution leans heavily on claims of objectivity and form. For the naturalist prosecutor, race and racial hierarchy constitute incontrovertible facts. On this view, the race-ing of facts in pleadings, trial arguments, and appellate briefs is an evidentiary compulsion, instead of an invention. At successive phases of trial and sentencing in the Byrd case, for example, Texas state prosecutors referred to one Klan defendant as a “racist psychopath” and to another as “satanic” in his “racist views.” For the naturalist prosecutor, these views are found inlaid in the social reality of racial hierarchy.

The necessitarian justification for racialized prosecution rests more acutely on adversarial process values. At race trials, those values combine with the logics of objectivity and form to accomplish the goals of representation, even if the end goals bend to racial stereotype. Trafficking in stereotypes reduces objectivity to an adversarial exchange of evidentiary proffer and objection. Out of this exchange, already compromised by inconsistent rules of admission and the ad hoc determinations of local triers of fact, comes an artificial sense of courtroom objectivity. Immersed in this sensibility, prosecutors rebuff claims of external objectivity, accepting the contingent nature of evidentiary rulings and fact findings.

The tight embrace of internal objectivity misleads both prosecutors and courts into a stance that devalues racially subordinate communities. In the Central Park Jogger case, neither the prosecutors nor the courts realized that the construction of the juvenile defendants in the guise of racial predators not only denied, but also defaced the larger reality of the defendants’ families, schools, and communities located outside the courtroom. Nor did they realize that the disparagement and obliteration of that social reality would offend communities of color throughout New York City, thereby causing an irreparable breach of faith in the criminal justice system.

Similarly, for the necessitarian prosecutor, form fulfills a crabbed function specific to the adversary system. Prosecutorial forms of investigation, indictment, and trial strategy match racialized narratives to the substantive purposes of prosecution: black-on-white and white-on-black. Conformity legitimates claims of constitutional, statutory, and common-law wrongdoing. In the trials of Lemrick Nelson and Charles Price, for instance, prosecution claims of civil rights

90. Stewart, supra note 88.
93. See Alfieri, Prosecuting Violence, supra note 2, at 818-19, 830.
94. Id.
statutory violations accompany racialized narratives of individual pathology and "vigilante mob" revenge to advance the retributive punishment of black-on-white violence. The exploitation of racialized norms and narratives in prosecution signals a loss of faith in objective judgment, neutral form, and fair process.

The justification of racial prosecution under naturalistic and necessitarian rationales ensnares prosecutors in the widening debate over the place of race in lawyering and ethics. This debate strikes at the core of the prosecutorial duty to embrace a color-blind constitutional faith despite state and public pressure to deploy color-coded stereotypes in the interests of justice. The temptation to breach the higher duty of color-blind constitutionalism in race trials for reasons of individual or collective justice recommends recalibrating the moral baseline of prosecution.

The trials of Lemrick Nelson and Charles Price on charges of unprovoked murder and mob incitement illustrate the prosecutorial moral imagination distorted by racial identity and narrative. The narrative of Lemrick Nelson heard from prosecutors speaks in natural and neutral tones about an out-of-wedlock, ill-schooled, sixteen-year-old black juvenile deserving of adult trial and sentencing. This portrait, engulfing a generation or more of young black men, confirms the symbolic caste of race and the narrative status of racial inferiority. In race trials, the precept of inferiority taints prosecutorial speech and conduct, reducing the defendant to an object of hate. Here Nelson, presumptively guilty of the sin of blackness, is pushed beyond the redemptive powers of law and society.

The Nelson and Price prosecutions reinstate a vision of blackness as original sin. At trial, prosecutors depict Nelson and Price in the bonds of deviant pathologies of race hatred and mob violence without hope of rehabilitation. This totalizing version of irredeemable black racial inferiority causes individual and community harm in the experience of stigma. The concept of stigma injury derives from civil rights doctrine in affirmative action, school desegregation, and voting rights. The injury of stigma ensues from state-enacted racial classification. Like harm flows from state-sanctioned racial regulation of the electoral process as exemplified by gerrymandering. Predicated on color-blind principles of participatory citizenship, the notion of expressive or representational harm stems from the perception of institutionalized racial bias.

Theories of stigma injury and expressive or representational harm fashion a new ethic of prosecution based on social contract and group defamation precepts. Animated by legal and political responsibility to the "other" (individual, group, or community), the ethic binds racial groups in a reconfigured social contract respectful of the dignity of racial identity and the integrity of racial

95. See Alfieri, Race Trials, supra note 2, at 1334-35.
community. This reimagined ethic of prosecutorial responsibility leads to provocative conclusions about the importance of group and community representation in race trials. These conclusions risk the amendment and sometimes the abandonment of the liberal norms governing representational autonomy and loyalty.

Uncovering alternative norms sufficient to mediate the tension between individual and collective autonomy and obligation starts with reciprocity. By reciprocity, I mean a shared sense of equitable exchange. The cultivation of this sentiment and an openness to an exchange of pluralistic views are basic to deliberative democracy. Here, the concept of reciprocity is grounded in the idea of mutual state, victim, defendant, and community accountability. It is realized in the practice of deliberative democracy. Local democratic practices afford no guarantee of individual-collective or state-community interest mediation. By force of training and culture, prosecutors elevate state interests over community, defendant, and victim considerations. But reciprocity at least introduces the dialogue of community restoration. Restorative dialogues of agreement must anticipate the protest of individual and group divergence and conflict. Rooted in the customs of radical individualism, pluralistic dissent, and adversarial competition, that protest may defeat the interest convergence needed to implement a race-conscious, community-guided model of prosecution.

Consider this race-conscious model in the Abner Louima case. During August 1997 in New York, the Brooklyn district attorney indicted four arresting officers on state charges of assault and sexual abuse. Subsequently, the U.S. Attorney for the Eastern District of New York, Zachary W. Carter, commenced a federal investigation, convening a federal grand jury to conduct a criminal inquiry. In February 1998, Carter filed a superseding federal indictment charging five officers with criminal civil rights violations. Simultaneously, he referred the Louima incident to the Civil Rights Division of the U.S. Department of Justice for a city-wide police brutality investigation of the New York City Police Department.

The Louima federal criminal prosecution and civil rights investigation present a race-conscious, community-oriented model of prosecutorial discretion. The prosecution and investigation demonstrate that a race-conscious approach to prosecutorial decisionmaking may not only meet but invigorate the requirements of conventional ethics rules. In addition to rule compliance, the Louima prosecution and investigation exhibit the state's normative reaffirmation of racial dignity and equality. Together, dignitary and equality norms protect individuals and communities of color against group- or state-sanctioned racial violence.

Race-conscious, community-oriented duties to investigate and prosecute cases of racially motivated violence correspond with the public purposes of criminal justice: positive law sanction, moral retribution, and instrumental deterrence. They also coincide with the prosecutorial tradition of heroic moral witness. The

98. See Alfieri, Prosecuting Race, supra note 2, at 1172-83.
ideal of bearing historic witness to confront injustice impels advocacy in other areas of the criminal law—for instance, in death penalty defense practice. In the Louima case, the ideal urges a sympathetic view of federal prosecutors as modern abolitionists in the struggle for American racial dignity and equality. Too often prosecutors buttress racial hierarchy instead of equality.

The reinforcement of hierarchies of white dominance and black subordination in the prosecution of racially motivated violence occurs in the symbolic and rhetorical representation of the body—its color, its caste, and its racial character. For the prosecutor, race-talk and racial imagery surround the public defense of the victim and the interrogation of the defendant. The disjunction of the body from personhood, from the corpus of the victim and the defendant, and from the ethos of their respective families and communities alienates prosecutors and the public. Alienation in criminal and civil rights prosecution prevents dignitary redemption of the person and community reconciliation of segregated groups.

The tendency toward victim, defendant, and community estrangement in race trials is embedded in the tradition of criminal prosecution. In the Louima case, this practice was overcome by affirmative and sustained prosecutorial intervention. Observed throughout communities of color in New York, that intervention instigated and gained momentum from political organization and mobilization over claims of criminal and civil rights injustice. The speed and scope of that mobilization points to the potential for broader community organization around the norms of criminal and civil justice.

A. PROSECUTORIAL NORMS

The move away from body-centered advocacy to higher traditions of representation marked by victim-, defendant-, and community-affirming prosecution requires the backing of constitutional principles, citizenship ideals, professionalism values, abolitionist traditions, and moral aspirations. Affirming those values in the prosecution of race trials signals a jurisgenerative process of normative reform. Under a positive law regime, these values may be established by voluntary act, by office, or by rule. The office of the prosecutor, its rules, and collective acts shape public perceptions of racial fairness, social good, and community.

Constitutional norms generate race-conscious prosecutorial duties of community outreach in cases of racially motivated violence by reference to the prosecutor’s role as a constitutional officer. In the Louima prosecution, Zachary Carter gained institutional strength from his constitutionally sanctioned position, ratified under rules of federal supremacy. Ratification gave Carter access to constitutional and statutory sources of authority independent of his general oversight of the federal criminal justice system within the Eastern District of New York. Accompanying the charge of district-wide administration of justice

is the duty to implement and enforce a policy of nondiscrimination. Enforcement commands the equal treatment of all defendants, victims, and communities. This equitable mandate extends to investigative, charging, trial, and sentencing decisions. At times, when the public and political clamor for retribution overwhelms the call for equality, as in the Louima and Byrd cases, the breadth of the mandate collides with the duties to secure individual and community justice. Disparity in case-by-case prosecutorial assessments of victim and community justice enhances the likelihood of collision and the consequent rupture of prosecutorial connections to the defendant, his family, and community. The definitional vagueness of racial community intensifies that rupture.

Citizenship norms likewise stimulate race-conscious prosecutorial duties of community outreach in race cases. In the Louima case, the malevolent impulse of arresting and conspiring officers springs from racial bias. Federal prosecution and investigation of that widespread impulse upholds the principle of equal respect and shared citizenship for communities of color in the criminal justice system.

Racial norms also stir race-conscious prosecutorial duties of community outreach. Founded in law, history, and jurisprudence, the norms borrow antidiscrimination principles from civil rights doctrine. The same norms pull antisubordination teachings from the critical race movement. They take as well from the fundamentalist commands of conservative black nationalism.

Moral norms additionally promote race-conscious prosecutorial duties of outreach in cases of racially motivated violence. Infusion of extraprofessional modes of virtue partially repairs the formalist separation of law and morality. No longer confronted by a choice between intrinsic and extrinsic venues for moral sustenance, prosecutors are free to grasp the law itself for moral guidance. Grasping the law in the context of criminal or civil rights enforcement discloses a moral commitment to constitutional equality.

To build a race-conscious, community-oriented model of prosecutorial discretion from norms implanted in constitutional, citizenship, professionalism, racial, and moral landscapes requires upheaval in the traditional function of federal and state prosecution. Integrating revised considerations of racial identity, racialized narrative, and interracial community into that function upsets the prosecutorial decisionmaking process in its entirety, from charging to sentencing. Thus revised, prosecutors must look to evidence of racial identity and racialized narrative, and to the potential for community mobilization, at the very outset of the charging decision. In the Louima case, racial identity swirls around color, alienage, accent, and language. Racialized narratives assemble from slur and innuendo. United in the violence of police brutality, racial identity and narrative momentarily connect communities of color and their immigrant constituencies. As shown in the Louima trial, the function of race-conscious prosecution is to protect such vulnerable communities against police brutality and to mobilize citizens in demanding their civic rights to racial dignity, equality, and justice.

In race trials, neither community protection nor mobilization will increase
from the charging decision alone. Once made, the decision to charge must lead prosecutors to allocate investigative and trial resources to awaken and uplift community. Doing so involves pretrial outreach and publicity, and the tactical use of narratives at trial and sentencing. The discourses of opening statements, examinations, objections, experts, and closing arguments are all ripe for narrative revision.

Simply reconceiving the narrative purpose of race trials falls short of the mark. Prevention of identity-based violence calls for police training and community outreach to establish monitoring, compliance, and enforcement structures with the active participation of citizens of color. Collaboration with local churches, community centers, hospitals, and schools provides opportunities for citizen participation.

The collaboration attending community-based prosecution in race cases assumes the susceptibility of law and legal agents to racial reason. The dialogue of racial reason abandons color-blind neutrality for color-conscious history to explore the rationality and irrationality of policy and practice. But reason fails to steady the inconstant qualities of racial identity and narrative, inside or outside adversarial proceedings. Reason also fails to confirm the practical utility of Critical Race Theory, leaving the race-conscious community prosecution of cases unmoored. To be effective, theoretical integration must proceed from practical experimentation.

In crime and criminal justice, experiment carries risk. Designing and testing alternative prosecutorial practices of state power threaten the public and private status of people of color. The threats risk further criminalizing racial status and further encroachment on the racial body, either through incarceration or death. Due to the hazardous mixing of the prosecutorial function, racial ideology, and the legal order in the criminal justice system, the architecture of state prosecution should be redrawn carefully. Drafters attentive to the Louima case will note that the prosecutorial function contains transformative potential. Part of that potential inheres in law and legal institutions. Anchoring the prosecution function in legal and institutional identities that transform racial meanings is a reconstructive project.

Definition of the prosecutorial function as a civic reconstructive project weds prosecutors to a model of community participation. Participatory models of public and private citizenship allow the joint dismantling of hierarchical structures of racial identity and narrative. They also encourage the cooperative building of oppositional movements that complement advocacy. Although the community contemplated is local, the model envisions a boundless historical community galvanized by racial emancipation. Instances of community participation often follow identity-based criminal violence motivated by differences of race, class, ethnicity, and gender.

Consider in this regard the 1990-91 Central Park Jogger sexual assault trials in New York City and the 1998-99 James Byrd murder trials in Jasper, Texas. Both high-profile criminal trials stress traditional configurations of racial iden-
tity, racialized narrative, and race-conscious representation. Extracted from antebellum and postbellum categories of racial status and community, the figures of black and white identity, the tones of dominant and subordinate narrative, and the colored codes of racial representation demarcate the trials in the courts, the streets, and in the popular mind.

The antebellum vision of racial status and community portrays James Byrd and the black juveniles of the Central Park Jogger case as a common primitive species of property. Enslaved by claims of natural inferiority and pathology, blacks and other people of color are pitied in their degradation. Evidence of inferiority is found in the markings of deviance and defiance, and in signs of acquiescence and subservience. Empirical descriptions of this misshapen identity resonate in the narratives of racial benevolence, discipline, and domination still heard in American courtrooms in spite of Reconstruction. Adorned by the rhetoric of state-sanctioned segregation, the descriptions unfold in the lawyer’s art of race-conscious representation.

Bound up in the idea of innate mental and moral inequality, the postbellum Reconstruction-era vision of racial status and community tolerates the stereotyped degradation of black identity. Narratives of the abased status of black identity range descriptively from sharecroppers to welfare recipients. The accounts emphasize the marginality of, and the propriety of control over, the black chattel of the antebellum period. Absent from these accounts is the ambition of moral perfectibility. Rather than instill this ambition or aspire to the union of interracial community, emancipation unlocks space for racial resistance and dissidence.

Opening sociolegal space for civil rights and civil disobedience through the partial vesting of political and economic rights brings nothing to the ambivalence toward interracial community radiating throughout the law and ethics of the criminal justice system. Discernible in the prosecutorial treatment of differentiation and sameness among defendants and victims, that ambivalence affects legal and ethical commitments to race-neutrality. Regimes based on sameness appear sympathetic to color-blind rules of advocacy, even when interracial community declines as a result. By contrast, regimes founded on differentiation seem more receptive to color-conscious rules, even if anathema to the reigning jurisprudence of blind faith criminal prosecution. Rectifying such deep-seated ambivalence toward interracial community requires the racial recognition of difference in law and ethics.

The Central Park Jogger and the James Byrd trials reveal prosecutorial norms and narratives of strong conviction but weak commitment to interracial community. The trials, ignited by the violence of gang rape and lynching, struggle to regenerate interracial community. In the Central Park Jogger case, the struggle is situated among the families, friends, and neighbors of a cluster of young black and Hispanic men, ages fourteen to eighteen, charged in the beating and rape, and their victim, a twenty-nine-year-old white woman from a community
of well-educated affluence. The woman, beaten into a coma at night in Central Park, nearly died from multiple fractures and lacerations. In the James Byrd case, the struggle for community is located among the families, friends, and neighbors of three young white men, ages twenty-three to thirty-one, charged with kidnapping and murder, and of their victim, James Byrd, a black disabled forty-nine-year-old former vacuum cleaner salesman and father of three. The defendants, at least two of whom were avowed white supremacists, kidnapped and assaulted Byrd, spray-painted his face, chained him to a pickup truck, and dragged him alive and conscious along a three-mile rural paved road until a concrete culvert decapitated his body.

Despite the good faith labor of state prosecutors, the Central Park Jogger case inflamed racial tensions in New York City, inciting claims of disparate treatment and invidious classification. The James Byrd trials, in comparison, reignited local efforts toward community reformation and interracial acceptance. The color-blind commitments of state prosecutors fueled those efforts, aided by the altruistic posture of the Byrd family toward the defendants’ families and local and national communities. Displayed in public statements of reconciliation, this family-initiated altruism points to the real but limited promise of race-conscious, community-oriented prosecution.

The Central Park Jogger and James Byrd trials show the limitations of race-conscious, community-oriented prosecution within a tradition riven by contest over antebellum and postbellum racial status. The contest entangles identity, culture, and society. Antebellum ethos denotes black racial status in terms of natural inferiority and moral degeneracy. In the Central Park Jogger trials, racial identity cuts across the antebellum categories of class and gender. Postbellum ethos adheres to the barriers of segregated community while allowing partial integration of political and economic spheres of participation. In the

101. See id. at 56, 129-31, 241-42. The two Central Park Jogger trials and five plea bargains produced sentences ranging from six months to fifteen years in jail. See id. at 54, 288-312, 319-20.
James Byrd trials, identity becomes ensnared in postbellum culture and society. These intersections reproduce normative and narrative hierarchies of racial status and community. Status hierarchies reenact the moral-formal dilemmas of representation in race trials. Counterposing abolitionist morality and formalist advocacy, the dilemmas strain the framework of a prosecutorial tradition imprisoned by antebellum and postbellum racial ethos. Antebellum ethos consigns racial community to segregation. Postbellum ethos hazards ethical denunciation by permitting interracial political and socioeconomic participation. In the same way, prosecutorial outreach that dislodges settled status and community divisions for purposes of economic improvement or social redemption chances resentment and retaliation.

Ethics rules govern the prosecution function in federal and state forums under the auspices of the American Bar Association, state courts and bar associations, federal courts and agencies, and advisory groups. Rule governance occurs within an adversary system shadowed by antebellum and postbellum status traditions. Admission in the prosecutorial literature of the asymmetry of the adversarial process and the danger of unchecked discretion in charging, investigation, plea-bargaining, trial practice, and sentencing hardly makes mention of moral incentive and racial motive. Likewise, contemporary accounts of prosecutorial impropriety and discipline scarcely refer to the moral purpose and racial impetus behind prosecutions. Instead, the accounts present a neutral position on the ethical regulation of prosecutorial roles.

B. PROSECUTORIAL ROLES

Regulatory inattention by federal and state authorities allows for discretion in fulfilling the multiple roles of the prosecutorial office. The office includes the roles of constitutional guardian, manager, professional custodian, cultural warden, community activist, and moral hero. At their best, the roles direct institutional functions to promote procedural fairness, organizational efficiency, and substantive justice. Those institutional functions determine the limits and prospects of prosecutorial discretion.

Consider the constitutional role of the prosecutor. Deduced from the moral structure of the Constitution, this role obtains guidance from due process and equal protection values. The equal protection norms of dignity and equality enriched the Central Park Jogger and James Byrd trials. The indignity of rape and lynching by pickup truck is indisputable. The indignities deny the Central Park jogger and James Byrd moral valuation and deprive them of equal standing in their own communities. The felony indictment of multiple defendants in the Central Park Jogger case and the capital indictment of the three white defendants in the James Byrd case indicate an even-handed attempt to enforce the constitutional norm of equality.

Racial equality summons egalitarian treatment of the self by others in private and public domains. Racial dignity relates to the physical and psychological integrity of the self. The Central Park Jogger prosecutors championed dignitary
and equality norms out of concern for individual victims of group-inspired racial violence. The James Byrd prosecutors advocated the same norms out of sympathy for communities of color. Such egalitarian sentiments drive the prosecutorial commitment to procedural fairness, however flawed. When en- circled by the adversary system, that commitment falters in vindicating the civil rights of the Central Park jogger and James Byrd. The lack of a civil rights complaint in either case shows the constraints of the prosecutorial role in safeguarding the public and private rights of victims, and their communities, in cases of racial violence.

Further constraints arise from the punitive imperatives of the prosecutorial role. At work in the Central Park Jogger case, the imperatives dictate the charging and trial of selected juveniles as adults. This sanction stunts the rehabilitative purpose of the juvenile justice system. Admittedly, the punitive treatment of certain juvenile defendants may benefit the immediate victim of violence and the community exposed to such violence. But it jeopardizes victim and defendant-community reconciliation in race cases. The shifting weight of prosecutorial constraints and imperatives corresponds to the hierarchical ordering of values in the criminal justice system. The institutional priority of that order follows the racial compass of antebellum and postbellum ideology, relegating the offspring of chattel to the harsh discipline warranted by immutable status.

Racial ideology also impinges on the institutional role of the prosecutor. Assigned to a supervisory function within the criminal justice system, the role encompasses the oversight of law enforcement. This organizational role involves the management of institutional command structures and bureaucratic operations. Managerial discretion over institutional decisionmaking and procedures serves a regulative function. That discretion draws on ethical considerations. In the Central Park Jogger and James Byrd cases, the prosecutorial supervision of police and sheriff officers, investigators, and experts raised ethical concerns about the status and treatment of race in the indictment, arrest, trial, and sentencing of the defendants. When federal and state authorities pursue a joint investigation—as in the cooperative engagement of the U.S. Department of Justice, the U.S. Attorney’s Office for the Eastern District of Texas, and the FBI in the Byrd trials—concerns about prosecutorial overreaching and abuse escalate.

Similar concerns pertain to the professional role of the prosecutor. Acting as a minister of justice, the prosecutor controls the advocacy and adjudication of a criminal case, the latter in the circumscribed context of plea-bargaining. His power and prerogative extend to charging, discovery, pretrial motions, trial practice, and sentencing. Each exercise of prosecutorial prerogative triggers discretion. Antebellum and postbellum value competition decides the discrete manner of discretion applied. Historically committed to the denigration of black racial status and black-white interracial community, the competition results in an essentializing construction of race. Superior in its emancipatory mandate, the
postbellum construction at least removes basic political and economic obstacles to integration while holding segregation intact.

The normative prescription of postbellum community merges the jurispathic and jurisgenerative purposes of law and lawyering. At once emancipatory and segregative, the prescription creates and destroys the dialogic and associational freedom indispensable to community-building. This simultaneous opening and closing of social space privileges white-dominated racial hierarchy. The clash of community-decentered, deviance-based jurispathic discretion and community-centered, redemption-based jurisgenerative discretion dictates whether prosecutors forsake or safeguard the rights of defendants, victims, and their associated communities.

The deviance-based jurispathic discretion exhibited by federal and state prosecutors in the trials of Lemrick Nelson, Charles Price, and the Central Park Jogger juveniles diluted the moral integrity of the defendants and their racially subordinated communities, thereby undermining the grounds for cross-racial dialogue and association with white victims and their racially dominant communities. The collapse of individual dialogue and group association decenters cross-racial community reinforcing postbellum racial segregation. The contrasting redemption-based jurisgenerative discretion haltingly displayed by federal and state prosecutors in the trials of Abner Louima and James Byrd affirmed the moral agency of the defendants only to the extent necessary to assign blame and allot culpability. Beyond that point, the prosecutorial deployment of racialized narratives actually diminished the integrity of the defendant police officers and white supremacists, and their racially dominant communities. Essential to public redemption, defendant integrity must survive the disciplinary process of prosecution even in a diminished form. Prosecutors' narrative exploitation of white-black duality and white police violence in the Louima case, and white supremacy and Ku Klux Klan invective in the Byrd case, abraded rather than preserved the individual and community integrity of the defendants under the glare of public moral judgment. This erosion is fatal to public redemption and fails to recenter the cross-racial dialogue and association fundamental to community. Without redemptive dialogue and association, neither federal nor state prosecutors will be able to reconcile the preservation of victim and community retributive rights with the obligations of defendant and community mercy.

The Central Park Jogger and James Byrd trials contextualize victims' lives, in death and in recovery, and defendants' lives, in isolation and in shattered community. Contextualizing victims credits the dignity of personhood in community. Contextualizing defendants uncloaks exclusion and locates alienation in community. Reinserting the defendant into an integrated community context fosters the values of atonement and forgiveness. Introduction of those values enlarges prosecutorial duties to include a jury and public-focused pedagogy of race, crime, and segregation. Teaching juries and the public about the impact of race and racial impoverishment on crime recollects the deformed community shared by victims and perpetrators of racial violence.
Moving from the recollection of broken community to repair calls for a cultural role for prosecutors. In the prosecution of racial violence, that role often goes unfulfilled. Prosecutors in the Central Park Jogger and James Byrd trials illustrate this reluctance. Ingrained by antebellum and postbellum habits, they confine their teaching of community reparation and restoration to racial lessons of natural subordination and necessary segregation. These instructional narratives submerge black and white agents of violence in contexts of cultural and social pathology. Manifested here in the violence of asserted white supremacists and black and Hispanic delinquents, pathology of this sort persuades prosecutors to recommend preventive detention, imprisonment, and even death.

None of those recommendations and their corresponding racial lessons satisfy the alternative cultural function of inculcating virtue into law and advocacy. The virtue of victim- and defendant-centered community is grounded in dignity and integrity. Both victim and defendant deserve dignity in prosecution. Individual dignity exerts a collective pull, tugging at relationships to multigenerational families, friends, and neighbors. Accrued gradually, the relationships acquire the character of community.

Culturally and spatially distinct, community character also deserves respect in prosecution. Respect concedes the integrity of a community's moral, cultural, and social commitments. The Central Park Jogger and James Byrd trials exhibit very different kinds of individual and community commitments. In the Central Park Jogger case, the commitment to segregated community emboldens prosecutors, criminal defense lawyers, and defendant families, pitting one against another. In the James Byrd trials, the commitment to an incompletely integrated community connects the victim's family to black and white neighbors. Jamie Byrd, the youngest of Bird's daughters, repeatedly sounded multiracial themes of connection and integration in her public remarks. Moreover, Texas state prosecutors depicted the Byrd lynching as an obstacle to integrationist progress.

The evidence of prosecutorial commitment to community integration in the James Byrd trials falls short of adducing a community-oriented prosecutorial role. Yet, even in its nascent state, the dimensions of that role seem outwardly apparent. An important dimension relates to the treatment of a violence-scarred community as a collective victim. This collective notion of injury proffers the experience of common harm and the possibility of common remedy. Restoring the sense of a collective or common entity demands the renewal of public trust. The role of community trustee restricts the unbridled prosecution of race cases in deference to a larger good, however vague.

The prosecutorial trustee function splices social and relational contract theory. Set down in contractual obligation, the trusteeship function operates in alliance with community through a covenant of trust and reciprocity. Weakly supported by the norms of the criminal law and the criminal justice system, this fragile covenant relies on local networks of family and friendship, community group

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105. See Alfieri, Prosecuting Violence, supra note 2, at 821 n.55.
organization, and neighborhood mobilization for backing. Formal and informal people's networks help bond prosecutors to communities. Even when the networks are underdeveloped, they divulge the need and the potential for more than punitive sanction. Recognizing the need for forgiveness and mercy in prosecuting individuals guilty of breaching community and legal norms activates the trustee function. Prosecutors in the Central Park Jogger and the James Byrd trials omitted that function. Rather than espouse a jurisgenerative ethos of community constituted by atonement, forgiveness, and reparation, they applied traditional practices of jurispathic prosecution motivated by penal norms of defendant punishment and community vengeance.

In the main, prosecutors squander the opportunity for heralding racial reconciliation. The Central Park Jogger and the James Byrd trials supplied ample opportunity to enunciate publicly the conciliatory norms of mercy and forgiveness. The invocation of those norms gives credence to a moral prosecutorial role. Heroic in tone, that moral role arises in the exercise of prosecutorial discretion. Because the standard exercise of discretion occurs within antebellum and postbellum frameworks, prosecutors struggle to perform a moral role independent of state fidelity to penal sanction, racial hierarchy, and adversarial fervor.

Struggling to gain independence from the jurispathic ethos of the criminal justice system and the punitive commands of state violence requires practical moral reasoning. Practical reasoning that attaches moral considerations to legal decisionmaking cultivates virtue for the self, society, and the state. Prosecutorial trumpeting of color-blind equality in the punitive discourse of the James Byrd trials authenticated the virtue of even-handed treatment. This virtue-based reasoning contributed to the reconciliation of long-segregated communities in Texas. Yet, facilitating community reconciliation through the moral pronouncement of color-blind equality in capital punishment under theories of deterrence and retribution turns the prosecutorial ethic of race-conscious community outreach on its head. Envisioned here, the ethic hews to the redemptive value of mercy, not the punitive value of equitable sanction. Instilling the virtue of forgiveness in the discretionary canons and regulatory standards guiding the prosecution function seems plausible given the history of lawyer-engineered reform movements and the richness of emerging theories of race and identity.

Unfortunately, the plausibility of the normative reformation of the prosecutorial function in no way guarantees its feasibility. The values of equality and retribution offer powerful normative challenge to an ethic of race-conscious prosecution in the Central Park Jogger and the James Byrd trials. At both trials, prosecutors encountered narrow traditions of statutory discretion and institutional regulation that inhibit an enlarged sense of community function. The history of lawyer-dominated law reform movements tends a meager sense of community engagement. Furthermore, remedial theories of race and identity too often undermine community sensibility in the very act of construing it, thereby attaining an ironic but debilitating sense of solidarity.
To endorse individual dignity and community integrity in the prosecution of racial violence constitutes a gesture of reconciliation. Prosecutorial norms permit such reconciliation even as they adversely affect the community. Normative critique of the current prosecution function in the field of racially motivated violence points out alternative prosecutorial roles suitable to reconciling groups devastated by violence. The roles carry attendant discourses, some conducive, and others contrary, to prosecutorial practices of community activism, outreach, and education.

Rebuilding community after major public incidents of interracial violence calls on a diverse battery of advocacy practices. The Central Park Jogger and James Byrd trials show that many of these community-oriented practices flow from the norms of prosecutorial discretion and the constitutional, statutory, and common-law narratives of the criminal justice system. This showing bears the ambiguity of normative and narrative contest. In fact, the trials suffer the internal tension of race-neutrality and racial consciousness. The same showing cloaks the notion of community in vagueness, here and elsewhere. In the high-profile trials at issue, community stumbles into different forms, both conspicuous and indecipherable. This fluctuation simply may prove the trials to be unrepresentative. But a more inclusive, empirical sampling cataloging descriptions of the role, function, and regulation of prosecutors in race cases may fare no better.

To shed controversy, reconsider the norms and narratives of the prosecutorial function. Fairly described, they appear to construct multiple prosecutorial roles, each accompanied by a set of burdens characterized by discretionary freedom and constraint. The roles roughly correspond to the varied functions of the prosecutorial office: constitutional, institutional, professional, cultural, social, and moral. Ideally, the functions abide by considerations of procedural fairness, organizational efficiency, and substantive justice. Even so, their impact on law and advocacy, as well as on culture and society, may be overstated. Overstatement may warp assessments of prosecutorial discretion, badly estimating the freedoms and the constraints impinging on prosecutors in race cases.

Nevertheless, the evaluation of the cultural and societal impact of prosecutorial norms and narratives in race trials must go forward in pursuit of a fruitful basis for a relationship between criminal lawyers and community. Contemporary law reform movements (civil rights, welfare rights, women's rights, and gay or lesbian rights) outside of the criminal justice system disclose a fragile basis for that relationship. Postmodern concepts of racial identity and community add a ramshackle, disorganized quality to the relationship, reducing community to an incoherent, almost utopian idea ill-fitted to restrain or overcome violence.

III. A RACE-CONSCIOUS COMMUNITY ETHIC OF PROSECUTION

To prevail in theory and practice, a race-conscious community ethic of prosecution must meet objections from epistemology, ethics, and practicality. A
The threshold objection challenges the claim of prosecutor, defendant, and victim community consensus. The claim of consensus, and the weaker contention of goal correspondence, applies at three levels. At the highest level of generality, the claim refers to relationships among prosecutors, defendants, victims, and associated communities. At an intermediate level, the claim concerns the relationships between defendant-communities and victim-communities. At a threshold level, the claim pertains to the relationships between defendants and their communities, and between victims and their communities. Empirically, the claim of consensus and goal correspondence among prosecutor, defendant, and victim fares poorly at each level of interaction. This failure deepens in racial settings. In fact, since the advent of the civil rights movement and the war on crime, communities of color have been beset by internal conflict and fragmentation. Less battered jurisprudentially, the claim of consensus still may be unobtainable. Racially constricted dialogue may prove inadequate to reach consensus. The tautness of racial conversations and relations renders the claim further indefensible. The saving presumption of collective reciprocity and voluntary deference seems counterfactual in race cases.

The adversarial system elicits a second objection alluding to structural barriers blocking prosecutor, defendant, and victim community consensus. Both liberal and critical scholars of the legal profession mention the endemic adversarial tendencies to sequester opposing litigants as combatants and to divide class litigants into competing groups. Systemic isolation and conflict undermine consensus-making agreement between individuals and among groups otherwise allied or in opposition. Striving for mutual agreement among the parties to race-conscious community prosecution thus seems not only futile, but also likely to subordinate and silence defendants, victims, and communities too weak to overcome prosecutorial power.

The scope of prosecutorial authority brings forth a third objection pointing to the imbalance of power among prosecutors, defendants, and victims in negotiating consensus. Entering into community dialogue or collective deliberation seems far-fetched in the context of hierarchical relationships. Hierarchy suppresses dialogue and skews deliberation. Although the impulse for cross-racial dialogue and deliberation may carry on, it appears misplaced in circumstances of unequal standing and paternalism.

The circumstances surrounding the prosecutor-led negotiation of consensus among defendants, victims, and their affiliated communities prompts a fourth objection relating to culture and society. Insofar as cultural and socioeconomic circumstances and prevailing political currents manufacture the shape of race trials—situating identity, designating narrative, and stipulating color-coded representation—reform of lawyering and ethics regimes seems unavailing. Indeed, on the strength of this objection, neither lawyering nor ethics can rescue the participants of race trials. For critics, rescue must come from politics, culture, and society, not law. The erosion of civil rights and the disintegration of biracial coalitions support the turn away from lawyering solutions.
The facial incompatibility of a race-conscious, community-based ethic of prosecutorial discretion and colorblind constitutional tradition sparks a fifth objection. Undeniably, race-conscious standards of prosecutorial discretion may run afoul of strictly read equal protection principles. But strict construction is nowhere compelled by equal protection. Surely, equality principles often oblige more expansive readings. Like state-enacted race-conscious procedures and remedies, prosecutor-espoused race-conscious standards confront the tension of constitutional contraction and expansion. That confrontation saps the axioms of liberal jurisprudence and the constitutional tradition of color-blind adjudication.

The mutability of racial identity and the inconsistency of racialized narratives further pummels prosecutorial standards of race-conscious discretion, thereby providing a sixth objection. The Louima case shows racial identity wrenched by categories of color, race, ethnicity, nationality, and sexuality. It also demonstrates the variation in racialized narrative when enunciated by prosecutors, defense lawyers, defendants, victims, and judges. In addition to categorical overlap and discrepancy, racial identity and narrative suffer the inscription of a white-black dichotomy. Reiterated in both high- and low-profile trials, this inscribed dichotomy misapprehends mixed-race classification and racial gradation for the duality of black and white.

Stubbornly fixed in race-conscious prosecutorial discretion, that duality leads to a seventh objection based on the claim of white-majority harm. This expressive or representational harm occurs when state prosecutorial action appears to favor minority interests. Theories of expressive and representational harm apply equally to white-majority and black-minority communities, though the race-conscious standards proposed here anticipate injury only to the dominant racial group. The theories project the harm of community stigma and the loss of public faith in government.

Public faith is crucial to the success of race-conscious, community-oriented prosecutorial discretion. Loss of faith conjures a last objection tied to the predicted decline of voluntary cross-racial community. Decline results from prosecutorial intervention that displaces alternative community-based, citizen-led modes of racial reconciliation. This mode of reconciliation fuses collective action with diversity and legal rights with political mobilization. To satisfy the norm of equal citizenship, mobilization must revere racial inclusion. Private market forces and American populist histories are barren of such reverence. The crude conception of community-based, popular justice unleashed by the antebellum and postbellum forces of history, together with concerns about constitutional incompatibility, practical unmanageability, expressive and representational harm, and compromised voluntary cross-racial community tarnish the prospects of a race-conscious, community-oriented model of prosecutorial discretion.

IV. DEFENDING THE VIOLENCE OF RACE

Impediments to the installation of a race-conscious, community-oriented model of prosecution in the current framework of the adversarial system rise up
as well in the criminal defense context. Because the defense function evolves from the moral obligation to shield the poor from state-inflicted violence, the impediments to formulating a race-conscious defender approach to race trials seem even more formidable. The conventional approach to the defense process deems guilt and innocence irrelevant to criminal trials. More germane is the historic inequity and rationing of state resources in the defense of the accused. These scant resources produce models for indigent defender systems sparing of innovation. Entrapped by the political economy and custom of unequal adversarial engagement, defense lawyers fall prey to plea-bargaining and paternalism. Neither plea-bargaining nor paternalism supplies a race-conscious, community-oriented approach to defenders in trials of racially motivated violence.

The prior criminal defense cases surveyed in this project yield precisely such an approach, albeit inchoate and haphazardly tried. The cases glean a race-conscious, community-oriented approach to advocacy from the disparate trials of Damian Williams and Henry Watson, the Alabama-based United Klans of America, and Lemrick Nelson and Charles Price. Although the trials reveal different conceptions of racial identity, racialized narrative, and race-neutral representation, they point to a basic mutability of identity, instability of narrative, and color coding of neutrality. The fluctuations of identity, narrative, and color-coded advocacy stem from the interchanges of procedural and substantive laws, judges and juries, defendants and victims, prosecutors and defenders, and

113. See Alfieri, Defending Racial Violence, supra note 2, at 1301-20.
114. See Alfieri, Lynching Ethics, supra note 2, at 1074-84.
culture and society. Unconfined by law and the adversarial system, the interchanges feed on stereotypes of color to fix a secure sense of racial hierarchy and status. In race trials, this sense of caste security is ephemeral. Repeatedly the case studies demonstrate that identity, narrative, and color-coded advocacy shift in an ongoing contest of accommodation and resistance to well-entrenched racial hierarchy.

Criminal defenders reproduce white-black racial hierarchies in race trials. They veil hierarchy in constitutional interpretation, statutory construction, and common-law application. The colors of black and white adorn the discourses of constitutionalism, legislation, and the common law. Evoked in speech and symbolic conduct, those discourses naturalize color-coded inferences and color-conscious stereotypes about racial identity. Both inference and stereotype equate black racial identity with moral inferiority. The precept of inferiority is rhetorically encoded in the defense of racially motivated violence.

Race trial defenses assemble color-coded claims that overtly and covertly appeal to demeaning racial stereotypes. The stereotypes contain racial identity judgments of moral inferiority. Criminal defenders stand unaccountable for expressing judgments of inferiority in narrative and story. Earmarks of the adversary system, narrative partisanship, and nonaccountability receive widespread acceptance in criminal defense advocacy. Apparently, they also obtain the freely given assent of defendant clients.

Liberal theories of moral agency decree the treatment of clients as subjects. Subjectivity enables defendant-client assent to racialized narrative, even when demeaning. Contingent on instrumental lawyer strategy and voluntary client self-construction, the narrative forms part of a natural or a necessary racial order. The ranking of this order bottoms on a naturally defective black moral character or a deprivation-induced black moral deficiency. This strategic ranking of racial inferiority legitimates subordinating narratives about black character and conduct under the aegis of race-neutral representation. The stance of race-neutrality in this way shields color-coded criminal defense advocacy.

The case of Damian Williams and Henry Watson illustrates the color-coded defense of race trials. To defeat charges of attempted murder and aggravated mayhem in the beating of Reginald Denny and others, the Williams-Watson defense lawyers controverted evidence of intent and voluntary conduct. They sparked controversy by introducing a “group contagion” theory of mob-incited diminished capacity. Mounted as an exculpatory defense, the social psychology-based theory intimates that young black males as a group, and the black

117. See Record at 8628-29, People v. Williams (Cal. Super. Ct. 1993) (No. BA058116) [hereinafter Record].
community as a whole, share a pathological tendency to commit acts of violence in collective outings.118 Both Williams and Watson are young, male, and black. The defense team supplemented this evidence with defendant-inspired narratives of deviance and defiance.119

The Williams-Watson trial record is replete with interlacing and sometimes dissonant deviance and defiance narratives.120 The narratives construct the identity of young black males in the antebellum terms of bestial pathology and insurrectionist rage, projecting images of good and bad young black men. This identity projection recreates the racial dichotomy of virtue and sin. Under its distended terms, to be born black is itself an act of original sin fatal to moral character. Distilling racial identity into an objective, unalterable quality of human nature robs blacks of liberal subjectivity in the making of identity and in the crafting of community. The tendency of white and black criminal defense lawyers to mix deviance and defiance narratives in race trials imprints bestial pathology into the sociolegal texture of racial identity and community. This tendency reemerges in the defense of white-on-black violence.

Defenders of the 1981 Ku Klux Klan lynching of Michael Donald recapitulated the identity-making function of legal narrative in the context of race and community bias.121 Employing several lynching defenses (jury nullification,122 victim denigration,123 and diminished capacity124), they spun narratives of cloaked racial invective and hatred seeking to captivate the white imagination and its sympathy. The narrative defenses of jury nullification and victim denigration appeal overtly to racial hierarchy. Nullification narratives invoke white racial supremacy. Denigration narratives restate black racial inferiority. The narrative defense of diminished capacity implores hierarchy by more covert reference, remarking favorably on the psychological disfigurement of a rightly segregated community.

Resonant of hierarchy, the racialized narratives accompanying the lynching defenses of nullification, denigration, and diminished capacity denote difference in sociolegal status. The defense of nullification, for example, petitions community members of a jury to affirm their commitment to racial difference and subordination by overriding the course of law and the weight of evidence. The affirmation encapsulates the moral sentiment of antebellum and postbellum community to rectify superficial alterations in racial status. For defenders of Klan lynching, jury-featured race trials provide a forum for disenfranchised

118. See Alfieri, Defending Racial Violence, supra note 2, at 1304.
119. See id. at 1309.
120. See, e.g., Record, supra note 117, at 5124, 5131. One witness, a police officer, testified that Williams confronted him prior to the outbreak of violence, stating: “Fuck you. You ain’t shit. If you was any kind of nigger, you would be out here with us.” Id.
121. See Alfieri, Lynching Ethics, supra note 2, at 1074-84.
122. See id. at 1077-79.
123. See id. at 1079-81.
124. See id. at 1081-84.
white citizens to participate in overturning the temporary realignment of racial hierarchy.

The defense of victim denigration also confirms racial status hierarchy by imparting narratives of black deviance. Deviant imagery degrades the worth of the black victim, thereby elevating the status of the white lawbreaker. Validating the debased status of black victims bolsters claims of moral, physical, and mental inferiority. The claims compose the moral rationale for lynching, segregation, and jury-granted white clemency.

The defense of diminished capacity reinforces racial status hierarchy by absolving white lawbreakers of moral and criminal culpability. Absolution recognizes and rewards the overwrought, almost delusional, commitment to unalloyed white dominance. Defenders contend that the depth of white commitment to racial supremacy induces an emotional state of rage. Swept up in a populist battle to reverse private and public advances in political, cultural, and socioeconomic integration, white lawbreakers commit acts of racial violence without individual or collective remorse. Discarding the image of white savagery, the defense revitalizes the exculpatory narrative of distraught white innocence.

The exculpatory narrative of racial innocence extends to the defense of black defendants. The race trials of Lemrick Nelson and Charles Price for the 1991 murder of Yankel Rosenbaum and the incitement of interracial violence both alluded to the racialized defense of diminished capacity. Noteworthy for dueling race-contaminated narratives in opening statements, witness examinations, and closing arguments, the trials sparked with defense claims of white hierarchical bias, manifested in the acts of police officers and prosecutors, and shared prosecutorial and defense assertions of black deviant pathology demonstrated in family dysfunction, juvenile delinquency, and drug abuse.

These commingled narratives triggered prosecution and defense motions (defendant adult transfer and judicial recusal) that concurrently asserted the defective, indeed irredeemable, state of white and black moral character.

Race-neutral ethics codes tolerate color-coded criminal defense narratives. Tolerance of color-coded advocacy rests on makeshift contractarian and communitarian accounts of liberal theory. The contractarian account builds on the presuppositions of moral agency and rational individualism. In this code-ratified account, the defendant-client independently decides the objectives and collaboratively consults on the means of representation. On this account, the client's autonomous embrace of racialized defenses accords with the rational and voluntary decisionmaking of a liberal agent.

The communitarian account weaves deliberative and third-party considerations customarily relegated to the periphery of the codes. In this similarly

125. See Alfieri, Race Trials, supra note 2, at 1323-39.
126. See id. at 1332-39.
127. See id. at 1323-24.
rule-sanctioned account, the defendant-client approves racialized defense strategies as a result of client-lawyer color-blind deliberative counseling. Standing alone, code deliberation may be inclusive or exclusive of public or third-party interests. The byproduct of deliberative inclusivity is accommodation; for exclusivity, the end result is preclusion. These distinct outcomes limit the influence of communitarian counseling. Code-encouraged discretionary dialogue in counseling affords little moral incentive to boost that influence in race trials.

The roughly cobbled contractarian and communitarian accounts deduced from current ethics codes condone the deformity of client and community racial identity constructions advocated in race trials. The codes countenance this deformation by allowing the marshaling of color-coded deviance and defiance defenses. The defenses acquire their legitimacy from the presumption that a defendant-client may freely adopt a self-abasing narrative. Adoption retains its legitimacy only when the client arrives at his subordinating self-description independently or through consensual counseling.

Ethical forbearance of this destructive defender practice rests in part on the rhetoric of color blindness that drapes the prejudicial undergirding of race trials. It rests in comparable part on the belief that the desecration of race in the public sphere of law bears no relation to subjective racial identity in the private sphere of family and community. This separation of public and private spheres partitions law and legal discourse from society and shared subjectivity. That division excises the discursive cause of racial harm, thereby erasing the taint of stigma injury for defendants, their families, and their communities. Equally important, the division shelters defenders from any accountability for voicing racialized defenses.

Two centuries of defender-facilitated racial stigma, however, are not erased by the sleight-of-hand partitioning of social reality. Defenders' approving stance toward racialized defenses, and its ethical correlates, works to preserve racial status boundaries in law and society. For defendants, the boundaries of racial caste traverse public and private spheres. Denial of the conjunction or the merging of public and private spheres in law and legal advocacy permits criminal defenders to maintain a color-blind stance of nonaccountability. This stance dominates lawyer appraisal of the moral consequences of defendant self-subordination for law and society. It also governs measurement of the harm done to the defendant and third-party or public interests.

Remedial regulation of criminal defense advocacy under an alternative race-conscious community ethic of professional responsibility hinges on the principle of lawyer moral accountability. This accountability extends to racial harm that disfigures the character of individual defendants and tarnishes the integrity of third parties or communities. The ethic combines both liberal and postmodern precepts. The initial precept, race-consciousness, posits race and racial difference as fundamental to a client's identity and, therefore, central to his moral decisionmaking process. An additional precept, contingency, asserts that a client's moral character and identity develop in contexts enlivened by family,
friends, and community. A final precept, collectivity, conceives lawyers and clients as collaborators in devising strategies of representation that are equally effective in defending the client from state violence and in preventing harm to his own dignitary and community interests.

Interweaving this cluster of alternative precepts into a feasible ethic entertains two rule-based approaches. A strong version of the ethic winnows from long-standing traditions of lawyer independence and moral activism. It requires criminal defense lawyers unilaterally to refuse deployment of deviance-based racialized strategies, except to nullify a racially discriminatory prosecution. A weak version borrows from well-known lawyer advisory and counseling traditions. It encourages client-lawyer counseling dialogue on the meaning of racial identity and community and on the potential harm posed by racialized defense strategies. This type of dialogue tests defendant-deviance narratives against the background norms of dignity and integrity, weighing the risk of harm to personhood and to community.

Denunciations of these unilateral and bilateral remedial prescriptions stretch widely, finding fault with the abandonment of the public-private distinction, the validation of identity-based harm to dignitary and community interests, and the curtailment of the criminal defense lawyer's duty of zealous advocacy. To confess fault in the tempering of classical defender commitments is to point out fault in the disaggregation of the conjoined public and private experience of law, in the negation of dignity and community norms, and in overstepping the limits of loyalty and zealous advocacy. Staging the antisubordination politics of Critical Race Theory in the theater of criminal justice, where it might explode racial hierarchies and enhance equality in law and society, presents an opportunity to temper the bloated principles of criminal defense advocacy. This stab at a theory of racial conciliation nowhere demands the abdication of professional role or the wholesale repudiation of ethical duty. The proposed ethic of race-conscious community representation merely seeks to reopen and to reincorporate the suppressed normative premises of liberal legalism in fashioning an enlarged vision of lawyer duty and client or third-party injury in race trials.

V. DEFENDING A RACE-CONSCIOUS ETHIC OF REPRESENTATION

The ethic of race-conscious responsibility transforms the liberal regime of color-blind criminal defense practice by revitalizing the foundational norms of dignity and community in the context of racial violence. The transformative race-ing of defense practice challenges the identity-making rituals of criminal lawyers, especially the tendency to construct racial difference out of the image of deviance and out of the narrative of inferiority. Recapitulated in the instant case studies, this tendency reenacts racial subordination in advocacy. Halting that reenactment in the criminal justice system requires the reintegration of dignitary and community values in legal ethics.

The call for the restoration of values in the legal profession resounds in
Defender codes sustain a weak normative conception of ethics deficient in the valuation of dignity, community, and equal citizenship. This deficiency encourages the traditional routine of identity-disfigurement in defending cases of racial violence. Allegiance to that advocacy routine emphasizes the primacy of a private, contractarian client-lawyer relationship and the priority of lawyer technique and tactical gambit.

Code emphasis on the private, contractarian nature of the client-lawyer relationship is not fatal to a public, community-oriented ethic of race-conscious responsibility. Adverting to a contractual relation in fact exposes certain background regulatory norms, such as reciprocity, that apply with equal vigor to a public ethic. Derivative of the norms of rational bargaining, reciprocity sanctions racialized defenses as the efficient, transactional product of client-lawyer consensus. The claim of efficiency plainly discounts the external costs of character and community harm. More troubling, the contention of moral or instrumental consensus falls overbroad. Too often in the turmoil of criminal defense representation, reciprocity proves counterfactual and consensus collapses into fallacy. Insistence on neutral tactic and color-blind technique in the racialized routine of the criminal justice system seems likewise false.

The falsity of client-lawyer reciprocity and consensus under the traditional ethic of defender representation in no way diminishes the value of moral dialogue in advocacy. Instead, it underlines the normative importance of dialogue commensurate with the preservation of individual dignity and community integrity. The task of value preservation converts defenders into moral custodians. Their custodial responsibility entails race-conscious dialogue with clients and communities in jointly opposing racial violence. Equivalent to an ethic of care applauded in emerging alternative ethics regimes, race-conscious dialogue brings other-directed empathy and solidarity to criminal advocacy.

The facile rhetoric of empathy and solidarity and the disavowal of entrenched tradition spur multiple objections to the ethic of race-conscious community responsibility. A starting objection condemns the blithe imposition of constraints on a criminal defendant’s freedom of defense. Protesting anticipated encroachments on a defendant’s strategic prerogative overlooks the code-endorsed limitations on a client’s liberty to decide the means of his own defense. Under the ethics codes, defensive strategy effectively rests on the discretionary judgments of counsel, not the client.

Critics also claim that race-conscious constraints encumber a criminal defen-
dant’s right to trial. Without more, disquiet over hindering a defendant’s right to trial seems exaggerated. Nothing in the proposed ethic of race-conscious community responsibility curbs a criminal defendant’s Sixth Amendment right. The ethic merely limits the racialized tactics available at trial, a limitation already erected from equal protection principles in the areas of jury selection and peremptory challenge.  

Further objections bemoan the implementation of a race-conscious ethic for fear of lawyer bad faith in counseling and negotiating cases of racial violence. Proponents of this objection fear that the new-found ethical disdain for the traditional conduct of race trials heightens the danger of plea-bargaining agreements and accelerated dispositions imimical to the interests of defendants. Absent evidence of past abuse or misconduct, conjecture about the danger of lawyer bad faith in race-case counseling and negotiation seems premature. To the extent that race-case counseling introduces additional variables for deliberation, it is fair to speculate that the risk of error increases proportionately. By definition, legal decisionmaking in advocacy, adjudication, and legislation carries the risk of error. Mitigating the chance and effect of such error in race-conscious counseling for defendants facing mandatory sentencing or capital punishment urges a review of counseling protocols in race cases.

Additional objections go to the principle of collectivity guiding client-lawyer character and community deliberation. Practitioners warn that this principle erodes client-centered rights and loyalties, skewing the individualist logic of the adversarial system. But practitioners cling to a truncated version of such rights and loyalties. The partisan duty they profess relegates other-directed third-party rights and community obligations to secondary consideration even when collective fidelity serves to enrich the adversarial system by purging it of bias and prejudice.

The racial cleansing of adversarial rights and duties may strike some practitioners as enfeebling. Deprived of righteous zealotry, defenders may feel enervated. Coupled with role confusion, this sense of weakness and ineffectuality may recreate the ethical ambivalence and moral anxiety experienced under the traditional defender practice of color-coded advocacy. Salvaging that defender tradition may come from the claimed right to racial injustice. This sullied claim of zealous advocacy views injustice as sometimes vital to client liberty. On this accounting, fostering or simply exploiting racial injustice may enhance personal autonomy to the detriment of social equality. The claimed right to long-run racial justice augments this logic. It maintains that short-run incidents of racial injustice prevent greater aggregate injustice. Even if empirically verifiable, the system-wide costs of overweening partisanship of this sort seem pernicious, depleting the morality of the defender role and public respect for law. The lynching defenses of jury nullification, victim denigration, and diminished capacity provide a case in point. Championed as zealous advocacy, the defenses privilege sociolegal norms of white supremacy. That act of racial privileging

130. See sources cited supra note 10.
dissipates norms of racial community and equal citizenship. State-focused claims of oppression and corruption raised to excuse such aggressive racialized defenses furnish no rescue when they fail to vindicate intrinsic client rights or extrinsic emancipatory policies.

VI. NEW PRACTICES, OLD QUARRELS

The proposed race-conscious ethic of community prosecution and defense introduces new practices of representation into the criminal justice system. In doing so, it inflames old quarrels over the duty of effective individual and state representation. Conventional views of criminal advocacy sever the duty of effective representation from the identity and community interests of defendants, victims, and their families. Revisionist views seek to repair that break. The clash of conventional and revisionist views of representation sharpens into quarrels over the ethics of criminal advocacy in race cases.

A. IDENTITY, COMMUNITY, AND LAWYERS

Contemporary notions of identity are intimately tied to the expression of the self and self-realization. Personal expression comes in physical and rhetorical performance. Although possessing only ephemeral coherence, identity often becomes fixed in commonplace visions of law, legal agency, and sociolegal relationships. Liberalism links agency and autonomy through the capacity to value in moral and legal decisionmaking. Perceptions of the capacity for agent (defendant or victim) self-direction in law, politics, and legal representation are complicated by difference. The image of difference imprints


stigma and encourages fabrication. Difference imagery limits lawyers' and judges' ability to discern the full dimensions of identity. Hobbled by cognitive and epistemological impairments, lawyers sometimes mistake norms for facts. This cognitive error and its inferential stream of blame and responsibility impose interpretive constraints on the practice of law by prosecutors and defenders. Prejudicial reliance on racial appearances and stereotypes brands the prosecutions and defenses of Damian Williams and Henry Watson, Lemrick Nelson and Charles Price, the Central Park Jogger juveniles, and the Texas Klansmen. Engrafting normative representational commitments on the surface of ungrounded or invented racial facts erases identity history and memory.

To be effective, identity-based community-advocacy practices must reassemble the history and revive the memory of race-conscious collective action and unity. Community implies belonging and membership. Belonging entails shared social norms, narratives, and spaces. Because difference inhibits openness


and sharing, lawyers, clients, victims, and community members must be responsive to the identity imperatives of racial expression, minority group self-determination, and interracial reconciliation. Responsive community requires a profound sense of collaboration and mutual responsibility to forge group connection and to overcome separation. Both assimilation and contractualism offer a thin sense of mutuality. A richer sense comes from democratic citizenship. Democratic models of citizenship rest on inclusive deliberative dialogue with others. Deliberation establishes the foundation for consent and grants legitimacy to authority, even in the face of disagreement. Moreover, it affords a defendant, victim, and community a public role in the civic governance of race relations.

Community advocacy gives lawyers a similarly public role in the civic regulation of race cases. Discarding convention, the role rejects practices that harm and allow harm in reinforcing caste and in constructing political and socioeconomic inequality. Plainly, simple rejection neither eradicates racial harm nor ends the suppression of equal civic participation. Reform entails

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Differences in Tolerance of Deviance and Legal Cynicism, RESEARCHING THE LAW: AN ABF UPDATE, Fall 1999, at 2, 4-5.


152. See Amy Gutmann & Dennis Thompson, Democracy and Disagreement 11-51 (1996); Thomas Christiano, Justice and Disagreement at the Foundations of Political Authority, 110 ETHICS 165, 174-83 (1999).


instilling community-regarding professional values into the justice-seeking ethical mandates that imbue the heroic tradition of lawyers and legal-rights advocacy. This tradition animates the civil rights movement and successor movements in poverty law and political lawyering. Doubtless, community-based lawyering produces role confusion and identity strain for advocates working within that tradition, quite apart from the encumbrances of gender.

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and race. Such strain may explain the critique of race-conscious community advocacy emerging out of the clinical and critical race movements. The critique, powerfully advanced by Richard Delgado and Abbe Smith, tenders both a sympathetic extension and a scathing indictment of the proposed ethic.

In her critique, Smith acknowledges that racism exists as a "deeply entrenched" facet of the American legal system, especially the criminal justice system. She describes racism as "a powerful and pervasive force" that "colors everything." The very "omnipresence of race," Smith suggests, may attach "racial significance" to "every defense theory, every defense strategy, every defense." She declares: "Every defense story that involves race may well be a 'racialized narrative.'"

By admitting the omnipresent predicate of race, Smith strikes at a core question of the instant project. Indeed, she demands: "What is a sensitive, concerned, 'race-conscious' defense lawyer to do?" Given the normative stakes, the question deserves more than her mordant rejoinder: "Plead them all guilty?" For professing guilt, as Smith well understands, accomplishes nothing in the fight against racial infirmity. In stark contrast, Delgado recognizes "the need to attend to the rhetorical meaning of race in trying cases and representing clients." For Delgado, grasping that meaning in the context of racialized narrative enlarges appreciation of the myriad "ways race determines outcomes" in civil and criminal justice systems. Additionally, it works to enhance efforts to "combat racialized narratives colored by racism." Furthermore, it enables lawyers to map "the limits of what can be achieved through advocacy."

Surprisingly, Smith ignores these constructive lines of inquiry. Instead, she charges that the instant project "is wrong-headed and regressive as a matter of both practice and theory." More troubling, she accuses me of "joining forces with those who care least about the least among us: the poor, the black, the accused, and the imprisoned." That accusation reflects the corruption of

165. See Delgado, supra note 3, at 1571.
166. See Smith, supra note 3, at 1585.
167. Id. at 1601 (observing that "race and criminal justice are so intertwined in this country—in practice and perception—that it is impossible to talk about one without the other").
168. Id.
169. Id.
170. Id.
171. Id.
172. Id.
173. Delgado, supra note 3, at 1571.
174. Id.
175. Id.
176. Id.
177. Smith, supra note 3, at 1591.
178. Id.
liberal theory under the dominant tradition of criminal defense practice, a tradition that privileges zeal over dialogue, freedom over equality, action over ideas, and ultimately lawyer egoism over lawyer-client collaboration.

B. ZEAL OVER DIALOGUE: THE CRITIQUE OF LAWYER DUTY

No one will quarrel with Smith’s observation that “there is something exceptionally burdensome about lawyering on behalf of the accused.”\(^{179}\) Nor will anyone differ with the view, even if calculated to deflect criticism, that those who comment on criminal defense ethics and lawyering “should know something of this unique burden” through either “actual experience” or “studied effort” in the thickness of this context.\(^{180}\) One must quarrel, however, with the view that criminal defense lawyers hold no responsibility “for the persistence of racism and racial stereotypes in the criminal justice system and larger American society.”\(^ {181}\) Like other legal agents enveloped in the criminal justice system, defense lawyers share in that responsibility.\(^ {182}\) Although their position commands fewer state resources, it acquires greater accountability from the constitutional commitment to dignity and equality.

Anticipating this claim of higher accountability, Smith contends that defense lawyers, unlike judges, lack “the power to determine guilt or innocence.”\(^ {183}\) But this contention proves too much. The lack of power to determine guilt or innocence is hardly tantamount to powerlessness. Defense lawyers are far from ineffectual. They hold and exercise the power to shape guilt and innocence every day in the arena of plea-bargaining, pretrial investigation, and trial strategy.

Smith cites a similar lack of power to “contribute to the institutional and social status of racial minorities” in the United States, ceding such power to prosecutors, juries, and judges.\(^ {184}\) But discourse molds institutional and social status, whether hidden in low-profile trials or exposed in the public transcripts of high-profile trials. Discounting such influence, Smith complains that “the only time defense attorneys are depicted as powerful is when we are being taken to task for adhering to the central ethical mandate for criminal lawyers: the requirement of zealous advocacy.”\(^ {185}\) Disclaimer by complaint or excuse runs afoul of the sociolegal reality of defender discursive power in both pretrial and

179. Id. at 1586.
180. Id. at 1586-87.
181. Id. at 1587.
182. See id. Smith pleads evasively: “Of all the political and institutional actors upon whom Alfieri might focus, why us?” Id.
183. Id. at 1588-89.
184. Id. at 1589.
185. Id. The lawyer’s duty of zealous advocacy arises from the CANONS OF PROF’L ETHICS Canon 15 (1908) (commanding the lawyer’s “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of utmost learning and ability”), the MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (2000) (“A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”), and the MODEL CODE OF
trial proceedings. It also conceals the more insidious power defenders wield in the relational discourses of counseling and negotiation. Worse still, the denial confuses an adversarial mandate for an ethical mandate.

The mandate of the ethical defender is multifaceted, splintered by competing commitments to the law, client, community, and courts. These tensions are part of the cacophony of liberal legal theory. Yet, Smith equates observance of these competing values with a conservative agenda. This equation suffers from normative and empirical error. Smith commits error by conceding the neglect of "the broader community" in advocacy while dismissing a race-conscious, community-centered "burden" as "so untenable as to be laughable." But she fails to trace the genesis of community neglect, gauge the weight of its burden, explain its incompatibility with past and present burdens, or clarify its untenable quality. Instead, she warns of sapping the "unmitigated devotion" of criminal defenders to the criminally accused. For Smith, this dilution "completely" transforms defenders into "protectors of the community." However, she provides no evidence of unmitigated defender devotion. Measured against the well-documented literature of defender deficiencies in plea-bargaining, at trial, and on appeal, such sentimental claims of devotion seem counterintuitive, if not outright false. Yet even when devotion finds credence in intuition and experience, it in no way precludes other-regarding community commitments.

C. FREEDOM OVER EQUALITY: THE CRITIQUE OF COMMUNITY

Staunch in her defense of freedom for the accused, Smith points to "an emerging neo-conservatism in legal ethics focusing on criminal defense lawyering." She construes the injunction of race-conscious community advocacy as a neo-conservative "call for communitarianism and racial justice over individual rights or individual justice." Despite its equality-inspired thrust, she discards such advocacy as a "brand of conservatism" motivated by an "abiding hostility toward the adversarial system." This hasty denunciation permits the grave inequality of the adversarial system to go uncensured. The lack of any mention, much less condemnation, of this grievous inequity is inexplicable.

Smith contends that the "heralding of communitarianism over individual rights and liberties" typifies an "emerging ethical conservatism." Evidently, proponents of this ethical stance cloak their regressive allegiances in the "politics" of racial identity and authenticity derived from a critical race or

PROF'L RESPONSIBILIT Y Canon 7 (1969) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").
186. See Smith, supra note 3, at 1589.
187. Id. at 1590.
188. Id. at 1591.
189. Id.
190. Id.
191. Id. at 1592 (footnotes omitted).
192. Id. at 1591-92.
193. Id. at 1593.
feminist perspective. Undaunted, Smith purports to strip away this cloak to discover "the traditional concern for community in criminal justice." The significance of this discovery in recentering community-based criminal advocacy norms seems wholly unappreciated. Once again, her disdain for nonadversarial tradition goes unexplained.

Pressed to escape the import of community tradition in criminal advocacy, Smith levels a more powerful objection in the claim of incoherence. Invoking the epistemological demurrer favored by criminal defenders, she assails the definitional opacity of community. In addition to its flimsy definition, she protests that "the notion of community invariably implies exclusion from that community." Further, she complains that the championing "of community interests over individual rights and liberties" replicates "an old, tiresome debate among progressive lawyers working for social change." She derides the debate over the relative merits of individual and group representation as "ridiculous and counterproductive."

In place of community or group representational norms, Smith heralds the norm of individual-client autonomy. However, she makes no reference to the source of that autonomy, its nature, or its relation to lawyer discretion. Rather than engage in reasoned exposition, Smith blithely trumpets the proposition that a "client can certainly choose to forsake his or her interests for the sake of a larger group or issue, but lawyers should not forsake individual clients for any 'larger' cause." But she furnishes no insight into the mechanics of client choice or the constraining dynamics of the client-lawyer relationship. Undeterred by explanation, she announces: "Lawyers should not set limits on what they will do to achieve a client’s interests because they conflict with the lawyer’s values." The announcement omits careful parsing of the nature of such limits, their internal and external origins, their impact on client interests, and the interplay of client and lawyer values.

From the principle of client-interest priority and the elevated norm of client autonomy, Smith deduces that "it may be perfectly appropriate for a criminal defendant to decide to forego certain legal strategies because they may hurt his or her community." The logic of this corollary turns on the separation of

194. Id.
195. Id. (footnotes omitted).
196. See id. at 1593-94 ("[I]t is unclear what Alfieri means by community. What community is he talking about? Who does this community include? Are there membership criteria? If so, who determines the criteria and who selects those to whom community membership is extended? What becomes of those to whom membership is refused?” (footnote omitted)).
197. Id. at 1594. Smith continues: “For there to be a community, there must be outsiders from that community.” Id.
198. Id.
199. Id. at 1594-95.
200. Id. at 1595.
201. Id. at 1595-96.
202. Id. at 1596.
client morality and lawyer ethics. That dichotomy allows Smith to conceive of client decisionmaking as “a matter of individual client conscience, not legal ethics.” Curiously, she confines the ambit of this decisionmaking only to high-profile cases in which “intense media attention, [which] influence[s] public opinion and discourse,” may sway client conscience. This unalloyed speculation restricts the capacity of client conscience-driven decisionmaking and misapprehends the pressures of low-profile cases.

D. ACTION OVER IDEAS: THE CRITIQUE OF ABSTRACTION

Like any dedicated criminal defender, Smith is wedded to action. Her rebuke of the call for community representation, whether rooted in “a generalized notion of ‘civic virtue’ or a concern about racial subordination,” stems from concern that such advocacy will “tie the hands of criminal defense lawyers.” Fearful of imposing an unnecessary limit on criminal defense advocacy, she overstates the claim of institutional practicality. She begins her defense of the practical by citing “a lack of concreteness” in the depiction of racial harm and an absence of “specific, empirically-grounded claims.” The scarcity of empirical proof, according to Smith, leaves such harm “essentially imaginary,” though not so imaginary as to render it “utterly without basis.” At least in “highly publicized cases,” she admits that criminal representation “may well have an impact on popular perceptions and culture.” Even to Smith, “some cases have meaning beyond the courthouse walls and influence how we think about race.”

The admission that “[s]ome narratives and images may well be painful to some people and some ‘communities’” undercuts Smith’s pragmatic justification of the defender function. Once she concedes that “a particular defense theory is offensive and will reinforce some peoples’ prejudices,” the fact that “the actual harm is elusive” becomes inconsequential. However elusive, the harm is damaging to identity and community when it afflicts defendants, their families, and their neighbors. That affliction may be privately cloaked or publicly hidden. Smith’s crucial acknowledgement deprives her of easy escape from the harmful grip of her own practices.

Undone by her own hand, Smith flees to soothing conjecture. Grandly, she opines: “[M]aybe the offensiveness of the theory will lead to outcry and debate.

203. Id.
204. Id. Smith further insists that “far from the lights and cameras that high-profile cases attract, the reality is the public knows little and cares less about what happens in most criminal cases.” Id. at 1596 n.58.
205. Id. at 1596-97 (footnote omitted).
206. Id. at 1597.
207. Id. at 1598.
208. Id.
209. Id. (footnote omitted).
210. Id.
211. Id.
that will uncover, and ultimately overcome, prejudice.”

Outcry from whom? Debate among whom? No hue and cry will emanate from the precincts of criminal defense lawyers, especially those inured to the color line. Even if heard, the feeble call to overcome prejudice sounds too late and altogether hollow. Floundering, Smith reaches for a last magical solution: free speech. Ever the trusting civil libertarian, she asks: “Why isn’t more speech the answer here . . . ?”

Surely, more racist speech is no answer. Yet, for Smith, speech is the only answer. Unwilling to ban or even regulate racist speech, Smith finds no factual or substantive ground for the defense of antiracist speech. Without evidence of the “real” and “tangible” racial harm for which she clamors, nothing in her argument bolsters a petition for antiracist speech.

Delgado, by comparison, posits the fact of group harm and injury. He warns that “monocular vision can end up harming a group.”

Remarking on the veiled quality of racist treatment and racialized narratives and on the natural or necessary quality of group racialization, he urges investigation of “the way race operates to constrain choices and limit trial possibilities.”

E. EGOISM OVER COLLABORATION: THE CRITIQUE OF PASSION

Unsure of speech and wary of harm, Smith descends into preoccupation with zeal. For Smith, authenticity and ardor combine in the earnest vitality of action. In her view, the fervent defender is the good defender, however myopic or unprincipled. Passion, she explains, “unbridled, undistilled, and intensely focused” is the moral force “that drives criminal defense lawyers.” Criticism of this vainglorious moral impetus purportedly betrays “a thinly-veiled aversion to passion.”

According to Smith, restraint in the form of “a more muted voice on behalf of a client” or “a more measured approach that contemplates others” discloses if not cowardice then a kind of pusillanimity.

Smith elucidates the pathology of abstraction that dupes critics of her defender-warrior model. It is not simply frailty or an aversion to the rough and tumble of adversarial combat, she sympathetically explains, but “a preference for ideas over feelings, for the imagined over the real, and for diffuse, collective relations over intense, individual ones” that fills dissenters with “a longing for bloodlessness.”

This startling and deluded egoism is best exemplified by Smith’s misreading of Barbara Babcock’s much cited account of her own benchmark.
criminal trial and the jury verdict of “not guilty by reason of insanity” that instructively closed it.\footnote{222} According to Babcock’s reportage, her client, upon hearing the verdict, burst into tears, threw her arms around Babcock, and declared: “I’m so happy for you.”\footnote{223} The stunning irony of this client exclamation is nearly lost upon Smith. Grudgingly, she acknowledges that the passion of criminal-defense advocacy “sometimes takes on a life of its own.”\footnote{224} That acknowledgement overlooks the bare egoism and solipsism of misplaced passion. More glaring, it fails to account for the incompetence and sloth that passion sometimes masks. Smith supplies no empirical linkage between passion and competence or diligence. She merely presumes that passion guarantees effective assistance.

Delgado declines to address the vaunted passion of criminal defense lawyers. More interested in broadening the inquiry undertaken here, he urges the inclusion of civil trials in studies of the rhetoric of race. Exploring the role of race for civil litigants and lawyers, he asserts, inevitably confronts “a host of racialized narratives, substantive laws, remedies, presumptions, and discourse patterns.”\footnote{225} To Delgado, that confrontation must occur outside of the black-white paradigm of race. Investigation of the role of racialized narratives, he stresses, needs to encompass “groups beyond blacks” such as Latinos and Asians.\footnote{226} American society, he points out, “has racialized Latinos and Asians differently from African Americans.”\footnote{227} The wide span of discrimination, afflicting skin color, accent, national origin, immigrant status, religion, and culture, furnishes an additional reason to expand the current Afrocentric focus: “Preoccupation with a single racial minority group can easily end up slighting, or even affirmatively harming, another.”\footnote{228}

Delgado notes the importance of legal education in the study of racial advocacy, particularly clinical legal education, remarking that racialized narratives or treatment “might be unrecognizable to a lawyer not trained to look for them.”\footnote{229} Lawyer training, he adds, should be carefully tailored to contemplate both racial and ethnic-group diversity.\footnote{230} Citing the multiplicity of race and “the different experiences, methods of racial identification, and histories of each minority group,” Delgado contends that “it is not possible to properly understand racial minorities by merely analogizing from what one has learned about

\begin{footnotes}
\footnote{222}{See Barbara Allen Babcock, \textit{Defending the Guilty}, 32 CLEV. ST. L. REV. 175, 204 (1983).}
\footnote{223}{Id. at 179.}
\footnote{224}{Id. at 1600 n.80.}
\footnote{225}{Delgado, \textit{supra} note 3, at 1575.}
\footnote{226}{Id. at 1576.}
\footnote{227}{Id.}
\footnote{228}{Id. at 1575, 1576 (“Ignoring racialization of one group can also positively injure another.”).}
\footnote{229}{Id. at 1575, 1576 (contending that “lawyers must understand how different groups are at risk of discriminatory treatment by society and the courts”).}
\footnote{230}{Id. at 1578 (“Sensitization to the narrative of race regarding one group thus does little when one is representing another group.”).}
\end{footnotes}
To his credit, Delgado also urges the study of white narratives and racialized rhetoric. He argues that the analysis of white racialized narratives and their embedded notions of privilege and superiority illuminates the meaning of color blindness and merit in law and lawyering. Searching for evidence of white race-coding in the areas of hate speech and affirmative action, he claims that “a free-speech narrative is often deployed in a way that advances and encodes white privilege, while cutting short discussion of countervailing equality values.” Likewise, in the case of affirmative action, he maintains that “whiteness plays an unexpressed but powerful role” in ascertaining remedies for historic racial wrongs.

Alert to both interpretive and material subordination, Delgado encourages advocates to be circumspect. Afraid of the concrete violence of the criminal justice system, Smith exhorts advocates to march ahead. Her admonition is: Don’t look back! For Delgado and others dedicated to the integration of theory and practice, this admonition would seem less facile if it came accompanied by some insight into the danger of shuttering advocacy to the reality of racial identity and community. Without attention to race, prosecutors and defenders construct their own prison house of advocacy.

To be sure, criminal trials are not the wellspring of racism in law and society, and prosecutors and defenders are not its petitioners. In the same way that criminal trials cannot be fairly blamed for the race-ing of law, prosecutors and defenders cannot be solely blamed for the perpetuation of racism and racial stereotypes. But they can be held accountable. Equally important, they can rise to meet a higher standard of accountability, even if that standard imposes upon criminal defendants and their victims an unwieldy and unjust burden of considering the identity-inscribed dignity of the other and the aspiration of community. That other-regarding burden is the first and last obligation of citizenship. It attaches to all members of the American community, inequality notwithstanding. And it is not lightly borne.

CONCLUSION: RACE IN THEORY AND PRACTICE

Constructive engagement in legal advocacy and ethics demands a liberal faith in reason and reform. Part of that faith entails a tolerance for experimentation and imperfection in the hard march toward attaining racial equality and community. For many criminal defenders and lay activists, the march of civil rights and civic reconstruction long ago abandoned the liberal ideals of individual dignity and collective good. What is left of that derelict march is a kind of rear-guard action aimed at stanching the retreat from basic procedural and substantive

231. Id. at 1579 ("Any particular racial narrative might be authentic as applied to one racial minority, but not so when applied to another.").
232. Id. at 1580.
233. Id. at 1581.
safeguards and at adjusting the recurrent imbalance of the adversarial system. For prosecutors, the march serves a disciplinary rather than an emancipatory function. Its civic purpose is punitive not reconstructive. That purpose overrides rehabilitative and therapeutic objectives in the urgency to enforce law and legal sanction.

Albeit practical, neither the prosecutor’s nor the defender’s sense of purposive professional commitment exhibits the other-regarding faith or risk-taking tolerance found in the dialogic and communitarian strands of liberal legalism. Oddly, the postmodern sensibility—so impatient with the practical and so indulgent of abstraction—displays a receptivity to the higher aspiration of dialogue and community, even as it belittles the liberal faith. The postmodern sensibility also shows an adroitness in mapping the twisting flow of discursive practices, institutional procedures, and social relations within law and lawyering. Critical Race Theory demonstrates a similar acuity and vigor of analysis, particularly in parsing the color-coded meaning of constitutional, statutory, and doctrinal materials. But both postmodernist and critical race sensibilities stall in pursuing and resolving the tensions bearing on the liberal-postmodern and theory-practice divides. Partially spawned by identity and community conflicts, those tensions challenge legal theorists and practitioners to revisit conventional standards of discursive and symbolic speech, narrative interpretation, and social construction to better understand and aid subordinated clients, victims, and communities in the criminal justice system. Because the standards prevail at multiple sites—courthouses, law offices, and police precincts—the struggle to reform prosecution and defender practices ranges widely across public and private fields of advocacy. This confluence of sites and convergence of public-private spheres hinders the navigation of this project through liberal and critical theory.

In time, my hope is that this project will persuade race prosecutors and defenders to reconsider their ethical responsibilities in racially and politically charged cases like the recent state murder trial of four New York Police Department (NYPD) officers for the shooting death of Amadou Diallo and the federal investigation of that killing, and the current federal and state investigation of police brutality in the Los Angeles Police Department’s (LAPD) Rampart Division. Both the NYPD and LAPD officers under scrutiny participated in neighborhood-based, anticrime units within impoverished communities of color—communities that were represented by public defenders as well as private criminal defense lawyers. Furthermore, both investigations have involved U.S. Justice Department lawyers, local U.S. attorneys, and state prosecu-

tors. Whether this project can convince prosecutors and defenders in such circumstances to adopt a race-conscious community ethic of representation remains unanswered. Until an answer is found, the project will prod practitioners and scholars to reevaluate the place of racial identity, racialized narrative, and race-neutral representation in law, lawyering, and ethics.237