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Retrying Race

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RETRYING RACE

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INTRODUCTION

This Essay investigates the renewed prosecution of long-dormant criminal and civil rights cases of white-on-black racial violence arising out of the 1950s and 1960s. The study is part of an ongoing project on race, lawyers, and ethics within the criminal-justice system.[1] Framed by this larger project, the Essay explores the normative and sociolegal meaning of that resurgent prosecution. My hope in pursuing this inquiry is to better understand, and perhaps begin to refashion, the prosecutor's redemptive role in cases of racial violence.[2]

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This Essay mourns for my father, John B. Alfieri, no one to drive the car.

1. *See* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (exploring the rhetoric of race in cases of black-on-white racially motivated violence; citing the defense of Damian Williams and Henry Watson on charges of beating Reginald Denny and others during the 1992 South Central Los Angeles riots); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) (probing racial rhetoric in cases of white-on-black racially incited violence; noting the civil and criminal trial of the Ku Klux Klan in the 1981 lynching of Michael Donald); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999) (examining the federal prosecution of five white New York City police officers charged with assaulting Abner Louima, a young male Haitian immigrant, in 1997); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000) [hereinafter Alfieri, *Prosecuting Violence/Reconstructing Community*] (discussing the 1990-91 Central Park Jogger sexual assault trials in New York City and the 1998-99 James Byrd capital murder trials in Jasper, Texas); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2228 (2001) (assembling "race-conscious, community regarding methods of representation culled from conventional and alternative models of criminal prosecution and defense"); Anthony V. Alfieri, *Race Trials*, 76 TEXAS L. REV. 1293 (1998) [hereinafter Alfieri, *Race Trials*] (analyzing the rhetorical meaning of race in the federal and state trials of Lemrick Nelson, which grew out of four days of interracial violence in the Crown Heights section of Brooklyn, New York, in 1991).

2. Prior efforts in this enterprise to reconstruct prosecutor and defender roles have sparked criticism. *See, e.g.*, Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788 (1996); Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA — Getting a Little More Precise About Racialized Narratives*, 77 TEXAS L. REV. 1571 (1999); Christopher

Both descriptive and prescriptive in nature, the inquiry addresses race in relation to law and community.[3] Grappling with the historical violence accompanying that troubled relationship, the Essay employs the notion of *race cases* to decipher juridical forms of white-on-black violence, parsing their content and tracing their genealogy in selected criminal and civil rights prosecutions of the 1950s and 1960s.[4] The central purpose of this inquiry is to ground the justification for retrying race cases in the discretionary ethics of the prosecution function and the normative jurisprudence of criminal justice.

Race cases present hard and easy judgments of prosecutorial discretion. The threshold justification for retrying race cases comes from the standard conception of discretion and its adversary system-based sources of normative guidance. Under standard discretion, easy cases for retrial emerge from supervening events material to the outcome of prior prosecutions, such as the discovery of new physical evidence, the identification of new witnesses, and the belated proffer of inculpating confessions. Hard cases, by comparison, resurface on their own strength of merit without the benefit of supervening events. In such cases, prosecutors adduce no new evidence, produce no new witnesses, and offer no startling "deathbed" confessions. Instead, they grasp the elusive opportunity to right historical wrongs committed in aborted or failed criminal and civil rights prosecutions.

Standard discretion permits prosecutors to seize the opportunity to renew aborted and correct failed race case proceedings. The seizure of prosecutorial power, however well-intentioned, is distinct from the reasoned exercise of prosecutorial discretion. To be sure, power is the necessary precondition of discretion. Yet, power alone is insufficient to give reasoned justification for reopening long-dormant cases. Indeed, if the reopening of race cases turned solely on evenhanded-prosecutorial power, then black victims would not have been made to suffer decades of irrevocable loss and white lawbreakers would not have enjoyed the freedom of lasting immunity.

The hazard of extending the inquiry of reopening beyond the bluntness of curative power is both theoretical and practical. Power infects law and society.[5] It adopts manifold public and private forms.

Slobogin, *Race-Based Defenses — The Insights of Traditional Analysis*, 54 ARK. L. REV. 739 (2002); Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEXAS L. REV. 1585 (1999). *But see* Alex J. Hurder, *The Pursuit of Justice: New Directions in Scholarship About the Practice of Law*, 52 J. LEGAL EDUC. 167, 185-86 (2002).

3. For an elegant account of the intersection of law and community, see AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1995).

4. *See infra* Section II.A.

5. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books ed. 1979) (1975); JUSTICE AND POWER IN SOCIOLEGAL STUDIES (Bryant G. Garth & Austin Sarat eds., 1998); Jonathan Simon,

And it finds expression in myriad state, institutional, and individual actions. Allied with race, it distorts lawyer cognition and epistemology, and deforms sociolegal discourse and ideology. The upshot of that alliance is displayed in the decades of prosecutorial inaction toward reopening race cases.

The clandestine alliance of race and power endangers efforts to explicate and justify reopening under the ethical and jurisprudential norms of criminal justice. Inside the criminal-justice system, race and power seem veiled, furtively encircling prosecutors and fouling their professional judgment. Ensnared by race-embedded tradition, prosecutors seem inured to ethical or jurisprudential calls for reopening. And yet, drawing on the tenets of liberal legalism, the criminal-justice system concedes not only a measure of independence to prosecutors, but also a degree of autonomy to law.[6]

Predicated on liberal legalism, the call for reopening echoes the precepts of lawyer independence and the autonomy of law. Like power, however, these precepts mix with race to constrain prosecutor independence and jurisprudential autonomy. The constraint rises from color and the foundational commitment to a colorblind jurisprudence. Unsurprisingly, the jurisprudence of a colorblind faith in criminal-justice prosecutions in part explains the reopening of dormant race cases. As to black victims and white offenders, that faith dictates equality of treatment, for example, in the submission of new evidence. But that explanation applies only to easy cases of newly discovered evidence. It fails to explain the delay in reopening hard cases, where prosecutorial judgment is solely at stake.

The genesis of a colorblind commitment to criminal justice extends far into American legal history. Colorblind claims propound a prosecutorial stance of neutrality toward race and race cases. For prosecutors occupying this stance and contemplating reopening criminal and civil rights cases, race is inapposite. But for divergences of fact or law, like cases are to be treated alike in context and in retrospect.

The aesthetics and mechanics of colorblind prosecution offer an appealing formalism. As a model of legal process, prosecutorial formalism carries integrity and efficiency. Yet, when applied to dormant race cases, it lacks an explanation and a justification for historical delay. Putting aside lawyer error or misconduct, colorblind prosecutors cannot account for either delay or failure in reopening past prosecutions, except to cite extra-judicial sources of interference, such as jury nullification, police corruption or witness intimidation.

Between Power and Knowledge: Habermas, Foucault, and the Future of Legal Studies, 28 LAW & SOC'Y REV. 947 (1994).

6. *See* E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 219-69 (1975).

The contemporary legacy of colorblind prosecution is color-coded pretext. Driven by mixed motives, the twin desires to stand presently unbiased and rectify past injustice, color-coded claims maintain a disinterested stance while surreptitiously evoking, and often exploiting, racial status and stereotypes. Posed as dispassionate and objective, color-coded prosecutions impart a familiar instrumentalism. Unlike a formalist model of legal process, instrumentalism is purposive and result-oriented. As a model, however, it lacks candor and risks unfairness to both victim and offender. Despite a lack of transparency and the risk of unfairness, color-coded prosecutions supply a legitimate justification for reopening race cases. Outcome-orientation notwithstanding, color-coded-driven reopenings advance dignity and equality norms on behalf of the victim and the state. Reopening affirms the dignity and worth of the victim as an inviolate person. At the same time, it vindicates the state interest in the equal protection of criminal and civil rights laws. That normative advancement sacrifices the process values of candor, openness, and fairness.

The normative costs of color-coded prosecutions leave race-conscious discretion as an alternative justification for reopening abandoned race cases. Race-conscious discretion posits color as a key constituent of sociolegal roles, relationships, and institutions. Sensitive to the starkness of and gradations in color, race-conscious prosecutors survey white offenders, black victims, and their assembled public and private communities for signs of color consciousness. In this way, they seek to reincorporate community into the prosecution function and the criminal-justice process. Under race-conscious discretion, color connects private lawbreaking and public responsibility. Admitting collective responsibility and demonstrating contrition within white-offender communities and embracing the obligations of forgiveness and showing mercy within black-victim communities link restorative justice imperatives to the exercise of race-conscious discretion. That linkage introduces a redemptive role for prosecutors in retrying cases of racial violence.

Redemption-spurred restorative discretion in race cases is color-conscious. Discarding the pretense of colorblind claims and the pretext of color-coded contentions, restorative discretion urges candor in recollecting local histories of racial violence and in reconciling painful differences of cross-racial community. Candor is tied to an open call for offender atonement and victim mercy. That call fastens retributive theories of punishment to redemption and reconciliation norms, integrating offender contrition and victim forgiveness while mitigating vengeance. Stitching retributive and restorative theories of punishment into a race-conscious model of lawyer discretion furnishes a redemptive process for prosecutors sullied by decades-old failure and decades-long neglect of criminal and civil rights cases. Redemption requires the reconception of victim, offender, and community identity,

the translation of their private segregated narratives into public empathic dialogues, and the revision of prosecutorial norms and practices to engender cross-racial conversations and restorative collaborations.

To muster a redemptive appraisal of prosecutorial norms and practices in retrying cases of white-on-black violence, the Essay will be divided into five parts. Part I examines the place of race in law and community. Part II outlines a genealogy of race cases and describes the renewed prosecution of criminal and civil rights cases winnowed from the 1950s and 1960s. Part III evaluates the standard conception of prosecutorial discretion as a justification for retrying race cases. Part IV analyzes the notion of race-conscious discretion as an alternative justification. Part V assesses the idea of community-guided restorative discretion as an additional justification. The Essay concludes with a reconsideration of prosecutorial ethics and community norms in retrying cases of racial violence.

I. RACE IN LAW AND COMMUNITY

Race colors law, crime, and community. It shadows the performance of public and private roles. It shades the meaning of relationships. And it stains the operating norms of institutions. Narrowly crafted, this Essay neither transforms the standard conceptions of criminal-justice roles, relationships, and institutions, nor adjusts the boundaries of colorblind, color-coded, and color-conscious representation. Instead, it parses the meaning of prosecutorial norms and their function in the context of retrying previously abandoned cases of white-on-black racial violence. The focal points of the analysis are race and redemptive community.[7]

The subjects of race and community have gained increased attention in legal theory and practice. Both the Critical Race Theory[8] and

7. The themes of race and community unite the essays in this Colloquium. *See* Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201 (2003); Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225 (2003); Eric K. Yamamoto et al., *American Racial Justice on Trial — Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269 (2003). For studies of racial reconciliation and redemption, see HARLON L. DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES (1995), and ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1999).

8. *See* CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancis eds., 2d ed. 2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002); *see also* ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (1998); MIXED RACE AMERICA AND THE LAW: A READER (Kevin R. Johnson ed., 2003).

LatCrit[9] movements proclaim race as central to legal theory and sociolegal studies. Likewise, both the community prosecution and defender movements[10] and the restorative justice movement[11] declare community as crucial to legal practice. Race and community seem equally pivotal to adjudication.[12] Yet academics, policymakers, and practitioners (prosecutors, defenders, and judges) remain at variance in their appraisals of the normative value and sociolegal meaning of race and community in the criminal-justice system.

Like the much-debated turn to norms and social meaning in recent criminal-justice-policy research,[13] this Essay challenges the standard

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9. *See* Symposium, *LatCrit: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997), 10 LA RAZA L.J. 1 (1998); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997); *see also* THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998).

10. The community prosecution movement encourages federal and state prosecutors to collaborate with local governmental (e.g., police departments and criminal courts) and nongovernmental (e.g., block associations and neighborhood groups) organizations in designing innovative, community-based crime prevention and law enforcement initiatives. *See* Elaine Nugent & Gerard A. Rainville, *The State of Community Prosecution: Results of a National Survey*, PROSECUTOR, Mar./Apr. 2001, at 26. By contrast, the community defender movement promotes multidisciplinary approaches to offender rehabilitation, offering individualized support services aimed at community reintegration. *See* Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002) [hereinafter Alfieri, *Community Prosecutors*]; Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401 (2001); Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUD. LEGAL ETHICS 199 (1999); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002).

11. The restorative justice movement addresses both the agents and institutions of the criminal-justice system, offering prosecutors, defenders, and judges a dissonant ethos of victim-centered offender punishment and offender-specific community restoration. Remarking on this discord, Robert Cochran observes: "[R]estorative justice takes the offender's crime seriously and calls for repentance and restitution." Robert F. Cochran, Jr., *The Criminal Defense Attorney: Roadblock or Bridge to Restorative Justice*, 14 J.L. & RELIGION 211, 213 (1999-2000); *see also* Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651 (2000); Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251 (1993); Sara Sun Beale, Still Tough on Crime? Prospects for Restorative Justice in the United States (2003) (unpublished manuscript, on file with author). On the discordant sociology of punishment, see JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990), and DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001).

12. *See* Kathryn Abrams, *Critical Strategy and the Judicial Evasion of Difference*, 85 CORNELL L. REV. 1426 (2000); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000); Lis Wiehl, *"Sounding Black" in the Courtroom: Court-Sanctioned Racial Stereotyping*, 18 HARV. BLACKLETTER L.J. 185 (2002).

13. *Compare* Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998), *and* Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805 (1998), *with* Elizabeth Anderson, *Beyond* Homo Economicus*: New Developments in Theories of Social Norms*, 29 PHIL. & PUB. AFF. 170 (2000), *and* Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC'Y REV. 179 (2000), *and* Tanina Rostain, *Educating* Homo Economicus*: Cau-*

adversarial conception of criminal-justice roles, relationships, and institutions.[14] Fundamentally, it contests the partisan, instrumental tradition of prosecutor roles. Moreover, it disputes prosecutor relationships with offenders, victims, and the state.[15] Further, it questions the function of race in prosecutor offices across advocacy, outreach, and training. For each role, relationship, and institutional practice, the Essay checks the construction of racial identity in prosecutor narratives, probing for signs of colorblind, color-coded, and color-conscious representation.

Like earlier interdisciplinary approaches to the study of race in American law drawn from legal anthropology,[16] history,[17] and the law-and-society movement,[18] the Essay views the social construction of color in law as a means to understand racial ideology in culture and society.[19] The task is to gauge the colored discourses — spoken and

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tionary Notes on the New Behavioral Law and Economics Movement, 34 LAW & SOC'Y REV. 973 (2000).

14. On the standard adversarial conception of lawyering, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 50-103 (1988), and Richard Wasserstrom, *Roles and Morality*, *in* THE GOOD LAWYER 25-37 (David Luban ed., 1983).

15. Here, the term "state" is used interchangeably to refer to federal, state, and local entities. The term implies government under the auspices of legislative, judicial, and executive branches operating at national, state, and local levels.

16. *See* JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART (1988); JOHN COMAROFF & JEAN COMAROFF, ETHNOGRAPHY AND THE HISTORICAL IMAGINATION (1992); CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (1983); CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE (Mindie Lazarus-Black & Susan F. Hirsh eds., 1994); John L. Comaroff, *The Discourse of Rights in Colonial South Africa: Subjectivity, Sovereignty, Modernity*, *in* IDENTITIES, POLITICS, AND RIGHTS 193 (Austin Sarat & Thomas R. Kearns eds., 1995); Carol J. Greenhouse, *Courting Difference: Issues of Interpretation and Comparison in the Study of Legal Ideologies*, 22 LAW & SOC'Y REV. 687 (1988); Sally Engle Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889 (1991).

17. *See* JAMES GOODMAN, STORIES OF SCOTTSBORO (1994); RACE ON TRIAL: LAW AND JUSTICE IN AMERICAN HISTORY (Annette Gordon-Reed ed., 2002); William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051 (1993); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

18. *See* RACE, LAW, & CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* (Austin Sarat ed., 1997); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995).

19. On law and culture, see PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); THOMAS ROSS, JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS (1996); Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129 (2002); Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149 (1997); and Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3 (2001). *See also* Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 LAW & SOC. INQUIRY 139 (2002).

unspoken — of prosecutors inscribed in the texts of criminal-justice advocacy. My thesis, garnered from prior studies of death penalty and poverty-law practice,[20] is that color-tinged criminal-justice narratives deform the public and private identity of offenders, victims, and their allied communities.

By narrative I mean story, voiced descriptively or prescriptively.[21] Akin to criminal-defense lawyers, prosecutors tell stories about law and society.[22] Everyday they talk of crime, the criminal law, and the criminal-justice system. They talk in advocacy through opening statements, direct examinations, and closing arguments at hearings, trials, and appeals. Their talk, at once prosaic and metaphorical, echoes in the texts of colloquies, memoranda, and opinions. By text I mean both the physical record (transcript, brief, or order) and the social context (law office, jail, or courthouse) of juridical speech and conduct. The norms and meanings heard in these texts bear moral consequence.

Liberal theory recognizes the moral import of juridical speech in its oral, written, and symbolic figurations. The gravity of speech gathers weight under feminist and critical race readings of law and sociolegal relations. Derivative of liberalism, these readings depart from pluralist tendencies toward neutrality and tolerance. For feminists, speech breaches neutrality in the political economy of the marketplace and the workplace, causing psychological and economic harm. The harm may deform the identity of women, as in the case of pornography, or silence the voice of women, as in the case of a hostile work environment. Left unregulated, the aggressions of speech reproduce gendered hierarchies of female submission.[23] For critical race

20. *See* Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325 (1996); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J 2107 (1991); Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994) (reviewing GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992)).

21. *See* LAW STORIES (Gary Bellow & Martha Minow eds., 1996); LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996).

22. *See* Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994); David Dante Troutt, Screws, Koon, *and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999); *see also* Paul Schiff Berman, *Rats, Pigs and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994).

23. *See* ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 24-47 (The Women's Press Ltd. 1981) (1979); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 206-13 (1987); CATHARINE A. MACKINNON, ONLY WORDS 71-110 (1993); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 195-214 (1989); *cf.* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995).

theorists, speech may strike blows against the body of the self and the bond of community. The blows of hate speech strike especially hard. Unimpeded by regulation, the individual and collective assaults of derogatory speech fortify the lines of segregation.[24]

Modern in tone, the proffered readings of feminists and critical race theorists concerning speech-induced injury extend under postmodern analysis as well. Keenly attentive to the identity grammar of language, postmodern jurisprudence views the liberal subject (offender or victim) as the product of interlocking public and private discourses. For illustration, consider the victim-as-subject. For postmodernists, the very idea of the victim and the experience of victimization are heavily contingent on the accretion of historical portrayals in culture and society. These discourse-sketched portraits depict images and convey meanings that describe and prescribe the behavior expected of victims. Ingrained in the conscious and unconscious mind and interwoven into society, the discourses — oral and written histories — manufacture the character and perception of the victim in the courtroom and in the world. The communication norms regulating speech at these and other overlapping sites help mold in private imagination and in public performance the stance of the victim toward society and the posture of society toward the victim. This complex interchange in no way forecloses agency: the subjective engagement with, and intervention upon, the world outside the self. Freedom and volition persist, albeit in an often highly structured space enclosed by larger forces and material necessity.[25]

Both modern and postmodern liberal norms connect dignity to personhood and liberty to agency. On this logic, when dignity is diminished, personhood suffers. Similarly, when liberty is curbed by a caste structure based on an immutable characteristic like race, the freedom of agency,[26] of self-intervention in the outside world, wanes for individuals, for their affiliated groups, and for their local and even national communities. To the extent that lawyer speech adversely

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24. *See* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery that Mocks the Thirteenth Amendment*, 44 HOWARD L.J. 311 (2001); Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283 (2000).

25. *See* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE (2000); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995); PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 24 (1996).

26. On the moral agency of the subject in liberal legalism and feminist jurisprudence, see Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995). *See also* MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 55-80 (1999).

affects the private self-worth or public caste-standing of participants (offenders and victims) in the criminal-justice system, it demeans individual dignity and curtails collective liberty in society.

To be sure, neither the debasement of individual dignity nor the constriction of collective liberty enacted by law or custom and enforced by state or private action obliterates identity. For offenders and victims, identity is too deep-rooted in its origins (for example, family, faith, school) and too multifaceted in its dimensions (for example, race, gender, class) to be easily upended or dismantled. But identity may be damaged if ideological discourses are pernicious and sociolegal conditions are oppressive. The damage is twofold. Dignity may be so trampled that the integrity or intrinsic value of the wounded person becomes discounted as negligible. At the same time, liberty may be so constrained in the spheres of economic exchange, social intercourse, and political participation that the status of the person or group becomes derided as marginal.[27]

The ideology-driven white racial violence of the 1950s and 1960s, coupled with the repressive regulation of Jim Crow laws, inflicted widespread damage on black communities throughout the South.[28] The damage exceeded simple injury and death to exact both dignitary and stigma harm. Rationalized by habits of discourse and reinforced by the force of law and vigilante violence, the harm belittled black racial dignity, negating the integrity of individual citizens and the value of whole communities. Deemed naturally or necessarily subordinate in commerce, culture, and civic governance, the same harm cabined black liberty, relegating black citizens to the status of economic marginality, social inferiority, and political disenfranchisement.

The resurgent prosecution of crimes of racial violence committed nearly a half century ago affords an occasion to reconsider the operation of the criminal-justice system in repairing the degradation of black dignitary and liberty interests. Reconsideration entails the application of a retrospective and contextual ethical valence, a valence that shifts backward and forward to explain prosecutorial inaction or

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27. *See* JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY (1990); William H. Simon, *Three Limitations of Deliberative Democracy: Identity Politics, Bad Faith, and Indeterminacy*, *in* DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 49 (Stephen Macedo ed., 1999) [hereinafter DELIBERATIVE POLITICS]; Iris Marion Young, *Activist Challenges to Deliberative Democracy*, *in* DEBATING DELIBERATIVE DEMOCRACY 102 (James S. Fishkin & Peter Laslett eds., 2003); Iris Marion Young, *Difference as a Resource for Democratic Communication*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 383 (James Bohman & William Rehg eds., 1997); Iris Marion Young, *Justice, Inclusion, and Deliberative Democracy*, *in* DELIBERATIVE POLITICS, *supra*, at 151.

28. *See* JOHN DITTMER, LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI (1994); ADAM FAIRCLOUGH, BETTER DAY COMING: BLACKS AND EQUALITY, 1890-2000 (2001); HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY 1954-1980 (1981).

failure when crimes of racial violence go unpunished and to justify prosecutorial action when such crimes undergo penalty. It is precisely this search for justification that drives the present inquiry.

At first blush, justification for the resurgent prosecution of cases of white-on-black racial violence years after their disparate criminal acts and their subsequently aborted or failed trials seems apparent. It is a justification rooted in the regularly intoned belief in a protean *politics of race.* Applicable to both southern and northern precincts, this vague incantation suggests that accumulated decades of emancipatory changes in American culture and society, joined by coextensive transformations in politics and economics, gradually liberated prosecutors to renew their campaign against racially motivated violence. Put aside for the moment that the historical record furnishes scant evidence of a prosecutor-mounted anti-terror campaign.[29] In fact, taken as a whole, the cases discussed here display small semblance of cohesion or organization. Scattered across numerous states and varied factual landscapes, they resemble the diffuse product of ad hoc decisionmaking, rather than the regimented logic of an egalitarian crusade.

Despite this erratic record and the ambiguity of redemption, the politics of race theorem casts prosecutors not only as redeemers, but also as prisoners. Imprisoned by history, their revelation to take up the cause of freedom comes late. History, however, is a multifarious warden. It dictates through state functionaries, among them legislators, judges, administrators, and sheriffs. It disciplines through evolving cultural and social mores.

Casting prosecutors as captive cultural and social artifacts or reflexive state instruments is troubling. Even at a glance, the account seems deterministic. It supplies crude treatments of agency and causation. More disquieting, the account seems tied by a strand of legal nihilism. It denigrates the role of law, professional norms, and legal ethics in guiding the prosecution function. Neither of these observations is meant to deny the force of culture and society or the power of the political arm of the state to twist prosecutorial decisionmaking. But no ideology banishes choice. And no state, acting through the delegated powers of legislatures, courts, and enforcement agencies, is omnipotent. Both impress freedom and constraint on the office of the prosecutor.

Mired in liberalism and its heralded autonomy of law, this Essay rejects an untrammeled politics of race justification for the resurgent

29. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, at 43-44, 101-13 (1985); BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE (1997); ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 (1980); Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 39-42 (1996).

prosecution of white-on-black racial violence. In fairness, the rejection is only partial. It acknowledges the influence of culture, society, and political economy on the prosecutor's station. Furthermore, it admits the potency of the state's grip on that station. Nonetheless, it balks at the suggestion that law and the norms of the profession hold no sway over the discharge of the prosecutor's duties. The duties may be circumscribed and the norms corrupted, yet they enter into the daily calculus of prosecutorial discretion in race cases. The task is to ascertain the capacity of such norms, and their corresponding ethical precepts, to infiltrate the race-besieged consciousness of prosecutors at the midpoint and at the turn of the century. The path into lawyer consciousness leads to discretion. Here, that path is bordered by color.

The idea of color pervades American law and the criminal-justice system. It suffuses advocacy and adjudication as well as legislation and law enforcement. Its boundary lines shift, sometimes detectable, sometimes coded. The notion of colorblind representation resonates deeply in the process-oriented constitutional jurisprudence of the criminal law,[30] appealing to a sense of neutrality, procedural fairness, and even-handed justice.[31] The notion of color-coded representation, in comparison, evokes an instrumental, result-oriented jurisprudence of subterfuge, entailing covert stratagem, veiled motive, and pretext.[32] By contrast, the notion of color-conscious representation invokes a remedial, egalitarian jurisprudence of restoration and reparation, broadly applicable to the fields of education,[33] employment,[34] and

30. *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992). For a critique of colorblind neutrality, see MATTHEW B. ROBINSON, JUSTICE BLIND: IDEALS AND REALITIES OF AMERICAN CRIMINAL JUSTICE (2002), and Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000).

31. On procedural fairness as justice, see JOHN RAWLS, COLLECTED PAPERS (Samuel Freeman ed., 1999); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001), and JOHN RAWLS, A THEORY OF JUSTICE (rev. ed., 1999).

32. *See* BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW (1998); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

33. *See* Richard Delgado & Jean Stefanic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000); Paul Diller, Note, *Integration Without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity*, 99 MICH. L. REV. 1999 (2001).

34. *See* John Cocchi Day, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CAL. L. REV. 59 (2001).

voting.[35] To better understand the classifications of colored discourse in criminal law and advocacy, consider the category of race cases.

II. RACE CASES

Race cases provide a categorical site for the intersection of law, culture, and society. The current prosecution of decades-old criminal and civil rights cases for long-neglected racial wrongs demarcates one such site. From an antebellum starting point, the trials preserve elements of the Middle Passage history of race in the law of slavery. This history chronicles the common law of contract, tort, and property, and the criminal law of slave codes.[36] From a postbellum perspective, the trials extend traces of the Reconstruction history of race in the law of emancipation. This history records the conjunction of statutory freedoms, common-law privileges, and criminal-law proscriptions.[37] Under both antebellum and postbellum regimes, the trials of race cases mirror the surrounding culture, politics, and sociology of race. Indeed, the law of race is shaped by, and in turn shapes, the culture, political economy, and social structure of race.

A. *A Genealogy of Race Cases*

The history of race cases spans more than two centuries of American law.[38] The task of surveying such wide-ranging cases

35. *See* Mark Crain, *The Constitutionality of Race-Conscious Redistricting: An Empirical Analysis*, 30 J. LEGAL STUD. 193 (2001); John Hart Ely, *Confounded by* Cromartie*: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders*, 56 U. MIAMI L. REV. 489 (2002).

36. *See* ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2000); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Ariela J. Gross, *"Like Master, Like Man": Constructing Whiteness in the Commercial Law of Slavery, 1800-1861*, 18 CARDOZO L. REV. 263 (1996); Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property*, 18 CARDOZO L. REV. 473 (1996).

37. *See* EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH (1984); ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY (1983); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM (1967); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969 (1992); Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994); *see also* Florence Wagman Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 ALA. L. REV. 463 (2002).

38. *See* DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW (4th ed. 2001); MICHAEL F. HIGGINBOTHAM, RACE LAW: CASES, COMMENTARY, AND QUESTIONS (2001); RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (Juan F. Perea et al. eds., 2000).

embroils the idea and historiography of race.[39] No attempt will be made here to settle those controversies or to compile a comprehensive catalogue of race cases. However laudable, such endeavors exceed the grasp of this Essay. Instead, the idea of race and the history of its prosecution will be tapered to reported accounts of black victims of white violence during a roughly ten-year period of the mid-twentieth century. Earlier periods inform these accounts, notably the colonial,[40] Reconstruction,[41] and Jim Crow[42] eras. In the same way, antecedent cultural and social conditions animate the character of the accounts.[43] The conditions impact upon the gendered and ethnic composition of racial identity, the form of racialized narrative, and the racial content of crime and criminal justice.[44]

Against that backdrop, the inclusion of civil disputes, criminal prosecutions, and civil rights proceedings in a catalogue of race cases, while appropriate, overtaxes this inquiry. Unsurprisingly, the civil cases of paramount interest stem predominantly from nineteenth-century slave-holding disputes under contract, tort, and property law.[45]

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39. *See* CHRISTOPHER WALDREP, RACIAL VIOLENCE ON TRIAL (2001); RACIAL CLASSIFICATION AND HISTORY (E. Nathaniel Gates ed., 1997).

40. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR — RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); ALDEN T. VAUGHAN, ROOTS OF AMERICAN RACISM: ESSAYS ON THE COLONIAL EXPERIENCE 128-74 (1995); ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON'S BOSTON (1998).

41. *See* EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION (1993); JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR (1994); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877 (1982); *see also* RICHARD PAUL FUKE, IMPERFECT EQUALITY: AFRICAN AMERICANS AND THE CONFINES OF WHITE RACIAL ATTITUDES IN POST-EMANCIPATION MARYLAND (1999); AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA (James Lowell Underwood & W. Lewis Burke, Jr. eds., 2000).

42. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1966); *see also* STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL (1988); Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine, 1865-1896*, 28 AM. J. LEGAL HIST. 17 (1984).

43. *See* FRANKIE Y. BAILEY & ALICE P. GREEN, "LAW NEVER HERE": A SOCIAL HISTORY OF AFRICAN AMERICAN RESPONSES TO ISSUES OF CRIME AND JUSTICE (1999); Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640 (2001).

44. *See* KATHLEEN M. BROWN, GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA (1996); CARL GUTIERREZ-JONES, CRITICAL RACE NARRATIVES: A STUDY OF RACE, RHETORIC AND INJURY (2001); RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD (2002); IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003); ERIC W. RISE, THE MARTINSVILLE SEVEN: RACE, RAPE AND CAPITAL PUNISHMENT (1995); Randall L. Kennedy, *"Nigger!" as a Problem in the Law*, 2001 ILL. L. REV. 935.

45. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975); ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES (1998).

The disputes determine the meaning of skin color and the norms of racial status.[46] Contemporary civil and criminal cases equally engage color[47] and status.[48] Civil rights cases, branching out from postbellum constitutional amendments and federal statutes, also confront dominant stereotypes and status distinctions.[49]

The social construction of color is basic to race-contaminated civil, criminal, and civil rights proceedings.[50] The process of construction occurs through the identity-making discourses of racial difference and hierarchy.[51] Difference, manifested in identity and culture, provokes the separation of division. Preserving the divisions and exclusions of hierarchy demands an abiding consciousness of race. Consciousness hinges on the reproduction of identity and narrative.

Stirred by interracial animus, race cases highlight the symbolic authority of racial identity and the rhetorical power of racialized narratives. Acts of bigotry and violence erupt out of identity distinctions based on status and narrative rationales. The distinctions rest on axioms of black moral and cultural inferiority deduced from antebellum principles of racial hierarchy as well as ingrained habits of subordinating construction.[52] The hierarchies depend on dominant and subordinate socioeconomic ranking. Race-based status distinctions

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46. *See* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998); *see also* Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000); Judith Kelleher Schafer, *"Under the Present Mode of Trial, Improper Verdicts Are Very Often Given": Criminal Procedure in the Trials of Slaves in Antebellum Louisiana*, 18 CARDOZO L. REV. 635 (1996).

47. *See* K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CAL. L. REV. 41 (2000); Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934*, 20 LAW & HIST. REV. 225 (2002); *see also* Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002).

48. *See* Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45 (1998); Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1 (1994).

49. *See* Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155 (1995); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509 (1994); *see also* Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989).

50. *See* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 111-53 (1996); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

51. *See* Robert J. Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TUL. L. REV. 11 (2001); Kim Benita Furumoto, *Boundaries of the Racial State: Two Faces of Racist Exclusion in United States Law*, 17 HARV. BLACKLETTER L.J. 85 (2001).

52. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000); STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001).

and
hierarchies pervade the laws, legal institutions, and sociolegal relations of the criminal-justice system.[53] The laws of criminal codes and procedure indulge race.[54] The offices of federal and state prosecutors exploit it.[55] Even the relationships between the prosecutor and victim, and conversely, the criminal defender and offender, mull its consequence.[56]

Racial identity lies at the core of hierarchies in the laws, institutions, and relations of advocacy and adjudication. Identity is carved into seemingly immutable stereotypes.[57] In the civil-and-criminal justice system, stereotypes warp symbols and skew speech. Advancing case-by-case, the stereotypes privilege unequal configurations of public and private rights and duties. Accrued over time, they infect constitutional interpretation, statutory construction, and common law adjudication.[58]

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53. On racial hierarchies in the criminal-justice system, see JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS (1998); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); David Cole, *Foreword, Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1074-82 (1999); Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 BROOK. L. REV. 1165, 1184-96, 1199-1204, 1205-46 (1995); and Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994). *See generally* Note, *Constitutional Risks to Equal Protection in the Criminal Justice System*, 114 HARV. L. REV. 2098 (2001); *Developments in the Law — Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988).

54. On racial status distinctions in the criminal law, see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); and Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

55. On prosecutorial exploitation of race in federal and state forums, see Miller-El v. Cockrell, 123 S. Ct. 1029, 1044-45 (2003) (citing statistical and historical evidence of racial discrimination in jury selection by Dallas County, Texas, prosecutors, including an office-wide "culture of discrimination"); and Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 180 (1996).

56. *See* Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212 (1992); M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855 (1993); Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319 (2001).

57. *See* Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999).

58. *See* MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM (1999); Pam-

The colors of black and white dominate racial stereotypes. Forged from antebellum and postbellum categories, the colors erect and reproduce a dichotomy of black guilt and white innocence. This dichotomy is integral to the narrative form and substance of criminal and civil rights disputes.[59] It produces false public pronouncements of black culpability and hollow proclamations of white virtue. These mixed declarations of law and fact carry their own logic and bring internal coherence to race cases.

The law itself maps the initial contours of race cases. Traced here, the substantive doctrines of criminal and civil rights law inject race into the methods of law enforcement, the strategies of advocacy, and the standards of adjudication. Consider, for example, racial profiling[60] and hate crimes.[61] Racial profiling affects law enforcement and charging. Hate crimes impact upon indictment and sentencing. The procedural rules of federal and state practice also interpose race into the tactics of advocacy and the iterations of judicial rulings. Consider, for instance, the continuing furor over equality interests in criminal procedure and jury selection. Equality issues vex suppression hearings and capital sentencing schemes.[62] Equal or fair representation issues rankle judges in reviewing jury peremptory challenges.[63]

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ela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998); William G. Ross, *The Constitutional Significance of the Scottsboro Cases*, 28 CUMB. L. REV. 591 (1997-1998).

59. On the black/white dichotomy in criminal and civil rights narratives, see RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE 164-89 (1995); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616-51 (1985); and Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990). *See also* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

60. *See* Brandon Garrett, *Standing While Black: Distinguishing* Lyons *in Racial Profiling Cases*, 100 COLUM. L. REV. 1815 (2000); Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); Gregory M. Lipper, *Racial Profiling*, 38 HARV. J. ON LEGIS. 551 (2001); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409 (2000).

61. *See* JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIMES (2002); JAMES B. JACOBS & KIMBERLY POTTER, HATES CRIMES: CRIMINAL LAW & IDENTITY POLITICS (1998); VALERIE JENNESS, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT (2001); BARBARA PERRY, IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES (2001); *see also* Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement*, 80 B.U. L. REV. 1227 (2000).

62. *See* Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedures: From* Brown *to* Miranda, Furman *and Beyond*, 54 VAND. L. REV. 359 (2001); Lewis R. Katz, Mapp *After Forty Years: Its Impact on Race in America*, 52 CASE W. RES. L. REV. 471, (2001).

63. *See* Samuel R. Gross, *Race, Peremptories, and Capital Jury Deliberations*, 3 U. PA. J. CONST. L. 283 (2001); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997); *see also* Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L. REV. 9, 21-27, 31-40 (1997); Susan

The race of judges and the racial composition of juries also demarcate race cases. For judges, racial biography may sway findings of fact and conclusions of law in formalist and instrumental directions, as demonstrated in slave code and civil rights enforcement.[64] For juries, racial biography may tilt evidentiary weighing and legal deliberation, as shown in jury nullification.[65] Race-tainted cognitive prisms may afflict parties, victims, and lawyers as well. The racial identity of parties rouses client-lawyer and client-community tensions.[66] Victim identity induces strain over prosecutorial abuse and bias, as seen in protests about revictimization, victims' rights, and victim impact statements.[67] Lawyer-racial identity, as counsel and as adversary,[68] also mediates criminal and civil rights cases, as the divergent history of the profession and the black bar prove.[69] Taken together, these markings indicate the external form and internal structure of race cases.[70]

N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807 (1993); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996).

64. *See* J.W. PELTASON, 58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1978); LINN WASHINGTON, BLACK JUDGES ON JUSTICE (1994); Derrick A. Bell, Jr., *Civil Rights Lawyers on the Bench*, 91 YALE L.J. 814 (1982) (reviewing JACK BASS: UNLIKELY HEROES (1981)); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997).

65. *See* Long X. Do, *Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake*, 47 UCLA L. REV. 1843 (2000); Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After* Bushell's *Case*, 111 YALE L.J. 1815 (2001); *see also* Walter Rugaber, *Trial of 18 Charged with Conspiracy in Mississippi Goes to All-White Jury*, N.Y. TIMES, Oct. 19, 1967, at 37.

66. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482-93 (1976); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law As Language*, 87 MICH. L. REV. 2459 (1989); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995).

67. *See* Katie Long, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187 (1995); Walker A. Matthews, III, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1998); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313 (2002).

68. *See* Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9 (1994); Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766 (1997); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995); *see also* Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium*, 18 HARV. BLACKLETTER L.J. 1 (2002); Elaine R. Jones & Jaribu Hill, *Contemporary Civil Rights Struggle: The Role of Black Attorneys*, 16 NAT'L BLACK L.J. 185 (1999-2000).

69. *See* J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944, at 541-610 (1993); Susan D. Carle, *Race, Class, and Legal Ethics in the Early*

B. *The Reprosecution of Race Cases*

The race cases in this preliminary study are culled from a score of criminal and civil rights proceedings in both northern and southern courts. For the northern states — Indiana and Pennsylvania — the cases arose late in the history of black industrial migration.[71] For the southern states — Alabama, Louisiana, and Mississippi — the cases emerged during the middle period of the evolution of the New South.[72] Like earlier postbellum incidents of lynching,[73] many of the cases grew out of vigilante forms of private violence variously aided or condoned by state agents. Precipitated by virulent opposition to the civil rights movement, the cases often attracted national attention.[74]

The violence engulfing the civil rights movement and spawning the proceedings at issue here illustrates the historical bonds of race, law, and community. Those bonds are forged in the trial and retrial of race cases under the aegis of prosecutorial discretion. In the criminal-justice system, both easy and hard cases are products of discretion. Although bounded by Jim Crow laws and customs (all-white juries and witness reprisals), the cases are manufactured from familiar materials: physical evidence and witness testimony of white-on-black violence. Easy cases rediscover omitted and suppressed evidentiary materials. Hard cases reweigh neglected criminal-justice norms in parsing extant evidence. For examples of evidence-driven easy cases, consider the histories of the Sixteenth Street Baptist Church bombing, Medgar Evers, Vernon Dahmer, Carol Jenkins, and Lillie Belle Allen.

Turn first to the 1963 bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama.[75] On Sunday morning, September

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NAACP (1910-1920), 20 LAW & HIST. REV. 97 (2002); David B. Wilkins, Comment, *Class Not Race in Legal Ethics: Or Why Hierarchy Makes Strange Bedfellows*, 20 LAW & HIST. REV. 147 (2002).

70. For an initial mapping of race case genealogy, see Alfieri, *Race Trials*, *supra* note 1, at 1305-23.

71. *See* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991).

72. *See* C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913 (1951).

73. *See* W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930 (1993); PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2002); STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930 (1995); GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY 1865-1940: LYNCHINGS, MOB RULE, AND "LEGAL LYNCHINGS" (1990).

74. *See* MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-*BROWN* SOUTH (1987); Michal R. Belknap, *The Vindication of Burke Marshall: The Southern Legal System and the Anti-Civil Rights Violence of the 1960s*, 33 EMORY L.J. 93 (1984).

75. *See* DIANE MCWHORTER, CARRY ME HOME: BIRMINGHAM, ALABAMA — THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION (2001).

15, 1963, a bomb exploded in the basement of the Sixteenth Street Baptist Church, killing four children, ages eleven to fourteen: Denise McNair, Carole Robertson, Cynthia Wesley, and Addie Mae Collins. Hindered by the FBI, state and federal prosecutors failed to marshal indictments. In 1971, Alabama prosecutors reopened the case and in 1977 indicted Klansman Robert E. Chambliss, citing the inculpatory testimony of Chambliss's niece. An Alabama court convicted Chambliss and sentenced him to prison where he died in 1985.[76] In 1995, at the urging of the Birmingham-black community, the FBI reopened its controversial investigation. In 2000, state and federal prosecutors indicted Klansmen Thomas E. Blanton, Jr. and Bobby Frank Cherry.[77] Alabama courts held Cherry mentally incompetent to stand trial but convicted Blanton of first-degree murder.[78]

Similarly, consider the 1963 murder of Medgar Evers, a thirty-seven-year-old NAACP Field Secretary, in Belzoni, Mississippi. On the night of June 12, 1963, Evers was shot in the back outside his home. Mississippi prosecutors indicted Klansman Byron De La Beckwith for the murder. Two 1964 trials ended in mistrials. In 1990, upon public disclosure of suspected jury tampering gleaned from Mississippi Sovereignty Commission records, prosecutors reindicted Beckwith. The trial court convicted Beckwith; he died in prison.[79]

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76. *See* Drummond Ayres Jr., *'Amens' at Church in Birmingham Are Loud After Bombing Verdict*, N.Y. TIMES, Nov. 21, 1977, at 24; Wayne King, *Indictments Recall Terror of Birmingham Sunday in 1963*, N.Y. TIMES, Oct. 4, 1977, at 18; *Alabama Does Right by Martyrs*, HARTFORD COURANT, May 6, 2001, at C2; *Ex-Klansman Indicted in '63 Bombing That Killed 4*, N.Y. TIMES, Sept. 27, 1977, at 20; *FBI Agents Honored for Helping Solve 1963 Church Bomb Case*, L.A. TIMES, Nov. 14, 2002, at A19.

77. *See* Marlon Manuel, *Church Bombing Trial Aims for Healing: Progressive Prosecutor, Nagging Consciences and New Power Structures Try to Make Up for Decades of Delays*, ATLANTA J.-CONST., Apr. 23, 2001, at A1; Marlon Manuel, *Church Bombing Trial 'Worth the Wait'*, ATLANTA J.-CONST., Apr. 23, 2001, at A6; Janita Poe, *Birmingham Bombing Victims: Church Bomber Guilty, at Last*, ATLANTA J.-CONST., May 23, 2002, at A1; Janita Poe, *Revisiting 'Bombingham'; Birmingham Aims Marketing Campaign Within City Limits as 39-year-old Trial Reawakens Lingering Doubts*, ATLANTA J.-CONST., May 11, 2002, at A1 [hereinafter Poe, *Revisiting 'Bombingham'*]; Tatsha Robertson, *Righting Our Uncivilized Wrongs: Reopened Race Murder Cases May Yet Add Justice to an Era*, BOSTON GLOBE, May 6, 2001, at E1; Kevin Sack, *An Alabama Prosecutor Confronts the Burden of History*, N.Y. TIMES, May 5, 2001, at A8; Cynthia Tucker, *In Birmingham, Justice Is Late for Four Little Girls*, ATLANTA J.-CONST., May 21, 2000, at B5.

78. *See* Marlon Manuel, *Church Bombing Verdict: Justice Served, FBI Man Says; Ex-Klansman Guilty in 37-year-old Case*, ATLANTA J.-CONST., May 2, 2001, at 1A; Poe, *Revisiting 'Bombingham,' supra* note 77; Howell Raines, *The Birmingham Bombing*, N.Y. TIMES, July 24, 1983, §6 (Magazine), at 12; Stephanie Saul, *FBI Outreach Led to Bombing Arrests*, NEWSDAY, May 19, 2000, at A6.

79. *See* BOBBY DELAUGHTER, NEVER TOO LATE: A PROSECUTOR'S STORY OF JUSTICE IN THE MEDGAR EVERS CASE (2001); MARYANNE VOLLERS, GHOSTS OF MISSISSIPPI: THE MURDER OF MEDGAR EVERS, THE TRIALS OF BYRON DE LA BECKWITH, AND THE HAUNTING OF THE NEW SOUTH (1995); Todd Taylor, *Exorcising the Ghosts of a Shameful Past: The Third Trial and Conviction of Byron De La Beckwith*, 16 B.C. THIRD WORLD L.J. 359 (1996) (reviewing VOLLERS, *supra*); Christina Cheakalos, *Around the South: No Big Breaks in Old Racial Slayings: Beckwith Case Seen as a Rarity*, ATLANTA J.-

Likewise, consider the 1966 murder of Vernon Dahmer, a grocery store owner and the President of the Harrisburg, Mississippi, NAACP. On January 10, 1966, Klansmen firebombed Dahmer's house at night. He died of smoke inhalation after exchanging gunfire with Klansmen, enabling his family to escape. Mississippi prosecutors indicted Klansman Sam Bowers for the murder. At trial, Mississippi juries twice acquitted Bowers. Prosecutors also indicted William Smith for the murder. Smith's first state trial ended in a hung jury amid charges of jury tampering. A second state trial court convicted Smith and sentenced him to prison. In 1998, again following public disclosure of Mississippi Sovereignty Commission evidence, prosecutors reindicted Bowers. A third Mississippi trial court convicted Bowers and sentenced him to life imprisonment.[80]

Further, consider the 1968 murder of Carol Jenkins, a twenty-one-year-old aspiring model, in Martinsville, Indiana. On September 16, 1968, Jenkins was stabbed to death while selling encyclopedias door-to-door. An Indiana police investigation failed to name a suspect or make an arrest. On May 8, 2002, based on new evidence supplied by a child eyewitness, state prosecutors indicted Kenneth Clay Richmond for murder. Indiana courts held Richmond incompetent to stand trial; he died in jail.[81]

CONST., Feb. 10, 1994, at A3; Willa J. Conrad, *One Man's Stand: Medgar Evers'* [sic] *Heroism Unleashes a Composer's Imagination*, STAR-LEDGER (New Jersey), Mar. 4, 2002, at 21; Anne Rochell Konigsmark, *Civil Wrongs; Pressure Builds to Reopen the Unsolved Murders of Rights Activists in 1960s*, ATLANTA J.-CONST., Feb. 21, 1999, at M1; Adam Nossiter, *As South Changes, Civil Rights Murders Being Probed Anew: Thirst for Justice Can't Be Buried by the Decades*, ATLANTA J. & CONST., Nov. 19, 1989, at D1; Adam Nossiter, *27 Years Later, Evers Slaying Gets Another Look*, ATLANTA J.-CONST., Dec. 15, 1990, at A3; John Shearer, *Civil Rights Era Cases Endure; As Prosecutors Pursue Justice Decades Later, the Wife of a Man Convicted for a Notorious Crime 1963 Murder Calls Him Innocent*, ATLANTA J.-CONST., Sept. 7, 2000, at C1; *Editorials: South Atoning for Racist Murders*, ATLANTA J.-CONST., Nov. 10, 1999, at A18; *see also* De La Beckwith v. State, 707 So. 2d 547, 554-65 (Miss. 1997).

80. *See* John Gibeaut, *Confronting a Dark Past*, 84 A.B.A. J., June 1998, at 26; J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & CIV. RTS. L. REV. 435, 440-41 (2001); Rick Bragg, *Jurors Convict Former Wizard in Klan Murder*, N.Y. TIMES, Aug. 22, 1998, at A1; Jerry Mitchell, *Evers Case Opened Doors*, CLARION-LEDGER (Jackson, Miss.), May 26, 2002, at A1; Earnest Reese, *Prosecutors to Re-Examine Activist's Slaying; Klan Implicated: The Slaying of Vernon Dahmer in Mississippi 29 Years Ago Brought Four Convictions, But Some Say More Needs to Be Done*, ATLANTA J.-CONST., Apr. 9, 1995, at A3; Anne Rochell, *Racial Slaying: New Trial Reopens Bitter Era*, ATLANTA J.-CONST., Aug. 17, 1998, at A1; Peter Scott & Andy Miller, *A Beginning: Racist Killings Reopened: New Probes Spark Hopes for Justice*, ATLANTA J.-CONST., Nov. 3, 1991, at A16; Alan Sverdlik, *Activist's Family Renews Call for Trials: Vernon Dahmer Was Killed in 1966, But His Case Isn't Dead*, ATLANTA J.-CONST., Aug. 1, 1995, at B5; *see also* Rick Bragg, *Memories of a Deadly Assault in 1996 Are Reawakened at Klan Trial*, N.Y. TIMES, Aug. 19, 1998, at A16; Mike Williams, *Focus on Sovereignty Commission: Files Might Provide Some Peace*, ATLANTA J.-CONST., Mar. 18, 1998, at B2.

81. *See* Dick Kaukas, *S. Indiana City's Residents Want Racist Image Relegated to Past*, COURIER J. (Louisville), July 1, 2002, at A1; Mike Ellis, *Decades-Old Case Challenges System*, INDIANAPOLIS STAR, May 28, 2002, at A1; Sharon Jenkins & Anare V. Holmes, *Justice for Carol Jenkins, a Human Being: Martyred Girl Touched Thousands of Lives*,

Finally, consider the 1969 murder of Lillie Belle Allen, a twenty-seven-year-old mother of two children, in York, Pennsylvania. On July 21, 1969, armed white-gang members shot Allen when her car stalled in a white neighborhood during a race riot. York police officers failed to conduct a thorough investigation or survey eyewitnesses. Decades later, officers pursuing a related investigation discovered overlooked witness testimony and forensic evidence. On that evidence, Pennsylvania prosecutors indicted ten white gang members; nine have received sentences — seven under plea agreements.[82]

Admittedly abridged, these five case histories highlight the evidence-specific quality of easy cases in the reprosecution of race trials. That quality, however, is misleading. Indeed, to mention the relevance of suppressed FBI reports and government documents, or to cite omitted eyewitness testimony and forensic findings, obscures a more basic normative point. Plainly, such evidentiary material is relevant to the prosecution or reprosecution of race cases. But deploying that material to advance the remedial purposes of reprosecution is a normative undertaking. Prosecutorial discretion in reprosecuting race cases is precisely such an undertaking. It is the normative threshold of race case reprosecutions: hard and easy. Exercising the required judgment entailed in crossing the threshold may undermine the distinction posed here. Easy cases in fact may prove to be a kind of stalking horse. Their pursuit seems to collapse into the same judgments demanded of hard cases. Put differently, to the extent that all race cases involve a crucible of judgment, easy cases may be distinguished chiefly by their post hoc rationale: old evidence newly discovered. For examples of more generalizable, norm-driven hard cases,

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INDIANAPOLIS RECORDER, June 7, 2002, at A1; Don Terry, *34 Years Later, Sad Secret Surfaces; Childhood Memory May Solve Slaying*, CHI. TRIB., May, 12, 2002, at 1; *Seeking Justice, Decades Later*, HARTFORD COURANT, May 20, 2002, at A6; *cf.* Bruce C. Smith, *Murder Suspect Dies of Cancer*, INDIANAPOLIS STAR, Sept. 1, 2002, at A1 (noting that Richmond died in a state mental-health facility).

82. *See* Russ Crenshaw, *Search for Hope Continues in York 25 Years After Violence of 1969: The Riots Ripped the City Apart. In Some Places, the Wounds Remain Open*, YORK DAILY RECORD, Aug. 4, 1994, at A1; Rick Lee & Teresa Ann Boeckel, *Slick Sent to Prison: He Was the Ninth Man Sentenced in the 1969 Killing of Lillie Belle Allen*, YORK DAILY REC., May 29, 2003, at A8; Marc Levy, *Man Pleads Guilty in 1969 Killing: It's 6th Plea Bargain in Pa. Race-Riot Slaying of Black Woman, 27*, CHARLOTTE OBSERVER, Aug. 30, 2002, at A14; Jim Lynch et al., *Verdict Writes History: Jurors' Decision Brings the County's Most Famous Case Since the Hex Trial to an End*, YORK DAILY REC., Oct. 21, 2002, at A11; Timothy D. May, *City Faces Racial Killings 3 Decades Later*, TIMES UNION (Albany), Sept. 24, 2000, at A25; Timothy D. May, *Pennsylvania City Confronts 2 Racial Killings 31 Years Later Justice: A Mob Killed a Black Woman Days After a White Policeman was Slain in York. No One Was Ever Charged in Either Death, But Cases Are Being Reopened*, L.A. TIMES, Oct. 1, 2000, at A3; *Background: Race Riots, '68 and '69*, YORK DAILY REC., Sept. 26, 2000, at A7; *Four Admit Guilt in '69 York Race Killings*, PHILA. DAILY NEWS, Aug. 15, 2002, at 9; *Guilty Pleas Begin a Time of Healing: The Book on the 1969 Riots Can Begin to Close, as Four Men did the Right Thing by Admitting Guilt*, YORK DAILY REC., Aug. 18, 2002, at 2; *Opinion: Murder Case Full of Choices*, YORK DAILY REC., Dec. 20, 2001, at A8.

consider the histories of Harry and Harriet Moore; Willie Edwards, Jr.; the Bethel Baptist Church bombing; Michael Schwerner, Andrew Goodman, and James Chaney; Oneal Moore; Ben Brown; Ben Chester White; Rainey Pool; Henry Hezekiah Dee and Charles Eddie Moore; and Wharlest Jackson.

Turn first to the earliest of these cases, the 1951 murders of Harry and Harriette Moore in Mims, Florida. On December 25, 1951, a bomb exploded under the bedroom of the Moore's small wood frame house, killing Harry, a NAACP activist, and gravely injuring Harriette, who died eight days later. An FBI investigation of the Klan in Orange County, Florida, and a 1952 federal grand jury in Miami produced perjury indictments in 1953 but no arrests. Florida officials subsequently reopened the investigation in 1978 and 1991, finally closing the case in April 1992 for lack of evidence.[83]

Turn next to the 1957 murder of Willie Edwards, Jr., a twenty-five-year-old black truck driver in Montgomery, Alabama. Edwards failed to return home from work on January 23, 1957. In April of 1957, fishermen found Edwards's decomposed body in the Alabama River. Notwithstanding suspicions of a Ku Klux Klan abduction, state officials ruled the death an accident by drowning because of insufficient evidence. In 1976, the state attorney general opened a homicide investigation and indicted three Montgomery Klansmen for murder: William Kyle Livingston, Jr., Henry Alexander, and James York. The indictment accused the Klansmen of forcing Edwards to leap to his death from the Tyler Goodwin Bridge on January 23, 1957 for allegedly making advances toward a white woman. Despite Britt's grand jury testimony, bargained in exchange for immunity, an Alabama court twice dismissed the indictment for lack of a specific cause of death. In 1992, near death, Alexander confessed to the murder. Pressed by the Edwards family to reopen the investigation, in 1997 prosecutors exhumed Edwards's body, officially ruled his death a homicide, and reconvened a grand jury to seek a second murder indictment. In 1999, the grand jury failed to return an indictment.[84]

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83. *See* BEN GREEN, BEFORE HIS TIME: THE UNTOLD STORY OF HARRY T. MOORE, AMERICA'S FIRST CIVIL RIGHTS MARTYR (1999); Philip Morgan, *The Martyr*, TAMPA TRIB., Nov. 5, 2000, at 1; Ormund Powers, *Book Revives Debate About Fatal Christmas 1951 Bombing*, LAKE TRIB., May 19, 1999, at 3; Harry Wessel, *Civil Rights Leader Gets His Due*, ORLANDO SENTINELTRIB., Aug. 1, 1999, at F-7 (reviewing GREEN, *supra*); *Healing Old Wounds*, ST. PETERSBURG TIMES, Nov. 15, 1999, at A14; PBS, Freedom Never Dies: The Legacy of Harry T. Moore – Florida Terror – Who Killed Harry T. Moore, *at* http://www.pbs.org/harrymoore/terror/who.html (last visited July 30, 2003).

84. *See* Ray Jenkins, *Alabama Slaying Laid to Klansmen; Former Member Testifies Against Others Accused in Montgomery Court*, N.Y. TIMES, Feb. 27, 1976, at 13; Adam Nossiter, *Widow Inherits a Confession to a 36-Year-Old Hate Crime*, N.Y. TIMES, Sept. 4, 1993, at A5; *Alabama Witness of Alleged Slaying Admits an Error*, N.Y. TIMES, June 2, 1976, at 17; *3 Named as Klan Members Plead Not Guilty in Murder*, N.Y. TIMES, Mar. 16, 1976, at 18; *3 Whites Indicted in '57 Black Death*, N.Y. TIMES, Mar. 6, 1976, at 38; *see also* John Zenor, *Unresolved Death Casts Long Shadow: Despite a Deathbed Confession by One Suspect*

More forcefully, compare the June 29, 1958 bombing of the Bethel Baptist Church in Birmingham, Alabama. Initially, Alabama prosecutors offered no indictments. Twenty years later in 1977, prosecutors indicted white supremacist J. B. Stoner. Alabama state courts extradited Stoner, convicted him, and sentenced him to ten years.[85]

Turn as well to the 1964 murder of civil rights workers Michael Schwerner, Andrew Goodman, and James Chaney in Mississippi. The June 21, 1964 abduction and shooting of the three men resulted in the FBI arrest of twenty-one Klansmen. When local and state prosecutors refused to act, federal prosecutors indicted nineteen of the Klansmen on conspiracy charges. Despite three mistrials, Mississippi courts convicted only seven Klansmen. Recently, the FBI opened 40,000 pages of investigative files on the murders, sparking calls for renewed prosecution.[86]

Comparable calls mark the 1965 murder of Oneal Moore, a thirty-four-year-old black Washington Parish Sheriff Deputy, in Varnado, Louisiana. On June 2, 1965, Moore was shot and killed in a midnight ambush while on patrol. Mississippi police arrested Klansman Ray McElveen. Louisiana prosecutors extradited McElveen and indicted him for murder but released him within weeks for insufficient evidence and dropped all charges. The FBI reopened the case in the 1980s, posting a $40,000 reward on January 16, 2002.[87]

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and the Cooperation of Another, an Alabama Man's Family is Waiting for Justice 42 Years Later, ATLANTA J.-CONST., Mar. 4, 1999, at A10; *FBI Wants To Know If It Helped Klansman Dodge Murder Charge*, N.Y. TIMES, Sept. 17, 1993, at A13.

85. *See Conviction in Bombing in Alabama Is Upheld*, N.Y. TIMES, Aug. 14, 1982, at 8; *Segregationist Gives Up To Serve Bombing Term*, N.Y. TIMES, June 3, 1983, at A16; *Segregationist Stoner Is Convicted in '58 Bombing and Gets 10 Years*, N.Y. TIMES, May 14, 1980, at A20; *U.S. Appeals Court Upholds Conviction of White Racist*, N.Y. TIMES, Jan. 20, 1985, at 23.

86. *See* Ben Chaney, *Schwerner, Chaney and Goodman: The Struggle for Justice*, 27 HUM. RTS. Spring 2000, at 3; *see also* Kathleen Kenna, *Racing Time: State that Once Shielded the Klan Is Determined To Put It on Trial Before the Last Witnesses Die*, TORONTO STAR, Aug. 27, 2000, at B1; Walter Rugaber, *Mississippi Jury Convicts 7 of 18 in Rights Killings*, N.Y. TIMES, Oct. 21, 1967, at 1; Emily Wagster, *Next Old Civil Rights Case May Be 'Mississippi Burning' Murders*, LETHBRIDGE HERALD, May 3, 2001, at A13.

Consider also the July 14, 1964 murder of Henry Hezekiah Dee, a twenty-year-old sawmill worker, and Charles Eddie Moore, a twenty-year-old college student, in Tallulah, Louisiana. Both Dee and Moore vanished on May 2, 1964, though neither was active in the civil rights movement. A search party found their bodies in a nearby river. In November of 1964, FBI and state officials arrested two Mississippi Klansmen, Charles M. Edwards and James Ford Seale, on murder charges. State prosecutors dismissed the charges without convening a grand jury. In 2002, Mississippi prosecutors and police officials, together with the FBI, reopened the case for active investigation. *See* John Herbers, *White Man Linked to Slain Negroes: Alleged Klansman Is Said to Have Admitted Beating of 2 Men Found Dead*, N.Y. TIMES, Jan. 15, 1966, at 1; *Whites Freed in Slayings*, N.Y. TIMES, Jan. 12, 1965, at 18; *2 Whites Seized in Negro Slayings: Mississippians Accused of Shooting 2 Hitchhikers*, N.Y. TIMES, Nov. 7, 1964, at 56; *see also* Richard A. Serrano, *Chasing Justice in the New South: A Brother Who Won't Forget, a Prosecutor Who Won't Give Up*, L.A. TIMES, June 18, 2002, at A1.

87. *See* Alison Gerber, *Prosecutors Reopening Other Decades-Old Cases of Murder*, USA TODAY, May 18, 2000, at A3; Jerry Mitchell, *Federal Trial in '66 Killing Likely*,

The same calls for reopening attend the 1967 murder of Ben Brown in Jackson, Mississippi. On May 11, 1967, Brown was shot in the back by police officers at a civil rights protest rally. Mississippi officials conducted a week-long investigation but declined to make arrests. In 1999, the Jackson Police Department established a Cold Case Unit to investigate dormant investigations, as yet it has made no arrests. Calls to reopen the investigation continue to sound even though the two accused officers are dead.[88]

Turn more sharply to the 1966 murder of Ben Chester White, a sixty-seven-year-old farmhand, in Natchez, Mississippi. On June 10, 1966, three Klansmen, Ernest Avants, Claude Fuller, and James Jones, abducted White, shot him, and dumped his body in Pretty Creek at Homochitto National Forest. Mississippi officials arrested all three men. State court proceedings ended in a mistrial for Jones and an acquittal for Avants. Fuller never stood trial. He and Jones subsequently died. In 2000, federal prosecutors indicted Avants for civil rights violations, citing federal jurisdiction over the Homochitto National Forest.[89]

Last, turn to the 1970 murder of Rainey Pool, a one-armed sharecropper, in Louise, Mississippi. On April 11, 1970, seven white men assaulted Pool outside of a Delta nightclub and dumped his body into the Sunflower River where he died. Prosecutors obtained multiple indictments in 1970 but declined to go forward. In 1998, at the urging of Pool's family, prosecutors reopened the case and indicted five of the seven surviving men on manslaughter charges: James "Doc" Caston, his brother Charles E. Caston and half-brother Hal Spivey Crimm, Dennis Newton, and Joe Oliver Watson. At three separate trials, state courts acquitted Newton but convicted the Caston brothers

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CLARION-LEDGER (Jackson, Miss.), Jan. 9, 2002, at A1; Suzi Parker, *In New South, a Bid to Redress Old Crimes: Today's Prosecutors Raise the Priority of Unsolved Cases from the Civil Rights Era*, CHRISTIAN SCI. MONITOR, June 7, 2000, at 1; Paul Rioux, *1965 Murder of Deputy Gets New Look from FBI: Agents Launch 3rd Try to Solve Racial Killing, Ease Family's Pain*, TIMES-PICAYUNE (Louisiana), Aug. 17, 2001, at A1; Stephanie Saul, *Their Killers Walk Free: Because Murder Has No Statute of Limitations, and Political Strength of Black Voters is Growing, Some Unsolved Killings of Black Men in the Civil Rights Era are Being Revisited*, BALT. SUN, Dec. 20, 1998, at C1; Richard A. Serrano, *Chasing Justice in the New South: Answers Elusive in 1965 Slaying*, L.A. TIMES, June 26, 2002, at A1; Ed Timms, *A New Climate, a New Call for Justice*, CHI. TRIB., Jan. 7, 1990, at 22.

88. *See* Adam Lynch, *Cold Case Unit Reveals Tactics Involving 1967 Shooting*, MISS. LINK, Feb. 15-21, 2001, at 2.

89. *See* Rick Bragg, *Last Cry for Justice in Mississippi as U.S. Trial Revisits '66 Killing*, N.Y. TIMES, Jan. 26, 2003, at 1; Jerry Mitchell, *Avants' Stroke May Derail Trial: Seventy-year-old Faces Federal Murder Charge in 1966 Case*, CLARION-LEDGER (Jackson, Miss.), Feb. 12, 2002, at B1; *Alleged Klansman is Freed in Slaying of Negro; Mississippi Had Charged That Killing Was Attempt to Lure Dr. King in Murder Plot*, N.Y. TIMES, Dec. 10, 1967, at 44; *Klansmen Linked to Negro's Death; Co-Defendant Asserts Two Killed Mississippian*, 65 N.Y. TIMES, June 18, 1966, at 20; *3 Men Held in Mississippi on Charge of Killing Negro*, N.Y. TIMES, July 8, 1966, at 13.

and Crimm, sentencing each to twenty years in prison. Watson pleaded guilty.[90]

Albeit truncated, these case histories demonstrate that the accepted conception of standard discretion permits prosecutors to renew race cases in accord with the ethical and jurisprudential norms of the criminal-justice system. Shorn from liberal legalism, those norms grant both the independence of lawyers and the autonomy of law. They also allow a departure from the colorblind stance of impartiality and neutrality toward race. In so doing, they give latitude to color-coded pretext. Infused by racial-status distinctions and stereotypes, color-coded claims damage the prosecution function as a legal process and, thereby, weaken both the professional and institutional values of candor, openness, and fairness. Race-conscious discretion revives that process, openly conceding the impact of race on lawyer cognition, epistemology, and ideology, as well as its influence on sociolegal roles, relationships, and institutions. The candid admission of race as part of the criminal-justice process leaves race-conscious discretion untied to restorative justice communities and redemptive forms of advocacy. The next Part contemplates securing those ties in the reopening of race cases under the standard ethical conception of prosecutorial discretion.

III. STANDARD DISCRETION IN RACE CASES

The standard ethical conception for the prosecution of criminal and civil rights cases rests on discretion. Prosecutorial discretion is bound up in law, ethics, and tradition.[91] The exercise of discretion underlies prosecutorial decisions to commence, decline, and dismiss actions in federal and state court. Decisions to abandon and to renew race case prosecutions incite speculation about state racism and racial hegemony.[92] Such speculation provides ample explanation for prosecu-

90. *See* Caston v. State, 823 So. 2d 473, 479-82, 503 (Miss. 2002). Compare in this respect the 1967 murder of Wharlest Jackson, a thirty-seven-year-old NAACP local chapter officer, in Natchez, Mississippi. On February 27, 1967, Jackson was killed by a truck bomb while driving home. In spite of a 6,000 page investigative record, the FBI closed the case after the statute of limitations on civil rights prosecutions expired. In 1998, the Natchez Board of Alderman issued a resolution urging local police officials to reopen the case. A police review of the FBI files ensued. *See* Seth S. King, *Slaying Recalls Series of Deaths That Have Marked Rights Fight*, N.Y. TIMES, Apr. 5, 1968, at 24; Anne Rochell Konigsmark, *Civil Wrongs: Pressure Builds to Reopen the Unsolved Murders of Rights Activists in 1960s,* ATLANTA J.-CONST., Feb. 21, 1999, at M1.

91. *See* Richard Bloom, *Prosecutorial Discretion*, 87 GEO. L.J. 1267 (1999); Teah R. Lupton, *Prosecutorial Discretion*, 90 GEO. L.J. 1279 (2002); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996); Roland G. Schroeder, *Prosecutorial Discretion*, 78 GEO. L.J. 853 (1990).

92. *See* Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998-1999); Laura Kalman, *From Slavery to Freedom*, 90 GEO. L.J. 161 (2001); Mark Tushnet, *Constructing Paternalist He-*

torial failure and renewal. But the explanation may prove too much. Its logic merges the prosecutor into the machinery of the state and immerses professional ideals into racial ideology. That immersion erases the independent-ethical role of the prosecutor and his autonomous judgment of legality and justice.

Independence aside, prosecutorial judgment in race cases is never far from bias. Entrenched in the political economy of the state and circulating across culture and society, bias seeps into the criminal-justice system.[93] Prosecutors interpose bias[94] in the social construction of crime.[95] Distinct from the overtness of de jure discrimination, bias emerges at all phases of criminal justice, extending from street-level policing to courtroom sentencing.[96] Pervasive in its reach, it intersects gender and sexuality.[97] Throughout these intersections, it combines with the intrinsic and extrinsic sources of prosecutorial discretion, particularly legality and justice. Validated by law and custom, bias survives the remedial grassroots and legislative efforts of the twentieth-century civil rights movement.[98]

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gemony: Gross, Johnson, and Hadden on Slaves and Masters, 27 LAW & SOC. INQUIRY 169 (2002); David Menschel, Note, *Abolition Without Deliverance: The Law of Connecticut Slavery 1784-1848*, 111 YALE L.J. 183 (2001).

93. On the dynamics of bias, see Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001).

94. On prosecutor bias in the social construction of crime, see Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993), and Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988). *See also* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (1981).

95. *See* MICHAEL TONRY, MALIGN NEGLECT – RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); Paul G. Chevigny, *From Betrayal to Violence: Dante's Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787 (2001); Paul Knepper, *Race, Racism and Crime Statistics*, 24 S.U. L. REV. 71 (1996).

96. *See* Thorne Clark, *Protection from Protection: Section 1983 and the ADA's Implications for Devising a Race-Conscious Police Misconduct Statute*, 150 U. PA. L. REV. 1585 (2002); Kathryn Roe Eldridge, *Racial Disparities in the Capital System: Invidious or Accidental*, 14 CAP. DEF. J. 305 (2002); Marvin D. Free, Jr., *Race and Presentencing Decisions in the United States: A Summary and Critique of the Research*, 27 CRIM. JUST. REV. 203 (2002).

97. *See* Serena Mayeri, *"A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045 (2001); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 875-925 (2002).

98. *See* Jack M. Beerman, *The Unhappy History of Civil Rights Legislation: Fifty Years Later*, 34 CONN. L. REV. 981 (2002); Richard Delgado, *Explaining the Rise and Fall of African American Fortunes-Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002).

A. *Standard Discretion: Intrinsic Sources*

Standard discretion defines the prosecution function as a means to enforce law and to promote justice.[99] Fastening legality to justice establishes the moral predicate for the criminal-justice system. Moreover, it confirms the logic and legitimacy of that system. Abraded by bias, the link between law and justice erodes in race cases. The sometimes prejudicial interests clamoring for criminal justice — cause-oriented groups, political parties, the media, and the public — speed that erosion.

The history, organization, and adversary setting of criminal and civil rights prosecutions direct prosecutorial decisionmaking in serving the multiple interests of private parties and public agents.[100] Critical moments of decision come in investigating, charging, and plea bargaining.[101] Efforts to guide such discretionary moments by prudence, truth, or virtue[102] struggle to overcome racial bias.[103] Comparable efforts grounded in administrative, doctrinal, and ethical regulation also falter.[104]

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99. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607 (1999); Judith L. Maute, *"In Pursuit of Justice" in High Profile Criminal Maters*, 70 FORDHAM L. REV. 1745 (2002); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

100. *See* Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126 (1988); David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 LAW & SOC'Y REV. 247 (1998); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. Rev. 669 (1992); Alan Vinegrad, *The Role of the Prosecutor: Serving the Interests of All the People*, 28 HOFSTRA L. REV. 895 (2000); Joan E. Jacoby, *The American Prosecutor in Historical Context*, PROSECUTOR, May/June 1997, at 33.

101. *See* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA (1981); Eli Paul Mazur, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 DUKE L.J. 1333 (2002); Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion — Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371 (2000); Lisa F. Salvatore, United States v. Hammad: *Encouraging Ethical Conduct of Prosecutors During Pre-Indictment Investigations*, 56 BROOK. L. REV. 577 (1990).

102. *See* Darryl K. Brown, *What Virtue Ethics Can Do for Criminal Justice: A Reply To Huigens*, 37 WAKE FOREST L. REV. 29 (2002); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

103. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601 (1992).

104. *See* Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473 (1976); Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475 (1998); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*,

Ethical restraints on bias are thwarted by the enabling discretion of law and community.[105] Law divulges bias via custom and text. Custom permits bias through habits and practices. Texts — constitutional, statutory, and common law — authorize bias through their plain meaning, legislative history, policy, and precedent. In race cases, prosecutors apply constitutional and statutory texts in accord with the racial customs of their office and locality.

Community instills bias by direct and indirect pressure. Direct pressure follows from the prosecutorial-appointment process. Appointed by election or merit selection, prosecutors periodically must offer their policies and records up for popular or state ratification. That occasion serves as a kind of public referendum, a plebiscite on the juridical rules of race. Indirect pressure flows from cultural and social conventions. Cultural conventions embodied in prosecutor charging and jury deliberation decide on the suitability of black victims for trial and the patience of black communities to endure prosecutorial inaction and failure. Matching social conventions decree the availability of white offenders for trial and the willingness of white communities to accommodate the strife of trial without political intervention. For decades, law and community combined to stifle the prosecution of race cases and to quiet outcry when that prosecution failed.

For contemporary prosecutors, especially at the federal level,[106] criminal and civil rights law and community fervor are no longer freighted with the same weight of nineteenth-century bias. Less encumbered by the racially inflammatory texts of law and the prejudicial onus of cultural and social convention, they enjoy expanded discretion under augmented federal criminal laws[107] and federal sen-

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68 FORDHAM L. REV. 1511 (2000); N. Douglas Wells, *Prosecution as an Administrative System: Some Fairness Concerns*, 27 CAP. U. L. REV. 841 (1999).

105. *See* Peter Krug, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section V Prosecutorial Discretion and its Limits*, 50 AM. J. COMP. L. 643 (2002); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 4 DUKE L.J. 651 (1976).

106. *See* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000); *see also* Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641 (2002); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553 (1999).

107. *See* AMER. BAR ASS'N, CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 32-35 (1998); Steven W. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 675-97 (1997); Symposium, *Federalization of Crime: The Role of the Federal and State Governments in the Criminal Justice System*, 46 HASTINGS L.J. 965 (1995).

tencing guidelines.[108] The still developing body of procedural law implementing these federal criminal statutes seems similarly unhindered by brazenly asserted bias, though controversy afflicts the burdens of procedure, specifically the judge-made evidentiary barriers to selective prosecution claims.[109] Paradoxically, by enlarging the prosecutorial range of discretion in case selection, sentencing departures, and penalty enhancement, these burgeoning statutes offer greater opportunity for bias.[110]

Lacking the civil rights-era insulation afforded by state law enforcement officials and the massive resistance of local white communities, contemporary prosecutors seem more prone to hear complaints of inaction and to suffer the inferences of bias-related misconduct.[111] The constitutional repercussions of misconduct charges ignite debate over professional discipline and the abuse of ethical rules.[112] Now, as before, charges of prosecutorial bias rarely address the source of the bias itself.

Bias originates in community. The cohesion and vitality of community hinge on values. Segregated community is founded on the values of white superiority and domination. Rooted in segregated

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108. *See* Cynthia K. Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199 (1997); William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W. VA. L. REV. 373 (1995); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993).

109. *See* Marc Michael, Note, United States v. Armstrong*: Selective Prosecution — A Futile Defense and Its Arduous Standard of Discovery*, 47 CATH. U. L. REV. 675 (1998); Tobin Romero, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 GEO. L.J. 2043 (1996).

110. *See* G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175 (1995); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1325-44 (1997); Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137 (1995).

111. John M. Burkoff, *Prosecutorial Ethics: The Duty Not "To Strike Foul Blows"*, 53 U. PITT. L. REV. 271, 282 (1992); Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 10-20 (1999); *see* Andrew M. Hertherington, *Prosecutorial Misconduct*, 90 GEO. L.J. 1679 (2002).

112. *See* Jennifer Blair, Comment, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations: 28 U.S.C. § 530B and the Reality of Inaction*, 49 UCLA L. REV. 625 (2001); Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 687-90 (1996); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887 (1998); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001); *see also* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080 (2000).

community, both northern and southern prosecutors fell subject to white racial ideology. Nothing in the prosecutorial office granted immunity from its malevolence. But lack of immunity alone scarcely explains prosecutorial inaction and failure in the instant race cases. Fuller explanation of prosecutorial breakdown points to the discretionary calculus of instrumental lawyering.

Instrumental theories animate the prosecution and defense functions. Value-laden in design, instrumental lawyering is purposive. The purposes encompass broad and narrow goals. Result-oriented in style, such lawyering seeks certain outcomes. The outcomes arise in single cases or along a continuum of cases. This consequentialist ethic extends to case selection and trial strategy.

The freedom to exert autonomy in case selection and strategy distinguishes prosecutors from other state agents. To borrow from William Simon's prior writing on ethical discretion elsewhere in lawyering, the freedom to pursue "potentially enforceable legal claims" and "to refuse to assist in the pursuit of legally permissible courses of action" puts prosecutors at some distance from the state.[113] Distance of this sort is significant. It implies discretion and political room to maneuver. Variation in the degree of distance from state authority delimits the ambit of discretion available to prosecutors. However narrow, that ambit reserves the inchoate redemptive opportunity to advance legality and justice in the prosecution of race cases.

The prospect for redemptive prosecution in race cases rises from reflection. Prosecutorial discretion carries what Simon calls "a professional duty of reflective judgment."[114] Reflection involves an assessment of the relative merits of the state's criminal-justice goals and claims. For the cases assembled here, the goals include conciliation, integration, and segregation. The claims sound colorblind, color-coded, or color-conscious themes.

Both state goals and claims entail conflicting considerations of criminal justice. The considerations favor different groups and outcomes. Conciliation goals encourage face-to-face meeting and forgiveness. Integration goals promote gradual cooperation and mercy. Segregation goals foster separation and reprisal. Tilted toward integration, colorblind claims grope to obtain incremental changes in intergroup relations. Covertly joined with racial partition, color-coded claims work to preserve unequal relations. Openly revisionist, color-conscious claims alternately serve to realign and retrench intergroup positions.

Prosecutorial reconciliation of the competing merits of criminal-justice goals and claims requires a sense of legality and justice

113. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988).

114. *Id.*

independent of state sanction. Professional independence from the client, the market, and the state comports with Simon's sense of the "traditional ambitions of lawyers."[115] For Simon, realizing that ambition demands direct-lawyer participation in relevant decisionmaking, not unreflective acquiescence to the commands of vigilante mobs or partisan officials. Such participation, uninhibited by offender bargaining, victim preference, or state prerogative, involves a prosecutor-initiated process of elaborating and implementing norms of legality and justice. To be helpful, elaboration must go outside the traditional law of race and the entailment of de jure and de facto discrimination. Deploying countervailing constitutional, statutory, and common law resources, it must aspire to restore community and to reconcile conflict. In the same way, implementation must go beyond customary-legal remedy to fashion equitable, community-based relief.

The starting point for the vindication of the norms of legal merit and justice in race cases is the particularized circumstance of the victim, the offender, and their cohort communities. Promoting justice in these difficult circumstances urges the embrace of the discretionary norms applied in judicial decisionmaking. The analogy to judicial decisionmaking in lawyering is not uncommon.[116] Building on this analogy, Simon recommends judge-made norms for their analytic breadth, flexibility, and complexity.[117]

Unlike the instrumentalist emphasis on lawyering goals and claims, the formalist style of judicial decisionmaking stresses relative and internal merit. Applied to the prosecution of race cases, relative merit comprises three measures: law, interest, and equality. The first tests the legal underpinnings of prosecutorial goals and claims against governing constitutional, statutory, and common law standards in search of accord and, when unavailing, reform. The second appraises the quality of the public and private interests embedded in prosecutorial goals and claims, a measure that admittedly may prove unquantifiable. The third estimates the remedial impact of asserted prosecutorial goals and claims on political and social inequality. Simon refers to this impact as a kind of equalization effect, more pertinent to legal services access than political or socioeconomic status.[118] Conceptually, it bears noting that equalization possesses enough dexterity to address both racial access to justice in law and racial equality in society.

Unquestionably, Simon's proposed measures of relative merit pose difficulties. Law is far too indeterminate and its policies too often

115. *Id.* at 1144.

116. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

117. *See* Simon, *supra* note 113, at 1090-91.

118. *Id.* at 1093.

incommensurate to resolve merit by force of will. Even edicts carrying the force of law may still not cure ancient nonconformity, as shown in the repeated frustration of Reconstruction and post-*Brown* era statutory and constitutional decrees. Interest analysis is also suspect. Public and private interests frequently stand incompatible. State, offender, and victim interests similarly diverge. Remedial solutions enamored of equality also generate uncertainty. Equality remedies spawn incalculable effects, sometimes recasting the very form and substance of discrimination, for example in the criminal context of jury selection where tolerance for race-based peremptory challenges continues to survive judicial scrutiny.[119] Such secondary and often unforeseeable effects may contravene the purpose of the remedy itself.

Faced with compound indeterminacies in assaying the relative merit of state criminal-justice goals and claims, prosecutors must turn to an inspection of internal merit in race cases. To Simon, internal merit dictates an assessment of legal value. This valuation consists of three parts.[120] The first part evaluates the substance and procedure of the appointed goals and claims. The substantive and procedural goals of race cases relate to the formal protection and vindication of communities of color under criminal and civil rights statutes. The second part assesses the purpose and form of state goals and claims. The redemptive purposes of race cases fracture upon entering the criminal-justice system where adversarial and penal conventions thwart restorative-justice goals. The third part contemplates the framing of state goals and claims in broad and narrow terms. The framing of race cases adverts broadly to black and white community, but refers narrowly to the offender and victim.

Prosecutor appraisal of the relative and internal merit of state criminal-justice goals and claims in race cases gathers consequence when state decisionmakers in law enforcement locales, legislatures, and courts abdicate responsibility for guaranteeing equal protection and due process rights to communities of color. In these circumstances, as here, state decisionmakers fall unreliable. Doubtless the logic of collective action, coupled with federalism and separation of powers principles, urges fairly apportioning responsibility to multiple-state decisionmakers in race cases. Evidence of institutional bias, however, behooves prosecutors to lead the decisionmaking process in establishing and implementing controverted state goals in race cases.

Prosecutorial leadership in race cases requires a role-situated brand of self-appraisal tailored to the exercise of discretion. To be useful, lawyer self-appraisal must set out a manageable and reliable decisionmaking procedure. Indicated by Simon, self-appraisal gives

119. *See* Purkett v. Elem, 514 U.S. 765 (1995).

120. Simon, *supra* note 113, at 1096-109.

rise to a heightened duty to assure a sound procedure for the formulation of state criminal-justice goals and claims. Soundness implies efficacy in intervention. Embellishing Simon, this process imperative reinforces the prosecutor's ordinary duty to take "reasonably available actions to make the procedure as effective as possible and to forgo actions that would reduce its efficacy."[121] Implying an efficacy principle militates against prosecutor dissonance and deception in pursuing state goals.

The interventionist duty to formulate a decision procedure demands close attention to the purpose and form of prosecution. Mainstream purposes well-matched to community wants channel prosecutors to abide by formal procedure. Reformist purposes, discordant with community desires, leave prosecutors unguided by traditional procedure. The burden of unguided discretion accentuates the complex procedural judgments and responsibilities prosecutors undertake in assuring substantively valid decisions in race cases.

Prosecutorial judgments of purpose and form may be aided by reframing state criminal-justice goals and claims. Reframing entails the deployment of broad and narrow issue templates. Narrow templates, Simon explains, define issues "in terms of a small number of characteristics of the parties and their dispute," for example, in a white-on-black crime of assault or murder.[122] Broad templates define issues "to encompass the parties' identities, relationship, and social circumstances[,]" for example, in a race-infected hate crime offense.[123] For utility, the templates must correspond to the facts and issues in controversy. Simon posits certain general standards of relevance to guide the process of framing.[124]

Of these standards, the first is interpretive plausibility. Plausibility in the interpretation of law and fact in race cases is battered by lasting antebellum legal privilege and evidentiary presumption. White privilege, with its deep-seated bias, may mislead law. At the same time, presumptive white credibility may undermine fact.

The second standard of relevance is practical impact. The salutary impact of reopening race cases on criminal and civil rights law, community, and inequality is unsure. If the cases flourish, legislatures may curtail the scope of applicable law. Judges may also ration its use. Even communities may resent its imposition. Meanwhile, inequality may prosper with its political and economic undercarriage intact.

The third standard of relevance is knowledge. Prosecutor knowledge of the issues in race cases is ostensibly confined to the sphere of

121. *Id.* at 1100.

122. *Id.* at 1107.

123. *Id.* at 1107-08.

124. *Id.*

criminal justice. Although triggered by crime, race cases develop out of conditions of political powerlessness and socioeconomic inequality. At bottom, the cases deal with discrimination shrouded in violence. Outside of the criminal-justice system, prosecutors' knowledge of discrimination and its repercussions for communities of color is often meager.[125]

The fourth standard of relevance is institutional competence. Prosecutors in race cases possess the competence to investigate and indict white lawbreakers. Bolstered by courts, they join in the conduct of trials and negotiation of sentences. But their powers of penalty assignment and remedial monitoring are secondary to law enforcement officials and managerial judges. Ill-equipped for relief-giving duties, prosecutors flounder outside their ken.

Reframing state criminal-justice goals and claims in accordance with general standards of relevance is likely to narrow prosecutorial judgments of purpose and form in race cases. For prosecutors, interpretive plausibility may prove too attenuated and practical impact too paltry. Absent sufficient knowledge and institutional competence to mobilize a broader political-legal reform strategy, they may submit their judgments to the prosecution of discrete, disaggregated cases. In this surprising way, Simon's proffered bundle of standards help frame the relevant purpose and form of prosecutions in race cases.

The intrinsic sources of legality and justice entwined in the calibrations of relative and internal merit lay down the normative foundation for prosecutorial discretion. That foundation is buttressed by the values of autonomy and good faith in decisionmaking. Race cases confront prosecutors with conflicting state and community commitments to legality and justice. The collision of prosecutor, state, and community norms calls for autonomy.

Prosecutorial autonomy takes two forms: conciliation and independence. Conciliation drives the prosecutor to find grounds for community agreement over racially revisionist state criminal-justice goals and claims. The agreement may come from republican dialogue and deliberation or from a shared vision of the common good. As the instant cases show, racial animus may prevent such agreement. It may hamper dialogue and disrupt deliberation. And it may preclude consensus over the selection and implementation of state ends.

Independence prods the prosecutor to overcome racial discontinuity in state commitments to legality and justice by returning to the legal values of internal merit. These values underscore the importance of independent community-oriented goal and claim selection. To an

125. The community prosecution movement signals the gradual rectification of the extra-judicial neglect of race. *See* Jana Sorensen, *Slums: A Dirty Shame*, PROSECUTOR, Mar./Apr. 2001, at 34; Rita Spillane, *Community Prosecutors as Pioneers*, PROSECUTOR, Nov./Dec. 2002, at 34.

extent, that professional conviction is weakened by the prosecutor's own counterposing pledge to effect state-certified values and outcomes, however bigoted and inequitable. Ascertaining community goals in race cases without the coincidence of prosecutor-state normative commitments requires reasoned and inclusive deliberation with both black and white communities.

Community deliberation over the place of color in the prosecution of race cases makes no promise of consensus. In fact, to engage in such extra-state deliberation, prosecutors must adopt a denaturalized view of consensus that concedes the normal suppression of minority voices. Problematizing the notion of consensus in this way uncloaks prosecutor tendencies towards coercion and exclusion. Exposing coercion and acknowledging exclusion in the traditional model of discretionary decisionmaking makes little progress toward prosecutor-community goal consensus or coincidence. But finding coherence and compatibility may be futile. Condemned to futility, prosecutors must nevertheless seek at least some sense of community confirmation or assent. The risk in seeking out such express or implied consent lies in prosecutorial overreaching.[126] Deprived of intrinsic sources to curb overreaching and its unfettered discretion, prosecutors must rely on extrinsic sources of authority to guide their discretion.[127]

B. *Standard Discretion: Extrinsic Sources*

Extrinsic sources of discretion restrain and embolden the reprosecution of race cases. These sources derive from ethics rules, constitutional values, and community norms. Collectively, they shape the prosecution function alternately into an instrument of racial emancipation and subordination. That instrumental function is exemplified by the charging decision. The contested site of conscious and unconscious racism, charging constitutes an act of naming. The naming of a white offender and a black victim in race cases signifies prosecutorial freedom from the antebellum state and Jim Crow culture and society.

The main source of extrinsic discretion comes from governing ethics rules and standards. Promulgated by federal and state bar associations,[128] national advisory groups,[129] and governmental agencies,[130]

126. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001).

127. For a more sympathetic account of intrinsic sources, see Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567, 2620-36 (1993) [hereinafter Alfieri, *Impoverished Practices*].

128. *See* AMER. BAR ASS'N MODEL CODE OF PROF'L RESPONSIBILITY (1983); AMER. BAR ASS'N MODEL RULES OF PROF'L CONDUCT (2001); AMER. BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE (1993).

and ratified by court enforcement, the rules and standards regulate prosecutorial power in charging, investigation, plea bargaining, trial practice, and sentencing.[131] Regulation retreats from larger issues of adversary justice and institutional incentive.[132] It prefers instead to address matters of conflict, impropriety, and discipline.[133] Discussion of these interstitial matters normally omits mention of racial identity and a racialized narrative. Even in the context of race cases, discussion routinely holds tightly to the position of neutrality. Tied to an adversarial ethic, that position espouses the norms of partisanship and moral nonaccountability.

Although stripped of moral accountability and express racial purpose, bar rules early established the prosecutorial duty to see that justice is done. Initially proclaimed under the American Bar Association's Canons of Professional Ethics, that public duty condemns fact suppression and witness tampering.[134] The ABA Model Rules of Professional Conduct reiterate the prosecutorial responsibility to serve as a minister of justice.[135] Likewise, the ABA Standards for Criminal Justice reaffirm the prosecutorial obligation to seek justice rather than merely convict.[136] The Standards assign the prosecutor the

129. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 97, 99, 109, 112, 123 (2000); NAT'L DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS (2d ed. 1991).

130. *See, e.g.*, U.S. DEP'T. OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-27.000 to .745 (1997) (enumerating principles of federal prosecution).

131. *See* Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992); Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923 (1996); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37; Judy Platania & Gary Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials*, 23 LAW & HUM. BEHAV. 471 (1999).

132. *See* H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA (1996); Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996); Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283 (2001); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

133. *See* Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415, 468-83 (1993); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699 (1998); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429 (1996).

134. *See* AMER. BAR ASS'N CANONS OF PROF'L ETHICS Canon 5 (1908).

135. *See* AMER. BAR ASS'N MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt (2003).

136. *See* AMER. BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.2(c) (1993).

critical, quasi-judicial role of justice administrator. Entrusting him to pursue the interests of justice with broad discretionary powers, the Standards urge the prosecutor to elevate the quality of criminal justice.[137]

The elevation of criminal justice to a higher standard of public ministration comports with the specific mandates of prevailing ethics rules.[138] These rules issue four chief mandates: evidentiary burdens, the rights of the accused, the defender lawyer-client relationship, and trial-associated publicity. To discharge his evidentiary burdens, the prosecutor must marshal probable cause in support of the charging decision and make timely disclosure of evidence relevant to guilt and sentencing. To safeguard the accused, he must honor the right to obtain counsel and strive to prevent the unknowing waiver of pretrial rights. To preserve the defender lawyer-client relationship and the integrity of the adversary system, he must reign in the intrusions of lawyer-targeted subpoena power. To avert the prejudicial impact of pretrial and trial publicity, he must limit the extra-judicial statements of subordinates and refrain from illegitimate extra-judicial comments likely to arouse public condemnation of the accused.[139]

Conferring the role of justice minister, these rule-issued mandates recognize the influence wielded by prosecutors in race cases. Bestowed as an institutional prerogative, that influence extends to charging, discovery, pretrial motions, trial practice, and sentencing. Each component of practice corresponds to a differential form of discretion. And each risks the repetition of an essentializing construction of race in the cloak of victim and community inferiority. Cloaking victims and communities of color in antebellum stigma is an act of normative privileging. That act forsakes the victim. Equally important, it severs the redemptive obligations of the offender.

Shielding the victim from denigrating stigma and sparing the offender from undeserved retaliation in race cases prod prosecutors to draw upon a second extrinsic source of authority, bound up in the constitutional values of due process and equal protection.[140] Exalted in

137. *See id.* at Standard 3-1.2(d) cmt.

138. *See* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

139. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(a)-(f) cmt; *see also* AMER. BAR ASS'N MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(A)-(B) (1982); Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865 (1990).

140. *See* Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001); Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298 (1988); Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659 (1981); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923 (2000).

the moral structure of the Constitution, these procedural and egalitarian norms unleash, and provide a bulwark against, prosecutorial incursions under the banner of state-law enforcement. The thrust of state criminal enforcement actions, however, oftentimes overwhelms procedural fortifications. Indeed, when carelessly planned, the incursions quickly threaten to trample the dignitary interests of the victim and the equality interests of the offender. Dignitary interests concern self-worth and social value. Equality interests pertain to evenhanded treatment. For black victims, dignity is endangered by wounding treatment of the black body caused by prosecutor, jury, and public denigration.[141] For white offenders, equality is imperiled by double jeopardy[142] and speedy trial infractions.[143]

Constitutional norms of dignity and equality are realized during the investigation and trial of race cases. The investigation of racially motivated violence summons the managerial role of the prosecutor in supervising local law enforcement. That institutional role requires the fair-minded supervision of law enforcement officials in targeting, apprehending, and interrogating suspects.

The trial of racial violence calls upon the educational role of the prosecutor in teaching the offender, jury, and community about the experience of violence and its manifold harm. Teaching harm to a segregated community inhabited by the offender and victim demands the abnegation of natural and scientific claims of racial inferiority.[144] It also compels the disavowal of the virtues of separatism.

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141. *See* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 81-114 (1997); Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997; Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 YALE J.L. & HUMAN. 267 (1995); Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571 (1993).

142. For useful discussions of double jeopardy in successive state-federal prosecutions, see Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994), and Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. REV. 649 (1994). *See also* Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887 (1998).

143. Speedy trial safeguards emanate from both constitutional and statutory sources, including the Due Process Clause of the Fifth and Fourteenth Amendments, the Sixth Amendment, the Speedy Trial Act of 1974, and Federal Rules of Criminal Procedure. *See* U.S. CONST. AMENDS. V, VI, & XIV; 18 U.S.C. §§ 3161-3174 (2000); FED. R. CRIM. P. 48(b) & 50(b). On speedy trial principles, see Akhil Reed Amar, Foreword, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 649-77 (1996), and George C. Thomas, III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 228-31 (2001). *See also* Peter Applebome, *Mississippi Hearing in Evers Slaying Pits Trial Rights against Civil Rights*, N.Y. TIMES, Oct. 15, 1992, at A18.

144. *See* Frank Dikotter, *Race Culture: Recent Perspectives on the History of Eugenics*, 103 AM. HIST. REV. 467 (1998).

Teachings of moral import point to a third extrinsic source of discretion in the guise of community. In race cases, the cardinal values of the criminal-justice system — retribution and redemption — stem from community norms. Stirred by vengeance, retribution entails punishment. Inspired by mercy, redemption entails penitence and forgiveness. Both victim-centered vengeance and offender-centered redemption reflect the character and custom of a community. Race-torn communities are likely to be the custodians of antebellum character and segregated custom. Their custodial stake in violence is inimical to the prosecutorial commitment to interracial justice. That stake may be unyielding. It may rebuff appeals to criminal justice, public welfare, and constitutional value. It may refuse to treat violence as a collective injury. And it may reject the role of prosecutor as the trustee of the common good.[145]

Founded on social contract theory, the prosecutor-trustee role requires institutional deference by offender and victim alike. It also necessitates interracial reciprocity by offender and victim support groups and their communities. Deference highlights the intrinsic sources of prosecutorial discretion. It leaves the judgments of legality and justice to the prosecutor. Reciprocity underscores the extrinsic sources of prosecutorial discretion. It hinges on the outside judgments of ethical concurrence, constitutional valuation, and community conviction.[146]

Together, deference and reciprocity transform the prosecutorial role. That transformation invigorates the redemptive aspect of the prosecutorial function. Employed as state agents of redemption, prosecutors stand free to enunciate the norms of penitence, forgiveness, and mercy. However alluring, their newfound theology of healing founders in race cases. Although deduced from intrinsic and extrinsic sources of prosecutorial discretion, it fails to install a racial compass to guide discretion in the use of colorblind, color-coded, and color-conscious modes of analysis. The next Part elucidates the distinctions of color consciousness in prosecutorial discretion.

IV. RACE-CONSCIOUS DISCRETION

The notion of race-conscious discretion offers an alternative justification for the resurgent prosecution of white-on-black racial violence. Extracted from the normative foundation established by standard discretion, the notion of race-conscious prosecutorial discretion holds a shared commitment to legality and justice. It bolsters that commitment by like reference to ethics, constitutional values, and community norms. Despite these common intrinsic and extrinsic

145. *See* Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 274-78 (1999).

146. For an earlier account of prosecutor roles, see Alfieri, *Prosecuting Violence/Reconstructing Community*, *supra* note 1, at 831-49.

origins, standard and race-conscious forms of discretion differ. The crux of the difference lies in adversarial faith.

Standard discretion posits a misplaced faith in the adversary system. Modernist rather than absolutist in tone, that faith concedes incidental and systemic error. Incidental errors are performative. They point to deficiencies in the performance of law enforcement, advocacy, and adjudication functions. The deficiencies are treated as isolated and ephemeral. Even when obdurate, they are deemed susceptible to individual correction. In contrast, systemic errors disclose deficiencies in the basic structure of law enforcement, advocacy, and adjudication. The deficiencies are recurrent and intractable. Impervious to change, they withstand individual and institutional remedy.

The acknowledgement of incidental and systemic error within the adversary system of criminal justice overlooks the virulence of race. This oversight is endemic to the standard conception. To overlook race is not to deny it. Prosecutors guided by standard discretion admit to race in the profiling of offenders, in the selection of jurors and jury pools, and in shopping for judges. They also admit to race in the narrative texts of their opening statements, closing arguments, and pretrial comments. Yet, these admissions are blind to color in its full normative and social meaning.

The institutional faith of standard discretion emanates from suppression. Standard discretion suppresses the normative consequence of coloring identity and narrative, and the social significance of coloring advocacy. Part of the explanation for this suppression pertains to the individualistic content of the criminal law and the adversary system. The criminal law principally contemplates solitary wrongdoing. The adversary system primarily addresses individual lawbreakers. Neither focuses on community transgression and collective responsibility for lawbreaking.[147]

Additionally, part of the explanation for the suppression of color relates to the neutral pretense of the ethical canons of the legal profession. The pretense of neutrality is inextricably linked to partisanship and moral nonaccountability. Partisanship veils colored discourse in the ethos of adversarialism. Moral nonaccountability excuses it inside and outside the domain of law. Repeated evidence of this pretense is discoverable in the norms and meanings of racial discourse in the criminal-justice system. Routinely heard among prosecutors, and echoed among lawyer defenders, judges, and law enforcement agents, that discourse approves distinct modes of colorblind, color-coded, and color-conscious representation. However biased in content and

147. On collective guilt and responsibility for community transgression, see Sanford Cloud Jr., *The Next Bold Step Toward Racial Healing and Reconciliation: Dealing with the Legacy of Slavery*, 45 HOW. L.J. 157 (2001), and George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002).

discriminatory in effect, none of these narrative modes apparently departs from neutrality. Evidently, they are merely partisan. At worst, they are overzealous. More important, none of the modes is presumed to be adverse to identity or inimical to community.

Rhetorical approval or disapproval of the trope of color signals competing public commitments to racial identity and status in law and society. Historical crimes of white-on-black racial violence give prosecutors the opportunity to realize their commitments to color in the ongoing decisions of criminal advocacy. The vectors of punishment and mercy form a basic dyad of commitment for the prosecutor in his public role of crime-fighting sentinel and criminal-justice minister. Fulfilling that dual role in a redemptive spirit of conciliation may prove beneficial to the struggle for interracial community justice. But it may invite the popular condemnation of victim and offender groups.

No offender or victim — white or black — stands alone apart from his identity-based community. Materially, each comes from situated family and community circumstances. Symbolically, each reflects the character of that original community, either in a discrete feature or in a multiplicity of traits. At all times, each offender and victim belongs to a specific group or a collection of community groups. Ordinarily consigned to colorblind or color-coded adversarial conflict, those groups may collide differently in a move to race-conscious, redemptive prosecution.

Faced with white-on-black violence, black-victim groups may look to race-conscious, redemptive prosecutions on egalitarian grounds, demanding equal punishment for white lawbreakers. White offender groups may view the same prosecutions on procedural grounds, insisting on the protection of due process safeguards for lawbreakers. The clash of state-sponsored restorative conciliation, victim-implored instrumental vengeance, and unrepentant offender-pleaded procedural formalism is the paradox of racially redemptive prosecution in the adversary context of retributive punishment. That clash indicates that race-conscious, redemptive bids for interracial reconciliation may be incompatible with the reprisal norms of adversarial justice. It also suggests that such bids may be incongruent with community sentiment, insofar as community may be said to exist in a racially polarized state.

The liberal imagination, beset by a plural tolerance for divided community, offers little chance of resolving this central paradox of race-conscious, redemptive prosecution. Closely tied to the rational individualism of adversarial contest, liberalism holds limited tools from which to build a legal process of racial conciliation. Individualism strains to engage in the dialogue and other-directed empathy required for reconciliation. Tolerance prefers the passivity of secular forbearance to the affirmative, identity-imbued clasp of reconciliation.

Pluralism endorses a weak sense of community best defined by competition rather than cooperative consensus.

The atomized fellowship, meek tolerance, and thin consensus of liberal community are further undermined by critical race jurisprudence. Critical race theorists castigate liberal tolerance for its repression of diversity. They also rebuke liberal consensus for manufacturing a false civic accord. Solicitous of intersectional color and its promise of common fellowship, they call for a more inclusive tolerance and a more genuine consensus across racial lines traditionally dividing African-American, Latino/a, Asian, and Native-American communities.

Race-conscious, redemptive discretion joins liberal and critical race jurisprudence in reconstructing the adversarial model of prosecution. Both liberal and critical race scholars point to pervasive evidence of race discrimination in law and society.[148] In the criminal-justice setting, scholars observe patterns of disparity binding race, crime, and criminal justice.[149] The patterns surface in prosecutorial charging[150] and court sentencing.[151] Their repercussions materialize in accusations of selective prosecution[152] and in damage to black communities.[153]

148. *See* IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001); CORAMAE RICHEY MANN, UNEQUAL JUSTICE — A QUESTION OF COLOR (1993); Charles J. Ogletree, Jr., *The Burdens and Benefits of Race in America*, 25 HASTINGS CONST. L.Q. 219 (1998).

149. *See* BENJAMIN BOWLING & CORETTA PHILLIPS, RACISM, CRIME AND JUSTICE (2002); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA (2d ed. 2000); RACE, ETHNICITY, SEXUAL ORIENTATION, VIOLENT CRIME: THE REALITIES AND THE MYTHS (Nathaniel J. Pallone ed., 2000); Richard R. W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660 (1996); Anna Wang, *Beyond Black and White: Crime and Foreignness in the News*, 8 ASIAN L.J. 187 (2001).

150. *See* Amy Grossman Applegate, *Prosecutorial Discretion and Discrimination in the Decision to Charge*, 55 TEMP. L.Q. 35 (1982); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985); Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175 (1987).

151. *See* SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION (1989); Kathryn Roe Eldridge, *Racial Disparities in the Capital System: Invidious or Accidental?*, 14 CAP. DEF. J. 305 (2002); Larry Michael Fehr, *Racial and Ethnic Disparities in Prosecution and Sentencing: Empirical Research of the Washington State Minority and Justice Commission*, 32 GONZ. L. REV. 577 (1996-97); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001); Charles Ogletree, *The Significance of Race in Federal Sentencing*, 6 FED. SENTENCING REP. 229 (1994).

152. *See* Paul Butler, *Starr is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705 (1999); P.S. Kane, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293 (1993); Romero, *supra* note 109.

Scholarship documenting these repercussions and searching out remedies demonstrates that race consciousness, and the offshoots of affirmative action and multiculturalism, are not the sole preserve of critical race scholars.[154] Stitched in race-neutral color, they are already embroidered in the liberal text of ethics rules governing the adversary system.

To their credit, ethics rules prohibit bias in prosecutor charging, discovery, pretrial jury selection, trial practice, and more. Guided by adversarial norms, the rules emphasize procedural justice and evidentiary fairness. The ABA Standards, for example, bar intentional misrepresentation, bad faith, knowing offers of false or inadmissible evidence, and misstatements of evidence. As previously mentioned, they also regulate extra-judicial public statements calculated to cause prejudice. More profoundly, they ban invidious racial discrimination in mounting an investigation or prosecution.[155]

The ban on invidious discrimination enmeshes prosecutors in debate beyond the choice of allocating intrinsic and extrinsic sources of discretion. Without diminishing the importance of that debate to prosecutorial decisions at indictment or at voir dire, sorting out the right balance of discretionary sources is unlikely to resolve the parameters of a race-conscious duty in cases of white-on-black racial violence. Compelled by the facts of violence but pinioned between the ideals of colorblind constitutionalism and the practical efficacy of color-coded stereotypes, prosecutors may be tempted to opt for covert resolution. Put simply, they may resort to a clandestine style of race-conscious decisionmaking behind a veneer of race-neutral rhetoric, a style evident only in its de facto consequences.

Clothed in the adversarial tradition, this pretextual style of race-neutral prosecution actually may serve the key interests of victims and communities of color in race cases. Refashioning antebellum and postbellum codes of color into retributive claims, it might deliver individualized justice to black victims and kindle the collective healing of black communities. Concurrently, it might exact justice from white offenders and thereby invite the partial redemption of white commu-

153. *See* Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005 (2001).

154. *Compare* Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990), *and* Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535 (2001), *with* Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669 (1998), *and* Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659 (2002), *and* Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement*, 20 B.C. THIRD WORLD L.J. 231 (2000), *and* Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1 (2001).

155. *See* AMER. BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE Standard 3-3.1, 3-5.8 (1993).

nities. In such ways, it might mediate the prosecutorial tension of competing commitments to privately incurred punishment and publicly displayed justice. Finally, it might fulfill the obligation of liberal community to tolerate a continuing partition among still divided and often implacable racial groups.

On any yardstick, these are substantial accomplishments. Whatever the pretext, to meet even partially the interests of victim and offender communities and to carry out the purposes of private and public justice are formidable achievements. They gain added luster by satisfying the goals of liberalism and the imperatives of legality. Although not enhanced by the pretense of race-neutrality, surely the value of legality is not lessened by its presence. Similarly, the value of liberalism is not diluted by the inauthenticity of racial pretense, particularly when, as here, it fosters consequentialist goals. What may be diminished are the value of open procedure and the virtue of juridical candor. Redemption depends in substantial measure on the values of process and candor.

Race-conscious discretion borrows impoverished norms of process and candor from the standard conception of discretion. Importing these norms replicates the complications of private retribution and public redemption that irk the standard conception. Even with the embellishments of legality and justice, those complications may be insoluble. Race-conscious discretion merely extends the tenets of liberal legalism; it does not cure or displace them. Sympathetically extended, standard discretion may be pressed into closer alliance with the goals of interracial community and citizenship. That alliance requires the recognition of racial status and the elevation of process and candor in prosecuting race cases.

Inscribed in sociolegal identity and narrative, racial status is obscured in the colorblind and color-coded prosecution of race cases. Colorblind prosecution avoids the inscription of status out of formalist conviction. Avoidance shuns status distinctions as irrelevant to the advocacy process. That process is relatively open and candid. But it may frustrate the goals of race case prosecutions. Color-coded prosecution, on the other hand, evades confession of the inscription of racial status for instrumental purposes. Evasion of this sort covertly preserves status distinctions as relevant to the advocacy process but denies, or publicly withholds, its endorsement of such distinctions and their tactical relevance for fear of inviting claims of prejudice. This process is oblique and dissembling. Nonetheless, it may better advance the goals of race prosecutions.

Discarding the neutral claims of standard discretion under colorblind and color-coded prosecutions unseals the advocacy process in race cases exposing its race-conscious purposes. Candid disclosure of those purposes is a virtue unacknowledged by standard discretion. Disclosure is a virtue because it brings honesty to the public debate

over racial injustice, and because it furthers the public policy of racial reparation for individual victims of violence and of redemption for communities inured to violence, white and black.

The virtue of candor in embracing racial status and in designing a race-conscious process of advocacy links the prosecution function to citizenship. This linkage wrests the meaning of black citizenship from the stigma of antebellum and postbellum characterizations. Wresting meaning from the stigmatizing portraits of black victims and their accompanying communities revives a dialogic process in law, culture, and society. Revival stirs cross-racial economic exchange, social interaction, and political participation. These moments of community dialogue and joinder intimate the possibility of reconciliation.

At the same time, the linkage rescues white citizenship from its collective acceptance of antebellum and postbellum racial indignity and inequality. Rescuing white citizenship from its own acquiescence in such inequities allows for a kind of collective redemption. White redemption is grounded in the sorrow of remorse. Unlike black redemption and its locus of retribution, white redemption seeks to repair and to reconcile relations of historical violence. That allowance arrives from the candid prosecutorial decision to present the advocacy process openly as a means to restore the dignity of black victims and to redeem the conscience of white offenders, their communities, and the state.[156] Restoration includes black retribution and forgiveness. Redemption includes white punishment and penitence. Retributive punishment and mercy are integral to the reciprocal morality of citizenship. Reciprocity honors the norms of dignity and mutual respect. It forges sympathetic attachments across racial lines.

The candid process orientation of race-conscious discretion burdens the already strained prosecutorial role of state partisan and public minister. As a partisan of the state, the prosecutor strives to enforce the law by preventing, deterring, and punishing wrongdoing. As a minister of justice, he seeks to find the right result in balancing the interests of the accused, the victim, and the public. This role competition occurs along a shifting boundary line. That line is affixed to color. It dictates the freedom and constraint to engage in colorblind, color-coded, and color-conscious advocacy. To be effective, the

156. Symbolically and normatively, candor exposes criminal reprosecutions as a category of race trials, rather than the more blunt category of political trials. *See* David Garland, *Punishment and Culture: The Symbolic Dimension of Criminal Justice*, *in* 11 STUDIES IN LAW, POLITICS, AND SOCIETY 191 (Austin Sarat & Susan S. Silbey eds., 1991); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829 (2000). *Compare* DANIEL W. SHUMAN & ALEXANDER MCCALL SMITH, JUSTICE AND THE PROSECUTION OF OLD CRIMES: BALANCING LEGAL, PSYCHOLOGICAL AND MORAL CONCERNS (2000), *with* AMERICAN POLITICAL TRIALS 159-77 (Michal R. Belknap ed., 1994).

boundaries of freedom and constraint must be reasonably determinate. In race cases, the boundary lines are frustratingly indeterminate.

Prosecutors experience the indeterminacy of color in assembling the goals and claims of race cases. Based on victim, offender, and community interests, those goals and claims may be asserted under colorblind, color-coded, and color-conscious standards of discretion. The standards shape the character of identity and the content of narrative heard in advocacy. Identity and narrative are highly contingent on fact and law. The complex accumulation of facts and the aggregation of multiple legal theories and authorities in race cases heightens this sense of indeterminacy. In the racial spiral of retrospectively collected factual claims and statutorily culled legal claims, the lines separating colorblind, color-coded, and color-conscious advocacy blur.

The indeterminacy of fact produced in unearthing long-buried evidence[157] and in amassing legal materials gives race cases an unbounded quality where zealous advocacy seems to proceed unrestricted. That unbounded sense is intensified by the brutality of the underlying crime and the intervening passage of time. Unlike antecedent crimes and periods of racial violence, the reprosecution of race cases gives rise to an epochal sense of historic combat and enduring legacy. Gripped by this sensibility, prosecutors struggle to balance their duties to law enforcement and public justice. Instead of finding equipoise, they collapse the duties into a single compelling partisan obligation to avenge violence by any colored means necessary.

The coloring of partisanship into racially coded advocacy is restrained by the intrinsic and extrinsic sources of standard discretion. That restraint is partial. Given the compulsion of zealous advocacy, neither the factors of legality and justice, nor the variables of ethics rules, constitutional values, and community norms, supplies adequate controls. Insofar as each set of considerations draws on a lawyer's practical judgment in the interpretation of legal rules, the purpose of the rules may itself provide mitigating restraint. Both criminal and civil rights laws harbor compelling public purposes.

The reprosecution of race cases entails the application of lawyer judgment in interpreting the purposes of criminal and civil rights laws. Applying legal rules signals lawyer independence. Discretion is a function of that independence. The race-conscious exercise of lawyer discretion seeks to integrate the interests of the victim, offender, and public into the normative framework of criminal and civil rights law. That framework contains punitive and redemptive purposes rooted in penitence, reparation, and even restoration. Integration strives to

157. *See* Marlon Manuel, *Church Bombing Case Turns on Old Evidence*, ATLANTA J.-CONST., May 1, 2001, at A5; Jean Marbella, *Sins of Past Still Cry Out for Justice Conscience: Witnesses are Breaking Years of Silence and Calling Aging Men to Answer for Crimes of the 1960s*, BALT. SUN, May 20, 2001, at C1.

unify the interests of the accused, the victim, and the public in punishing white defendants and in redeeming white communities. Absent black and white community reconciliation, redemption will be subverted and the overarching purposes of criminal and civil rights laws will be nullified.[158]

The pursuit of black-white reconciliation motivates the race-conscious model of purposive lawyering. This independent-minded practice model departs from an adversarial framework. Yet, like its predecessor, that purposive framework relies on ethics rules and standards for regulation. The colorblind instincts and color-coded tendencies of conventional ethics rules undermine the candor demanded of race-conscious discretion. Accommodating candid midlevel procedures in reprosecutions that account for racial status, multiple party interests, and competing private and public needs requires independent judgment reached in collaboration with black and white communities. Cross-cutting collaboration is the springboard for community-guided ethical discretion in race cases. The next Part considers the basis for community-guided restorative discretion.

V. COMMUNITY-GUIDED RESTORATIVE DISCRETION

The idea of community-guided restorative discretion furnishes an additional justification for the resurgent prosecution of white-on-black racial violence. Restorative discretion modifies standard prosecutorial discretion by loosening adversarial norms and intermixing race-conscious community norms. Modification leaves intact the intrinsic sources of legality and justice as well as the extrinsic sources of ethics, constitutional values, and community norms.

Restoratively gleaned, intrinsic and extrinsic sources of discretion channel prosecutors toward interracial reconciliation. Under the standard conception of discretion, the intrinsic value of legality creates powerful law enforcement imperatives. Rather than weaken those imperatives, race-conscious discretion expands the framework of legality to encompass the public purposes of relevant criminal and civil rights laws.

Restorative discretion further enlarges that framework to take account of both victim and community reparations.[159] In race cases,

158. For useful discussions of indeterminacy and independence in lawyering, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988), and David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992). *See also* Alfieri, *Impoverished Practices*, *supra* note 127, at 2654-60.

159. *See* ERIC K. YAMAMOTO, RACE, RIGHTS AND REPARATION (2001); Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959 (2000); Alfred L. Brophy, *Losing the [Understanding the Importance of] Race: Evaluating the Significance of Race and the Utility of Reparations*, 80 TEXAS L. REV. 911 (2002) (reviewing JOHN H. MCWHORTER, LOSING THE RACE: SELF SABOTAGE IN BLACK AMERICA (2000)).

reparations refer to both spiritual and material recompense. The reparations may come from the offender in the form of atonement and restitution, from white communities in the form of public penitence, or from the state in the form of contrition and compensation for mental, physical, and economic harm.[160] Of greater symbolic than monetary value, the offering of apology may contribute to racial conciliation.[161]

Similarly instilled within standard discretion, the intrinsic value of justice commands potent retributive claims. Incited by vengeance, the claims implicitly boast the vigor of prevention and deterrence. Taken seriously, this boast suggests that the severity of vengeance works not only to prevent (by death), but also to deter (by fear) crimes of racial violence. Race-conscious discretion applauds such instrumental averments. Explicit in remedial purpose, it seeks to halt racial violence.

Restorative discretion views the plaudits of vengeance with more reservation. In spite of its asserted efficacy, vengeance wreaks profound damage on community. For some communities of color, the damage may prove irreparable. The joint failure of white communities and the state to enjoin or remedy that damage weighs heavily on conciliation, diminishing the likelihood of black forgiveness. The deterioration of forgiveness renders mercy for white offenders and their communities improbable. The decline of mercy in turn may discourage acts of atonement. Absent atonement, redemption ceases.

The debilitation of intrinsic sources of discretion under the standard conception of prosecution also saps extrinsic sources. Ethics rules, for instance, blinded by the pretense of neutrality, stumble in regulating the color-coded practices that permeate the criminal-justice system. Race-conscious discretion cures this blindness only to substitute a different sort of myopia. That is the myopia induced by the unstable boundaries of color in advocacy.

Even for clear-eyed prosecutors, the lines segmenting colorblind, color-coded, and color-conscious claims of advocacy fluctuate and regularly fade from view. Restorative discretion accepts this fluctuation as part of the instability of race and the mutability of racial identity. It appreciates that the facts of racial violence and the laws delineating its prosecution are vulnerable to multifaceted readings that may veer interpretatively from colorblind to color-coded and back. It also recognizes that these distinctions are contextual, surfacing in the everyday practice of advocacy and adjudication.

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160. *See* Joe Hudson & Burt Galaway, *Restitution Program Models with Adult Offenders*, *in* CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 165 (Burt Galaway & Joe Hudson eds., 1990).

161. On the use and subversion of apology, see Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000), and Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

Densely layered within criminal-justice roles, relations, and institutions, distinctions of color frequently resist easy discernment. Prosecutorial roles in courtroom advocacy and neighborhood outreach nimbly combine colorblind, color-coded, and color-conscious approaches, for example in jury selection and "qualify-of-life" policing.[162] Prosecutorial relations with offenders, criminal defense lawyers, and judges mingle the same approaches in street-level profiling and disqualification motions.[163] Prosecutorial institution-wide policies also blend these approaches in charging, plea bargaining, and sentencing.[164] Sometimes interchangeable, the approaches succumb to conscious and unconscious bias.

The insinuations of bias are entrenched in the materials of law and the tactics of advocacy. Colorblind claims may appear facially neutral and laudable, yet they may shelter animus. Without refuge from invidious intent, such claims engender racially disparate consequences in law enforcement. Color-coded claims may seem correspondingly neutral, yet they too elicit suspiciously disparate effects.[165] Even when prosecutors dispense with the veneer of impartiality in favor of a color-conscious approach, their claims may produce disparate outcomes, especially where race intersects gender, ethnicity, or sexuality. Despite these intricacies and contradictions, restorative discretion trusts the practical discernment of colored boundaries to the good faith of prosecutorial judgment, checked by community-guided intrinsic and extrinsic sources of restraint.[166]

Extrinsic sources of community-guided discretion flow from the constitutional values of dignity and equality. Aimed at offender-

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162. *Compare* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996), *with* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001), *and* Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

163. *See* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000); F. Michael Higginbotham, *In Memoriam: A. Leon Higginbotham, Jr. — A Man for All Seasons*, 16 HARV. BLACKLETTER L.J. 7, 11 (2000); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201 (1992). For discussion of race-based recusal and disqualification motions, see Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975), and Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155 (E.D. Pa. 1974).

164. On prosecutorial coloring in charging, plea bargaining, trial, and sentencing, see LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872 (1996); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071 (1997), and Lu-in Wang, *Unwarranted Assumption in the Prosecution and Defense of Hate Crimes*, 17 CRIM. JUST. 4 (2002).

165. On the appearance of prejudice, see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000).

166. *See* Alfieri, *Community Prosecutors*, *supra* note 10, at 1480-91, 1502-07.

specific retribution and unmindful of victim well-being, standard discretion discounts the value of dignitary and equality interests. Constitutional norms elevate dignity in safekeeping individual integrity and collective liberty from state onslaught or neglect. Moreover, they enhance equality in securing the evenhanded protection of communities. In race cases, those interests unite black victims and their communities.

Dignity applies equally in life and death. It is the root indignity of white superiority and black inferiority that instigates white-on-black violence. The act of white violence compounds that indignity. The failure to prosecute white violence, and to eradicate its societal underpinnings, magnifies indignity and ensures its continuation.

Equality also pertains to life and death. It is the inequality of the white-black hierarchy in economic and social relationships that permits a culture of white-on-black violence to flourish. Repeated acts of white violence reinforce black subordinate positions in that hierarchy. The historic failure to punish white violence, and alter the asymmetrical relationships of socioeconomic status, preserves inequality in society and guarantees a powerless black position in politics.

Race-conscious discretion honors victim dignitary and equality values. Highlighting the plight of black victims and the menace to black communities, it attacks white violence for lawbreaking and for denigrating individual and collective dignity. It focuses that attack on racial status, adducing evidence of status-based motive in offender conduct and summoning statutory sanction under criminal and civil rights law. Strengthened by a penalty-enhancement proviso, that summons increasingly calls on hate crime legislation for remedy. Although hate crime legislation captures the thrust of racial violence, it mislays emphasis on retaliation. Reprisal cedes slim ground for redemption.

Restorative discretion mitigates the retaliatory force of race-conscious hate crime prosecution. Endeavoring to repair dignity and equality through conciliation, it petitions for offender atonement, victim forgiveness, and state mercy. Contraposed to the punitive appeal of standard and race-conscious discretion, the petition declares the redeemability of white lawbreakers and the possibility of racial reform even when personal history and practical reason tilt to the contrary. That declaration complicates the relationship of punishment to redemption.

Nothing in the formal definition of redemption precludes punishment. In fact, its predicate acts — atonement, contrition, penitence — imply punishment of a robust size. The acts signal an acknowledgement of wrongdoing. This admission, coupled with promises of physical rehabilitation and spiritual reformation, hardly amounts to punishment. For redemption to be credible, some deprivation of

proportionate duration and severity must ensue. Pressed too far in severity, punishment may undermine the chance of white contrition.[167] In the same way, violence pushed too far in its brutality may undercut the prospect of black forgiveness. Cruelty in either respect runs afoul of redemption.

To survive incidents of private violence and public punishment, restorative discretion must establish a benchmark for the reinstallation of dignity and equality. The preference for reinstallation over restoration stems from the difficulty of recollecting black dignity and equality in American law and society. Recollections gathered from antebellum, postbellum, and Jim Crow eras find dignity battered and equality destitute. Neither finding is fatal to redemption.

Dignity inhabits manifold public and private spheres. The spheres are cross-cut by cleavages of race. The cleavages divide public space into black and white redoubts. Within these strongholds, black communities realize their own sense of dignity inlayed by culture and social history.[168] Outside of these strongholds, where public space overlaps black and white geography in culture, economics, and politics, black communities suffer the indignities of inferiority, subordination, and violence.[169] Inexorably, the battering of black dignity in a white-dominated public space will disturb the experience of black dignity in alternative public and private spaces.

To disturb dignity is not to extinguish it. The civil rights movement demonstrates that dignity can endure public violence and private humiliation.[170] The early history of the movement in particular shows that dignity can overcome even unbridled violence.[171] Triumphing over violence unsuccessfully resolves the tension spawned by differential assessments of dignitary values by victims and communities of color,

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167. Punishment may influence demonstrations of remorse. *See* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998); Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, *in* THE PASSIONS OF LAW 168-90 (Susan A. Bandes ed., 1999); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1 (2003); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998).

168. *See* Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803 (2000).

169. *See* Regina Austin, *"An Honest Living": Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119 (1994); Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147; Regina Austin, *"Not Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667 (1998); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

170. *See* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988); TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65 (1998).

171. *See* JOHN EGERTON, SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH (1994).

the public, and the state. That tension is inescapable given the rich diversity of color, the separatist fervor of the public, and the segregationist legacy of the state.[172] The failure to organize some union among these variable assessments limits the redemptive guidance of constitutional values.

Comparable limits impinge on the constitutional value of equality in restorative discretion. Like the attempt to recapture black dignity, the effort to restore black equality collides with the recollections of hardship mined from the antebellum, postbellum, and Jim Crow eras. Those recollections provide a benchmark for equality notched by poverty and stratification. That benchmark is anathema to restorative discretion. The handiwork of post-Reconstruction tools for demeaning socioeconomic status, the benchmark recalls a time of malignant inequality that continues in many sectors of the black community.[173]

To obtain a more satisfactory principle of equality in guiding race cases, prosecutors must turn again to the civil rights movement, particularly to antidiscrimination laws.[174] Unlike the more controversial claim of preferential treatment,[175] the turn to civil rights and its memory of struggle[176] points to the inadequacy of the colorblind approach in alleviating inequality in the criminal-justice system.[177] For race cases, only a forward-looking race-conscious approach to prosecution intent upon ameliorating the socioeconomic position of black communities will satisfy the goal of restorative justice. Amelioration comes in uplifting the legal, socioeconomic, and political status of communities, not simply in a flurry of apologies or an award of reparations.

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172. *See* Anita Christina Butera, *Assimilation, Pluralism and Multiculturalism: The Policy of Racial/Ethnic Identity in America*, 7 BUFF. HUM. RTS. L. REV. 1 (2001); Patrick F. Linehan, *Thinking Outside of the Box: The Multiracial Category and Its Implications for Race Identity Development*, 44 HOW. L.J. 43 (2000).

173. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

174. *See* Tanya Katerí Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws: A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093 (2002); Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194 (2000).

175. *See* Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943 (2002).

176. *See* Katherine M. Franke, *The Uses of History in Struggles for Racial Justice: Colonizing the Past and Managing Memory*, 47 UCLA L. REV. 1673 (2000); Bill Maurer, *Visions of Fact; Languages of Evidence: History, Memory, and the Trauma of Legal Research*, 26 LAW & SOC. INQUIRY 893 (2001) (reviewing HISTORY, MEMORY, AND THE LAW (Austin Sarat & Thomas R. Kearns eds., 1999)).

177. Colorblind axioms also flounder in combating race discrimination outside the black-white paradigm. *See* Liann Ebesugawa, State v. Rogan*: Racial Discrimination and Limits of the Color-Blind Approach*, 24 U. HAW. L. REV. 821 (2002); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

Uplifting the racial status of victims and communities of color slows the dilution of extrinsic sources of discretion under the standard colorblind approach to race case prosecutions. Community norms maintain a weak presence in the exercise of standard discretion. Displaced by adversarial rituals, the norms are shunted aside in the individualized hunt for criminal convictions.[178] Both offender and victim communities are shunned in this hunt, their participation stunted, and their voices silenced.[179]

Race-conscious discretion reincorporates community into the prosecution process. Implanting the offender and victim in community, it searches white and black constituents for signs of color consciousness. It is color that connects the private acts of criminal lawbreaking to a public constellation of actors. For white offenders, color connects up to communities founded on racial superiority. For black victims, color attaches to communities trapped by racial inferiority. Release from these parallel entrapments requires the blunt, race-conscious assignment of collective responsibility to white communities tolerant of racial violence and to states complicit in such acquiescence, an acquiescence that signals the collapse of public/private boundaries recognized by postbellum constitutional and statutory jurisprudence enacted by Congress during Reconstruction.[180] It also demands race-conscious sensitivity to the insidious devaluation of black communities as cultural and economic resources.

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178. On the integration of community norms in criminal and civil rights law, see PENDA D. HAIR, ROCKEFELLER FOUNDATION, LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE 151-55 (2001) (urging incorporation of race into a community framework of justice). *See also* John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927 (1999); Steven F. Lawson, *Freedom Then, Freedom Now: The Historiography of the Civil Rights Movement*, 96 AM. HIST. REV. 456 (1991); Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659 (2003). *Compare* Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751 (2000), *with* ROBERT WEISBERG, RESTORATIVE JUSTICE AND THE DANGERS OF COMMUNITY (Stanford Law School, Stanford Public Law and Legal Theory Working Paper Series, Research Paper No. 50, Feb. 2003) (unpublished manuscript on file with author).

179. The unreflective defense of criminal offenders independent of third-party interests contributes to this silence. *See* Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEXAS L. REV. 1383 (2002); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000). The same silence attends the neglect of role and racial identity. *Compare* ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE 61-75 (1999), *with* David B. Wilkins, *Beyond "Bleached out" Professionalism: Defining Professional Responsibility for Real Professionals*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 207-34 (Deborah L. Rhode ed., 2000).

180. On the constitutional and statutory bases of prosecuting bias crimes, see FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 110-60 (1999).

Standing alone, neither race-conscious responsibility nor race-conscious evaluation will achieve restorative results. To achieve restorative justice, white communities must accept responsibility for violence and contrition. Inversely, black communities must shoulder the obligation of forgiveness. Redemptive responsibility is not easily seized or imposed. It is a process shaken by internal quarrel over the criminal-justice goals and claims of prosecution in race cases.

Internal quarrels over prosecution goals and claims upset communities and state agents. Broadening prosecutorial goals from punishment to mercy incites disagreement within black communities. Shifting claims from culpability to contrition inflames the resentments of white communities. Adding to this internal discord is the external friction generated by prosecutor-community and prosecutor-state conflict. Offender and victim communities may clash with prosecutor-slated goals and claims. Federal, state, and local agents may also spar over the ranking of prosecutor goals and claims.

Restorative discretion concedes a broad spectrum of conflicts dividing communities and the state. It anticipates both internal dissension voiced within communities and external dissent announced within the state forums of administrative agencies, courts, and legislatures. Unsure of the exact permutations of dissension, it insists that the resolution of these conflicts occur in a grassroots collaborative context, rather than by paternalistic decree. The key to resolution is the renunciation of colorblind prosecution.

Community-guided restorative discretion is color-conscious. Rejecting the pretense of neutrality as false and unproductive, it substitutes candor in addressing the histories of racial violence and in settling the differences of racial community. Candor introduces an open process of prosecutorial decisionmaking. That process is republican: it calls for civic participation and public deliberation in setting the goals and claims of race case prosecutions. It demands the development of midlevel procedures that are responsive to racial status, multiple party and nonparty interests, and competing private and public needs. And it relies on independent practical judgment and community collaboration.

The institutional development of midlevel procedures to guide prosecutorial discretion builds from the groundwork of restorative justice.[181] Out of that groundwork come claims of atonement and

181. *See* DENNIS SULLIVAN & LARRY TIFFT, RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES (2001); David H. Bayley, *Security and Justice for All*, *in* RESTORATIVE JUSTICE AND CIVIL SOCIETY 211 (Heather Strang & John Braithwaite eds., 2001); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, *in* CRIME AND JUSTICE: A REVIEW OF RESEARCH 1 (Michael Tonry & Norval Morris eds., 1999); Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717 (2000); Glenn M. Kaas, *Restorative Justice: A New Paradigm for the Prosecutor*, PROSECUTOR,

mercy.[182] Those claims challenge conventional theories of punishment[183] and deterrence,[184] giving rise to an exploration of alternative sanctions.[185] Steering a path between vengeance and forgiveness,[186] the exploration leads to an evolving reconceptualization of racial violence as a hybrid form of legal-political crime. Conceived as such, race cases afford the opportunity to consider alternative prosecutorial strategies borrowed from restorative and transitional justice experiments abroad, for example in South Africa under the Truth and Reconciliation Commission[187] and in East Germany.[188] Those alternative strategies of racial reconciliation rest heavily on narrative.[189]

Nov./Dec. 2000, at 31; Clifford Shearing, *Transforming Security: A South African Experiment*, *in* RESTORATIVE JUSTICE AND CIVIL SOCIETY, *supra*, at 14.

182. *See* Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999); David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, then Why Is It So Hard to Find?*, 27 FORDHAM URB. L.J. 1663 (2000); Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303 (2000); Mary Sigler, *The Story of Justice: Retribution, Mercy, and the Role of Emotions in the Capital Sentencing Process*, 19 LAW & PHIL. 339 (2000).

183. *See* Kathleen Daly, *Revisiting the Relationship Between Retributive and Restorative Justice*, *in* RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 33 (Heather Strang & John Braithwaite eds., 2000); David Dolinko, *The Future of Punishment*, 46 UCLA L. REV. 1719 (1999); Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635 (2000).

184. *See* Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943 (2000); Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

185. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001); Dieter Rossner, *Mediation as a Basic Element of Crime Control: Theoretical and Empirical Comments*, 3 BUFF. CRIM. L. REV. 211 (1999).

186. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); Douglas B. Amnar, *Forgiveness and the Law-A Redemptive Opportunity*, 27 FORDHAM URB. L.J. 1583 (2000); Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599 (2000).

187. *See* Mariah Jackson Christensen, *The Promise of Truth Commissions in Times of Transitions*, 23 MICH. J. INT'L L. 695 (2002); Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355 (1999); Donald W. Shriver, Jr., *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?* 16 J.L. & RELIGION 1 (2001); Anurima Bhargava, Note, *Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission*, 102 COLUM. L. REV. 1304 (2002).

188. *See* Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002); Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 COLUM. J. TRANSNAT'L L. 89 (2001); Charles Vilá-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205 (2000).

189. *See* Stephane Leman-Langlois, *Constructing a Common Language: The Function of Nuremberg in the Problematization of Postapartheid Justice*, 27 LAW & SOC. INQUIRY 79

The narratives of restorative discretion break from the lexicon of retributive punishment in prosecuting race cases. They depart in search of redemption and reconciliation. The language of redemption speaks of contrition and atonement. The language of reconciliation talks of forgiveness and mercy. Both invoke the rhetoric of community on behalf of the offender, victim, public, and state. Borne of violence, that rhetoric may ring empty. Enlarging its meaning outside of the adversary tradition requires translation.

Prosecutorial translation of the retributive tradition into a restorative approach to criminal justice for offenders, victims, and their adjoining communities depends on narrative. Restorative narratives strive for empathy. Locating offender and victim stories in the racialized histories of segregated communities, they seek to promote empathic understanding in lay public and private forums, and among legal and political decisionmakers. Understanding differs from enlightenment. It arises from hearing stories of racial violence in common places: churches, schools, and public squares. Hearing stories provides the basis for cross-racial learning and dialogue in the innumerable venues of law, culture, and society. For public agents and private citizens, dialogue across racial lines contributes to an informed and empathic decisionmaking process in criminal justice and civic governance.

The adversarial practices of the criminal-justice system shackle the open search for information documenting racial violence and obstruct the dialogue essential for the redemptive resolution of race cases. The task of restorative discretion is to unfetter that search and to stimulate dialogue. The goal is to initiate and, if possible, sustain a multigenerational conversation between black and white communities about their mutual interests in redemptive justice.

Numerous obstacles jeopardize that conversation. Narratives are typically disjointed and contradictory. Stories are often incomplete and misleading. Dialogue is fragile and ephemeral. And empathy is vulnerable to the cognitive staining of color. But none of these deficits is more devastating than internal community strife. Internal divisiveness over the goals and claims of race prosecutions compromises the ability to repair black communities and redeem white communities.

To surmount these obstacles, prosecutors must engage offender and victim communities and their subgroups in a discussion about the shared benefits of reparation and redemption. Law offers no universal narrative or story capable of conveying those benefits. Because the benefits accrue differently to black and white communities, and splinter further within multicultural communities, colorblind discourse

(2002); Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL'Y & L. 195 (2000).

fares badly.[190] Instead of race-neutral or binary accounts of sociolegal benefit, prosecutors must draw upon the communities' diverse identity resources, finding common ground in social difference and historical alliance in law.[191]

By celebrating difference and its defense under criminal and civil rights law, prosecutors may be able to overcome status distinctions between and among racial communities. Those distinctions are enmeshed in symbolic and narrative descriptions of racial superiority and inferiority. The descriptions objectify and, thereby, deform offenders and victims. Interwoven in law and society, the process of objectification in contemporary race prosecutions too often reduces white offenders to objects of segregationist zealotry and black victims to feeble objects of pity. Neither punishment nor acquittal will arrest this reductionist tendency. Moreover, neither result will save its objects and their extended communities from harm.

In race cases, harm is experienced on individual and collective planes. For black victims and their communities, harm stigmatizes racial status. Black stigma is signified by powerlessness. Standard discretion attributes victimization to powerlessness, accenting its irremediable condition. It conjures images of historical vulnerability and passive resistance. Part of the purpose of race-conscious restorative discretion is to show that black victims actively resisted violence and that the intervening years of state inaction cloaked constant grassroots struggle.[192] Juridically restoring the historical power to resist individually and to struggle collectively against violence redeems the status of black communities in American law and society. That restoration of power enables those communities to demand punishment and yet pronounce mercy. The forgiveness underlying mercy redeems black communities in spirit and civic culture. For white offenders and their communities, mercy offers the reciprocal opportunity for atonement and redemption.

Race case prosecutors redeem black power in opposition to, and in conciliation with, the forces of white violence in northern and southern states. Redeeming the oppositional stance of black communities to white violence corrects misapprehensions of racialized roles in the historical record. Those misapprehensions led to the demeaning of

190. *See* Melissa Cole, *The Color-Blind Constitution, Civil Rights-Talk, and a Multicultural Discourse for a Post-Reparations World*, 25 N.Y.U. REV. L. & SOC. CHANGE 127 (1999); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000).

191. *See* Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000); David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223 (2002).

192. *See* MARY FRANCIS BERRY, BLACK RESISTANCE, WHITE LAW (1994); LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002).

black character and community in law and society. Restorative discretion affirms the dignity of black character and the centrality of black community to the pursuit of equality. Redeeming the conciliatory stance of black communities to white communities that harbor fugitive zealots renews the spirituality of the civil rights movement.[193] Renewal slackens the adversarial pull of retributive punishment, offering the prospect of mercy, forgiveness, and reconciliation.[194]

Prosecutorial-urged reconciliation in race cases is a practical enterprise. It occurs in the painful context of brutal fact and failed law. Its success is less contingent on case selection and strategy than on the capacity to bring candid, race-conscious perspectives to the prosecution of long-standing incidents of white-on-black violence. Tailored to the changing identity of offenders and victims, those perspectives look for guidance in cross-racial conversations and collaborations.[195] No longer merely accountable to the state or unaccountable to the morality of race,[196] redemptive prosecutors engage the contested judgments of interracial community.

CONCLUSION

Part of a larger project devoted to the study of race, lawyers, and ethics within the criminal-justice system, this Essay set out to conduct an investigation of the recently renewed prosecution of long dormant criminal and civil rights cases of white-on-black racial violence. Both descriptive and prescriptive in orientation, it tried to capture the normative and sociolegal meaning of this now resurgent prosecution. The purpose of securing that elusive meaning was to cast and recast the parameters of the prosecutor's redemptive role in cases of racial violence.

The Essay commenced its appraisal of prosecutorial norms and practices in retrying cases of white-on-black violence with a brief survey of race in relation to law and community, a review of race case genealogy, and a summary of renewed prosecution efforts in criminal and civil rights cases from the 1950s and 1960s. To discover a justification for retrying race cases, the Essay evaluated the standard conception of prosecutorial discretion, its intrinsic and extrinsic sources of

193. *See* Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990); Anthony E. Cook, *The Spiritual Movement Towards Justice*, 1992 U. ILL. L. REV. 1007 (1993).

194. *See* Roy Reed, *Dahmer Murder Enrages Whites; Reaction to Slaying Reflects a Changing Hattiesburg*, N.Y. TIMES, Jan. 22, 1966, at 12; Roy Reed, *Release of Klansman, Jailed for Killing Black Leader, Is Decried in Mississippi*, N.Y. TIMES, Dec. 24, 1972, at 17.

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

196. *See* K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE (1996).

content, and its staunch ties to the adversary system. Next it analyzed the notion of race-conscious discretion and its adaptability as an alternative justification. Last it assessed the idea of community-guided restorative discretion as a more compelling theory of justification. At each turn, the Essay attempted to reweave prosecutorial ethics and community norms in retrying cases of racial violence.[197]

It is unlikely that weaving a redemptive role for prosecutors in cases of racial violence and spinning out strands toward state-sponsored restorative conciliation will soon reform the criminal-justice system or reconstruct community. Nonetheless, they demonstrate the potential importance of prosecutorial leadership in teaching parties, nonparties, and the public about the different historical realities of racial dignity and inequality in law and society. This race-conscious pedagogy of prosecution may prove useful to legal education, law enforcement, and civil rights advocacy.[198] It also may serve to reinvigorate hate crime and bias laws, and promote interracial justice. For prosecutors entangled in the historical filaments of racial identity and narrative, redemption may seem inapposite. The call of lawyer shame and redemption, however, echoes throughout the American legal history of race.[199] The echo of redemptive prosecution sounds the highest calling.

197. For earlier reconstructive efforts, see Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999); Anthony V. Alfieri, *Ethics, Race, and Reform*, 54 STAN. L. REV. 1389 (2002); Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996).

198. *See* Anthony V. Alfieri, *Teaching the Law of Race*, 89 CAL. L. REV. 1605 (2001); Judy L. Isaksen, *From Critical Race Theory to Composition Studies: Pedagogy and Theory Building*, 24 LEGAL STUD. F. 695 (2000).

199. *See* Paul D. Carrington, *Lawyers Amid the Redemption of the South*, 5 ROGER WILLIAMS U. L. REV. 41 (1999); Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75 (1999).