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## REIMAGINING CRIMINAL PROSECUTION: TOWARD A COLOR-CONSCIOUS PROFESSIONAL ETHIC FOR PROSECUTORS

Justin Murray\*

### ABSTRACT

*Prosecutors, like most Americans, view the criminal-justice system as fundamentally race neutral. They are aware that blacks are stopped, searched, arrested, and locked up in numbers that are vastly out of proportion to their fraction of the overall population. Yet, they generally assume that this outcome is justified because it reflects the sad reality that blacks commit a disproportionate share of crime in America. They are unable to detect the ways in which their own discretionary choices—and those of other actors in the criminal-justice system, such as legislators, police officers, and jurors—contribute to the staggering and disproportionate incarceration of black Americans.*

*In this Article, I aim to undermine this color-blind assessment of criminal justice and explain why prosecutors should embrace a color-conscious vision of their professional duties. Color consciousness is complex and multi-dimensional. It involves understanding the ways in which America's long history of segregation generated the harsh socioeconomic conditions that lead so many young black males into a life of crime. It also demands awareness of the frequency of racial profiling and acknowledgment of the widely shared stereotypes that lead so many Americans to automatically perceive black men as potentially dangerous, violent and criminal. Finally, color consciousness recognizes the exclusion of blacks from political power and how this exclusion shapes the substantive content of the criminal law. Prosecutors should not only strive to acquire insight into how race operates in the criminal-justice system, but also to allow these insights to guide relevant aspects of their practice, including the ways in which they interact with police, charge crimes, negotiate plea agreements, and present their case to jurors.*

*Taking these steps, particularly when they redound to the benefit of criminal suspects and defendants, would depart from the adversarial norm that largely defines the professional ethics of American lawyers. Normally, attorneys are expected to zealously represent the interests of their clients and to leave ultimate decisions about what is fair and true to the judge and jury.*

*Prosecutors are different. They have a dual obligation to serve both as vigorous advocates within adversarial relationships and as officers of justice. Currently, no*

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*uniform guidelines exist as to the relative weight of the two components of prosecutors' dual roles, so they must make complex judgments about how to negotiate the intrinsic dissonance of their professional identity in a range of different situations. This Article advances a context-specific argument that prosecutors and the institutions that supervise them should be more concerned with pursuing justice than with being a vigorous adversary when dealing with the subtle racial dimensions of their work.*

## INTRODUCTION

Disturbing levels of racial inequality persist across many different areas of American life,<sup>1</sup> but the most extreme inequalities today lie within the criminal-justice system. Shortly after the triumphs of the 1960s civil-rights movement, the rate of incarceration in America sped up dramatically.<sup>2</sup> Racial minorities (especially blacks, whom I focus on in this Article<sup>3</sup>) have borne the brunt of this escalating predilection for punishment.<sup>4</sup> If current trends continue, approximately

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1. See Devah Pager, *The Dynamics of Discrimination*, in *THE COLORS OF POVERTY: WHY RACIAL AND ETHNIC DISPARITIES PERSIST* 21–22, 26, 34–38 (Ann Chih Lin & David R. Harris eds., 2008).

2. See John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547, 550 (2008) (“U.S. prison population fluctuated gently from the 1920s to the 1970s, but by the late 1970s it had started a slow and steady expansion that has continued unabated ever since.”). Some commentators believe that the temporal proximity of mass incarceration and civil-rights progress is no coincidence. See, e.g., KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 6–12 (1997) (indicating that many politicians and others deliberately connected race with crime in order to indirectly undermine racial integration and the civil-rights movement); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 267–72 (2007) (arguing that with the demise of Jim Crow segregation, fearful whites needed an alternative method for controlling blacks, and that mass incarceration fulfilled that need). However, others have identified factors that are not obviously linked to race, and the causal debate remains inconclusive. See, e.g., William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2040 (2008) (contending that state and national legislatures and voters have displaced local control over urban crime policy and imposed unduly harsh and out-of-touch solutions to city crime problems).

3. It is a limitation of this Article that it focuses primarily on blacks and whites, because the experiences of non-black racial minorities in the criminal-justice system can be very different from those of blacks. My hope is that future scholarship will close this gap by exploring how color-conscious prosecutors can serve the needs of non-black minorities as well. For a general discussion of the varied encounters of different minority groups within American criminal justice, see CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* (1993).

4. According to the Bureau of Justice Statistics, in 1974, 8.7% of black men and 2.3% of Hispanic men had spent time in prison during the course of their lives (compared to 1.4% of white men); by 2001, the numbers had risen to 16.6% of black men and 7.7% of Hispanic men (compared to 2.6% of white men). The percentage change in lifetime likelihood-of-imprisonment for women of color was even more pronounced, approximately tripling between 1974 and 2001 for both black and Hispanic women. See THOMAS P. BONCZAR, DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001*, at 1 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf> (charting incarceration statistics). Other empirical sources suggest slightly different figures for the incarceration rates among various racial groups; however, these alternative statistics are similar enough that they tell the same general story about a vast incarceration disparity between the races and a drastic increase in imprisonment between the 1970s and the present. See, e.g., BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 16 (2006) (stating that 8% of black men, 3% of Hispanic men, and 1.6% of white men in America have been incarcerated).

one-third of black males born in 2001 can expect to do prison time at some point in their lives.<sup>5</sup> As of 1995, approximately one-third of black men within the age range of twenty to twenty-nine were under some form of criminal-justice supervision—prison, jail, probation, or parole<sup>6</sup>—and in some major cities (including Washington, D.C.), the fraction of young black men under such supervision reached or exceeded fifty percent.<sup>7</sup> These shocking statistics highlight the enduring relevance of race in America and the severe burdens that contemporary criminal justice inflicts on many black individuals and communities.

Yet, many Americans do not believe that the severely disproportionate incarceration of blacks is a reason for reform. This passivity is linked to a widely shared racial ideology that is often referred to as “color blindness.”<sup>8</sup> The central premise of color blindness is that race and racism are no longer relevant in post-segregation America except for scattered individuals and groups on the fringe of society, such as the Ku Klux Klan.<sup>9</sup>

This assumption serves as the foundation for an entire political theory about how race operates in contemporary America. Color blindness teaches that the demise of governmentally sanctioned segregation in the 1950s and 1960s ushered in a new era of genuine equal opportunity for all races.<sup>10</sup> Equal opportunity does not guarantee equal outcomes and, indeed, color blindness acknowledges the undeniable fact that outcomes between whites and blacks remain gravely unequal. However, in a society of equal opportunity, unequal outcomes are not unjust; rather, they simply reflect the lack of effort or ability of those who wind up on the bottom. Thus, color blindness faults blacks—not whites or white-controlled institutions—for the persistent racial inequalities in American society, including disparities in the criminal-justice system.<sup>11</sup>

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5. See BONCZAR, *supra* note 4, at 1 (providing rates of incarceration for black men and additionally stating the incarceration rate of black women as 5.6%). The incarceration figure for black men is closer to 80% if we account for both jail and prison. See JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 48–49 (1996).

6. MARC MAUER & TRACY HULING, *SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 1 (1995).

7. See, e.g., Eric Lotke, *Hobbling a Generation: Young African American Men in Washington, D.C.'s Criminal Justice System—Five Years Later*, 44 *CRIME & DELINQUENCY* 355, 357 (1998) (describing incarceration rates in the District of Columbia).

8. The concept of color blindness was first prominently introduced into American law by Justice Harlan in his dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”). See generally *infra* Part I.A (defining the concept of color blindness).

9. See *infra* Part I.A.1.

10. Cf. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 7 (2d ed. 2006) (explaining that “socio-economic changes that transpired in the 1950s and 1960s” gave rise to “laissez-faire racism” and color blindness).

11. See *id.* (describing “laissez-faire racism” as an ideology which “blames blacks themselves for their poorer relative economic standing”).

The problem with this picture is that race remains psychologically and politically relevant in ways that most Americans do not care to admit. It is true that conscious and overt prejudice has declined considerably since the end of Jim Crow.<sup>12</sup> However, the tendency of color blindness to narrowly define racism exclusively in terms of conscious prejudice disguises the pervasive influence of unconscious and institutional racism—two concepts that will be explained at length as this Article proceeds.<sup>13</sup>

Psychological research has consistently shown that most Americans, even those who sincerely profess their commitment to racial equality, continue to harbor moderate to severe cognitive associations between blacks and a number of negative characteristics, including the propensity for violence and crime.<sup>14</sup> Because perceptions relating to these characteristics are central to many decisional stages in the criminal-justice process, it should be no surprise that implicit bias against blacks influences legislators in choosing what (or whom) to criminalize,<sup>15</sup> police in deciding whom to stop and arrest,<sup>16</sup> prosecutors in electing whom to indict,<sup>17</sup> and jurors in deliberating about whom to convict.<sup>18</sup>

In order to improve this troubling state of affairs, many different actors must transform the way they think about and address issues of race and crime. Police, jurors, judges, community activists, probation officers, defense attorneys, the media, legislators, voters, and others all have important roles to play. A single article cannot possibly address all of the actors who might help in building a racially equitable criminal-justice system. Accordingly, I will focus on one actor who has extraordinary promise, yet who has been mostly overlooked as a potential ally: the criminal prosecutor.<sup>19</sup> My central thesis is that prosecutors can help build

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12. See *infra* Part I.C.1.

13. See *infra* Part I.C.1 (describing unconscious racism), I.D.1 (describing institutional racism).

14. See *infra* Part I.C.1–2.

15. See *infra* Part I.C.3, I.D.1.

16. See *infra* Part I.B.1.

17. See *infra* Part I.C.1

18. See *infra* Part II.D.1.

19. Several scholars have recently begun to thoughtfully analyze the question of how prosecutors can contribute to racial justice. See Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1296, 1300 (2008) (criticizing the “race-neutral stance [that] pervades long-standing prosecutorial norms and practice traditions” and urging prosecutors to “honor the concept of human dignity” in their decisions relating to race); Kerala Thie Cowart, *On Responsible Prosecutorial Discretion*, 44 HARV. C.R.-C.L. L. REV. 597, 604–08 (2009) (exploring racial de-biasing strategies for prosecutors); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) [hereinafter Davis, *Prosecution and Race*] (“[P]rosecutors, through their overall duty to pursue justice, have the responsibility to use their discretion to help eradicate the discriminatory treatment of African Americans in the criminal justice system.”); Ellen S. Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 474 (2009) (“Broad prosecutorial discretion provides prosecutors with the ability to move beyond merely matching conduct with statutes. It allows prosecutors to correct bias within our legal system.”); Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 396 (2009) [hereinafter Taslitz, *Judging Jena’s D.A.*] (calling upon prosecutors to expand their commitment to justice in a way that encompasses “greater deliberation about the raced cultural meanings of prosecutorial actions”).

a more racially equitable system of crime and punishment by abandoning a color-blind, *adversarial* approach to the racial dimensions of their work and embracing a *color-conscious, non-adversarial* orientation in its stead.

For purposes of this Article, “color consciousness” refers to three overlapping ways of understanding and engaging race, each of which supplies practical insights into how a prosecutor can contribute to racial justice: historical consciousness, psychological consciousness, and political consciousness. I will briefly introduce each.

Historical consciousness is the practice of interpreting contemporary race relations within the context of their troubled past.<sup>20</sup> Color consciousness perceives links between the past and present that help to identify and confront present-day vestiges of America’s oppressive racial legacy.<sup>21</sup> It is important for prosecutors to develop this form of awareness, because they are well-positioned to counteract persistent segregationist practices in the enforcement of the criminal law, such as the use of racial profiles by police to target black individuals, black neighborhoods, blacks who are “out of place” in a “white” neighborhood, and other policies that continue to reinforce the social and geographic boundaries engineered by Jim Crow.<sup>22</sup>

Psychological consciousness means developing insight into the phenomenon of unconscious racism. As mentioned previously, most Americans still view blacks, particularly black males, with suspicion, and the automatic cognitive processes that generate this perception have real potential to distort outcomes in the criminal-justice system.<sup>23</sup> Although these findings are disturbing, psychological research has also illuminated the path forward: because most Americans sincerely profess egalitarian and anti-racist values, they can mobilize these conscious beliefs to counteract their unconscious biases, *if* they are made aware of those biases.<sup>24</sup> It is precisely this awareness that color blindness fears and suppresses, and which color consciousness invites.<sup>25</sup> The insight that we will have less racism when race and racism are brought out into the open has significant implications for the

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However, this emerging body of scholarship remains in its infancy. First, it has not developed a systematic normative foundation for its program of action. Second, it does not address the institutional constraints that prosecutors must creatively negotiate as they strive to integrate color consciousness into their practice. Finally, it tends to focus on situations where color consciousness and adversarial norms coincide (for instance, in the effective prosecution of racially motivated hate crimes), and therefore it has largely overlooked the question of how and why prosecutors should actively promote racial equity even when doing so conflicts with the role of adversary. This Article tackles these and other under-explored issues.

20. See generally *infra* Part I.B.

21. See generally *infra* Part I.B (describing the concept of historical consciousness).

22. See *infra* Part I.B.1 (explaining the status quo of racial profiling in America), II.C.1–2 (providing ways that prosecutors can confront racial profiling).

23. See *supra* notes 14–18 and accompanying text.

24. See *infra* Part I.A.2.

25. See *infra* Part I.A.2.

exercise of prosecutorial discretion,<sup>26</sup> trial advocacy,<sup>27</sup> and institutional policy for prosecution offices.<sup>28</sup>

Political consciousness involves understanding that America's legal institutions, including the substantive criminal law, are not always race neutral. For most of the time period during which American criminal law has evolved, blacks were almost completely shut out of the political process—first by enslavement, and then by the combined force of private racial violence and state-sanctioned segregation.<sup>29</sup> Even today, despite incredible progress over the past half century, black voices are still severely underrepresented within institutions of political power. Consequently, the criminal law continues to privilege the demands, needs, and fears (including race-related fears) of whites and to discount those of blacks.<sup>30</sup>

Color-conscious prosecutors must make a special effort to assess the justice needs of the entire community they serve, particularly those whose voices are not adequately reflected in the outcomes of majoritarian politics. They should develop charging priorities and exercise discretion in a way that reflects the full range of costs and benefits of enforcing particular criminal laws, not just the limited range of costs and benefits reflected in the laws themselves.

Finally, I recognize that color-conscious prosecution as it is envisioned in this Article is in tension with the adversarial norm that largely defines the professional identity of American lawyers. However, all lawyers, and particularly prosecutors, have a countervailing set of obligations as well. Prosecutors have a “dual role” to serve both as vigorous advocates and also as “officers of justice.”<sup>31</sup> Prosecutors must necessarily make difficult judgments about which component of their dual role should take precedence in particular situations. I aim to show that prosecutors should prioritize justice over the demands of adversarial posturing when confronting the complex racial dynamics of criminal prosecution.<sup>32</sup>

Part I of this Article defines color blindness and color consciousness and describes how each perspective analyzes race, racism, and the current state of American criminal justice. Part II identifies concrete ways for prosecutors to promote racial justice by integrating the insights of color consciousness into their work. Part II also explains why color-conscious, non-adversarial prosecution is a better situational interpretation of the prosecutor's complex dual role than a color-blind, adversarial approach. Part III explores how color-conscious prosecutors can productively engage with resistant institutional environments, as well as

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26. See *infra* Part II.B–C.

27. See *infra* Part II.D.

28. See *infra* Part III.

29. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* ch. 1 (3d rev. ed. 1974).

30. See *infra* Part I.C.3, I.D.1.

31. DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 355 (5th ed. 2009).

32. See *infra* Part II.

the related issue of how prosecutorial institutions can support and encourage their trial prosecutors to make racial equity a priority.

### I. THE CRIMINAL-JUSTICE SYSTEM ON TRIAL: COLOR-BLIND VERSUS COLOR-CONSCIOUS PERSPECTIVES ON RACE AND CRIME

This Part defines color blindness and color consciousness and provides a color-conscious analysis of the criminal-justice system that exposes severe justice deficits. Color blindness and color consciousness provide sharply contrasting understandings of racism and of how race operates in American criminal justice. The dominant color-blind approach defines racism as the intentional classification of individuals on the basis of race.<sup>33</sup> Defining racism narrowly in terms of intentional discrimination enables color-blind Americans to conclude that anti-black racism is largely an artifact of the pre-segregation past with little contemporary relevance, including in the criminal-justice system.<sup>34</sup>

By equating race-based classification with racism, color blindness is unable to distinguish benign, oppression-correcting racial classifications (i.e., arguably affirmative action) from oppression-reinforcing discrimination (i.e., Jim Crow segregation). Failure to make this distinction supports the widely shared conviction that the best way to eliminate racism in the criminal-justice system (and other social institutions) is to purge racial classifications from our minds and repress racial perception. Consequently, color blindness discourages open discussion of race and condemns affirmative steps to set right the enduring consequences of past racial injustices.<sup>35</sup>

Most color-conscious perspectives agree with color-blind Americans that the cultural significance of race and the nature of racism have changed for the better with the demise of Jim Crow segregation.<sup>36</sup> However, color-conscious scholarship from a range of academic disciplines, as well as the lived experience of racial minorities in America, reveals that racial perception and racism endure in less conspicuous forms. Classic racial stereotypes are alive and well at the sub-

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33. See *supra* note 8; see also *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”). Since Justice Harlan’s dissent in *Plessy v. Ferguson*, the concept of color blindness has become the official understanding of race and racism in American law. For a discussion of this idea, see Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, 44 STAN. L. REV. 1, 2–7 (1991), and for a discussion of it in American society more broadly, see BONILLA-SILVA, *supra* note 10, at 2–3.

34. See *infra* Part I.A.1.

35. See *infra* Part I.A.2.

36. However, some scholars emphasize the continuities between slavery, segregation, and modern mass incarceration to such an extent that they seem to deny that America has achieved any serious progress in the area of racial justice. See, e.g., Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1047–54 (2010). However, even the deplorable status of racially disparate incarceration in present-day America is an improvement over the lash, and it is clear that today’s black Americans have possibilities for advancement and freedom that were unthinkable in previous decades and centuries. Zeal to remedy contemporary injustice should not compromise objectivity about the past.



conscious level.<sup>37</sup> Many of the cultural, economic, and political wounds inflicted upon blacks through centuries of slavery and segregation remain unhealed, and blacks—particularly young black males—feel the sting of those wounds with particular severity in the criminal-justice arena.<sup>38</sup> The three dimensions of color consciousness that I explore in this Part—historical, psychological, and political—provide valuable insight into the subtle yet powerful ways in which unconscious racial hostility and inherited disadvantage continue to shape the products of criminal justice.

### A. *The Color-Blind Understanding of Race and Criminal Justice*

This Section explores two interrelated characteristics of color blindness that impact the experience of blacks in the criminal-justice system: its narrow definition of racism and its strategy for managing and suppressing racial perception.

#### 1. *Racism as Intentional, Race-Based Classification*

A central ideological tenet of color blindness is the way in which it defines racism. Color blindness defines a racist act as, “quite simply, an action taken on the basis of race.”<sup>39</sup> This definition applies to paradigmatic instances of oppressive racism, such as Ku Klux Klan cross burnings, racial slurs, signs expressing that minorities are not welcome, and other malicious acts that distinguish between people based on race. Importantly, however, it also condemns black racial consciousness, affirmative action, and other initiatives that aim to proactively redress the consequences of historic discrimination. Even though such programs do not discriminate against blacks, they do classify people based on race, to the disadvantage of whites. Therefore, color-blind individuals accuse these initiatives of “reverse discrimination.”<sup>40</sup>

The color-blind definition of racism is just as important for what it leaves out as for what it includes. By restricting the meaning of racism to intentionally race-based actions, color blindness fails to label stereotyping—“unconscious racism”<sup>41</sup>—as racism. Furthermore, because color-blind ideology identifies racism exclusively by reference to the intentions of individual persons, it does not perceive racism in the collective failings of America’s structures and institutions to hear and heed the voices, needs, and perspectives of blacks: “institutional racism.”<sup>42</sup>

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37. See *infra* Part I.C.

38. See *infra* Part I.B, I.D.

39. Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, 14 HARV. J. L. & PUB. POL’Y 68, 71 (1991).

40. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1533 (2004).

41. See generally *infra* Part I.C.1 (describing the concept of unconscious racism).

42. See generally *infra* Part I.D.1 (describing the concept of institutional racism).

These methodological limitations have far-reaching implications for the color-blind assessment of racial equity in the criminal-justice system. Color blindness has dramatically narrowed the types of questions that Americans ask with respect to race and criminal justice. It is no secret to anyone, including the color blind, that blacks are imprisoned in numbers that are vastly out of proportion to their representation in the American population,<sup>43</sup> and this fact has generated enormous discussion and debate for at least the past half-century.<sup>44</sup> However, the vast majority of that discussion—both in criminology circles and among the lay public—focuses on whether disproportionate incarceration results primarily from disproportionate rates of criminal offending among blacks, or from disproportionate targeting of blacks by law-enforcement officials.

That question is important because insofar as mass incarceration results from the deliberate targeting of blacks, it merits our attention and concern. However, it is disturbing that relatively few participants in the debate ever take the next step of inquiring about the staggering damage that mass incarceration inflicts upon black communities, or the underlying historical reasons why blacks commit a disproportionate share of crime in post-segregation America. In this way, the social dialogue about black criminality reflects the color-blind obsession with intentional discrimination—in this case, whether law-enforcement officials are classifying crime suspects based on race—and its corresponding indifference to the concrete effects of American criminal justice on the lives of black people.<sup>45</sup>

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43. See *supra* notes 4–7 and accompanying text (providing various estimates of the incarceration rates for blacks, Hispanics, and whites).

44. For a useful summary of this body of criminology scholarship, see Robert D. Crutchfield et al., *Racial and Ethnic Disparity and Criminal Justice: How Much Is Too Much?*, 100 J. CRIM. L. & CRIMINOLOGY 903, 906–32 (2010).

45. For instance, Alfred Blumstein, one of the leading criminologists to statistically investigate the causes of racial disparity in American prisons, had this to say:

If . . . the disproportionality results predominantly from some legally relevant difference between the races, such as a corresponding differential involvement in crime, then the charge of “racism” would not be justified. Indeed, it could be more harmful than helpful. The charge would wrongly strain even further the already troubled race relations in U.S. society. Perhaps most important, directing attention to a secondary issue rather than to the primary issue may well leave the primary problem unaddressed.

Alfred Blumstein, *On the Racial Disproportionality of United States’ Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1261 (1983). Fortunately, unlike most criminologists, he later modified this position by acknowledging that “[e]ven if all of this incarceration is totally legitimate in terms of law violation, it still must give rise to major concern about the undesirability of so broad a use of this otherwise poorly regarded instrument with so large a segment of an important part of the nation’s population.” Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 745 n.8 (1993); see *infra* Part I.D (explaining why the social costs of large-scale and racially disparate incarceration are unacceptable regardless of the cause of the disparity).

## 2. *Racial Repression as an Anti-Racism Strategy*

The color-blind prescription for eliminating racism logically follows, almost tautologically, from the manner in which it defines racism. It seeks to eliminate racism by ending the classification of individuals on the basis of race. Chief Justice Roberts captured the central idea behind this strategy when he wrote, on behalf of a plurality of the Supreme Court, that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>46</sup>

Color blindness makes no exception for purportedly benign racial classifications, such as affirmative action. Affirmative-action proponents contend that there is an obvious difference between equality-reinforcing racial classifications and oppressive ones,<sup>47</sup> and that American society still needs benign classifications in order to alleviate the wounds of past and present racial oppression.<sup>48</sup> Color blindness, however, rejects this distinction, in part because it sees “no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”<sup>49</sup> More fundamentally, interventions on behalf of racial minorities may operate to the disadvantage of whites, which produces heated charges of “reverse discrimination”<sup>50</sup> and helps explain why affirmative action is one of the most controversial topics in American society today.<sup>51</sup>

The concept of reverse racism is also used to condemn racial consciousness in other contexts, including criminal justice. When blacks or other color-conscious individuals attempt to have an open and candid discussion of the enduring relevance of race in America’s modern-day social and political institutions, they are silenced with accusations of “playing the race card.”<sup>52</sup> In this way, color

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46. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

47. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245–46 (1995) (Stevens, J., dissenting) (“[T]he term ‘affirmative action’ is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad. As with any legal concept, some cases may be difficult to classify, but our equal protection jurisprudence has identified a critical difference between state action that imposes burdens on a disfavored few and state action that benefits the few ‘in spite of’ its adverse effects on the many.” (footnotes and quotation marks omitted)).

48. *See, e.g., Kimberly Jenkins Robinson, The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 297–305 (2009) (arguing that governments must be given latitude to avoid racial isolation and create diverse schools in order to eradicate racial oppression).

49. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

50. *See Siegel, supra* note 40, at 1533 (defining “reverse discrimination”).

51. *See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 12 GERMAN L.J. 247, 267 (2011) (“[W]e must assume either that the adamant disbelievers in racial equality suddenly converted and became racial equality’s high priests, or more likely, that what really outraged whites about affirmative action was merely that minorities were now getting something at their expense.”).

52. Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1072 (2010) (quoting RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 17 (2008)).

blindness deflects attention away from the racially inequitable distribution of social, economic, and political resources and the enduring legacy of segregation, refocusing blame for sour race relations and socioeconomic outcomes on blacks. Popular sources routinely admonish and scapegoat what they perceive as black “resentment,”<sup>53</sup> “victim mentality,”<sup>54</sup> and “welfare dependency.”<sup>55</sup>

However, these patterns of discourse reveal that, despite their protestations to the contrary, the proponents of color blindness are not truly blind to race. Instead, color blindness represses (or claims never to see) that which it has already perceived. In order to preserve the myth of equal opportunity and excuse whites for the deplorably unequal distribution of resources between the races, color blindness propagates an image of blacks as lazy, irresponsible, aggressive, and criminal. The contemporary reasons put forward to explain the perceived racial merit gap are different from those of the Jim Crow era—“whites today rely more on cultural rather than biological tropes to explain blacks’ position in this country”<sup>56</sup>—but the substantive content of the underlying stereotypes remains fundamentally the same.

Whereas a “medically color-blind person is someone who cannot see what others can,” a “racially color-blind individual perceives race and then ignores it.”<sup>57</sup> Later Sections of the Article will show that the “blindsight” paradox that is central to racial color blindness undermines its ability to productively manage racial perception and combat contemporary forms of racism.<sup>58</sup>

### *B. Historical Consciousness: Remembering a Racial Legacy*

Color blindness draws a nearly absolute distinction between the racial oppression of slavery and segregation on the one hand, and the equal opportunity of the post-segregation era on the other.<sup>59</sup> Because explicit, governmentally enforced racial classification largely ended with Jim Crow, and analogous types of racism in the private sector became stigmatized (and, in many cases, legally prohibited<sup>60</sup>) around the same time, color blindness sees present-day America as a place where

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53. *E.g.*, PETER COLLIER & DAVID HOROWITZ, *THE RACE CARD: WHITE GUILT, BLACK RESENTMENT, AND THE ASSAULT ON TRUTH AND JUSTICE* (1997) (revealing language is reflected in the title and throughout the text).

54. *E.g.*, SHELBY STEELE, *A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA* 118–19 (1998).

55. *E.g.*, WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 21 (1987).

56. BONILLA-SILVA, *supra* note 10, at 7.

57. Gotanda, *supra* note 33, at 18.

58. See Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 1–2 (2007); see also *infra* Parts I.C, II.B–D.

59. See Jeffrey J. Wallace, *Ideology vs. Reality: The Myth of Equal Opportunity in a Color Blind Society*, 36 AKRON L. REV. 693, 706 (2003).

60. See, e.g., Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (prohibiting many forms of racism in the private sector) (codified as amended at 42 U.S.C. §§ 2000e-1–17).

people of all races are on an equal footing to pursue their goals.<sup>61</sup> Consequently, when color blindness is confronted with clear evidence of racially unequal outcomes across many dimensions of American life—not only criminal justice, but also education, employment, housing, and many others—it is reluctant to attribute those inequalities to the oppression of the past. Instead, it lays blame for those outcomes on the doorsteps of black individuals and their communities.<sup>62</sup>

The most fundamental feature of the contrasting approach—color consciousness—is that it analyzes contemporary race relations within the context of their history.<sup>63</sup> It need not deny the progress that has been made in race relations with the demise of slavery and Jim Crow.<sup>64</sup> However, color-conscious individuals are also keenly aware of the enduring marks that those institutions have left on the fabric of American society, and they refuse to settle for less than “full racial equality.”<sup>65</sup>

This Section describes two ways in which historical consciousness enhances our insight into the criminal-justice system. First, the widespread practice of racial profiling by law enforcement provides a powerful link between past and present by reinforcing the racial geographic boundaries erected by Jim Crow.<sup>66</sup> Second, the crime-producing effects of segregation and deprivation reveal that black individuals and communities are not exclusively responsible for the disproportionately high levels of street crime committed by blacks. Although it is important and empowering for blacks to accept responsibility for their individual actions and collective future (as it is for any group), it is equally important for the white majority to accept their share of responsibility for the past and present social conditions that contribute to racially disparate patterns of criminal offending.<sup>67</sup>

### 1. *Racial Profiling: Segregationist Policing in Present-Day America*

Nearly half a century after the official end of legally-sanctioned (“*de jure*”) segregation, America is still, as a factual matter, a segregated society (“*de facto* segregation”). Our residential areas, schools, hospitals, churches, and other social institutions still tend to come in colors of black and white.<sup>68</sup> According to color

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61. See Sean M. Scott, *Justice Redefined: Minority-Targeted Scholarships and the Struggle Against Racial Oppression*, 62 U. MO. KAN. CITY L. REV. 651, 701 (1994).

62. See *supra* notes 52–55 and accompanying text (discussing color blindness’s condemnation of racial consciousness).

63. See, e.g., Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003) (exploring color-conscious trial advocacy and prosecutorial discretion in a way that emphasizes history and genealogy).

64. See *supra* note 36 and accompanying text (discussing changes in race relations since the end of Jim Crow).

65. Alfreda Robinson, *Troubling “Settled” Waters: The Opportunity and Peril of African-American Reparations*, 24 B.C. THIRD WORLD L.J. 139, 151–54 (2004).

66. See *infra* Part I.B.1.

67. See *infra* Part I.B.2.

68. See Lawrence Bobo et al., *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler, Antiblack Ideology*, in *RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE* 17–18 (Steven A. Tuch & Jack K. Martin eds., 1997) (describing the current state of *de facto* segregation).

blindness, the absence of *de jure* segregation means that *de facto* segregation is not a serious problem, because it merely reflects the voluntary choices of blacks and whites about where to live, which schools to attend, etc.<sup>69</sup>

This *laissez-faire* account of *de facto* segregation obscures the many ways in which modern American social institutions, including governmental institutions, continue to enforce the geographic and social boundaries established by Jim Crow. Police departments and individual officers frequently integrate race into the “profile” of characteristics they use in determining which persons are most suspicious.<sup>70</sup> The justification offered in support of these policies is that blacks commit a disproportionate share of street crime, and therefore that it is statistically rational to consider race as a factor in making stops and arrests.<sup>71</sup>

In fairness to the proponents of profiling, the factual premise of this justification is substantially accurate (though it is commonly exaggerated both in public discourse and private psychology).<sup>72</sup> It is not clear whether blacks are responsible for a lopsided share of crime when all types of crime (including, for instance, white collar crime) are accounted for,<sup>73</sup> but it is well-established that blacks commit a disproportionately large fraction of crime within the categories that police officers on America’s streets most frequently deal with.<sup>74</sup>

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69. See I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 43 (2009) (“We assume that residential segregation along race lines is largely the result of individual preference, socio-economic status, or perhaps a remnant of *de jure* segregation. We assume that the government’s role in maintaining and perpetuating segregation is a thing of the past.”).

70. For a general summary of various types of racial profiling, see Jeanette Covington, *Round Up the Usual Suspects: Racial Profiling and the War on Drugs*, in PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM: THE DARK FIGURE OF RACISM 27–40 (Dragan Milovanovic & Kathryn K. Russell eds., 2001) [hereinafter PETIT APARTHEID].

71. See Bernard E. Harcourt, *From the Ne’er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 L. & CONTEMP. PROBS. 99, 137 (2003) (“[T]he justification for racial profiling often rests on the assumption of differential offending rates among different racial groups.”).

72. See Jody D. Armour, *Res Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 791 (1994) (“For countless Americans, fears of black violence stem from the complex interaction of cultural stereotypes, racial antagonisms, unremitting representations of black violence in the mass media, and other elements. The tendency of individuals to credit only those statistics and images which confirm their preexisting biases exacerbates these irrational influences. Thus, even if race does in some measure increase the probability that an ‘ambiguous’ person is an assailant, defendants and factfinders will inevitably exaggerate the *weight* properly accorded to this fact.” (footnote omitted)).

73. This caveat is important, because many discussions of racial disparities in criminal offending rates focus exclusively on traditional crime categories like drugs, assault, and murder, and ignore the disproportionate involvement of whites in white collar crime. Some commentators have suggested that this tendency reveals the degree to which society sees crime that blacks tend to commit as “real” crime, and that which whites commit as pseudo-crime. See, e.g., Richard Delgado, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 508–22 (1994). However, Randall Kennedy has persuasively countered that the emphasis on non-white collar crime is less a function of racial bias than the “sensible perception that the harm wrought by [non-white collar crime] is more personally threatening than harms wrought by [white collar crime].” RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 14 (1997).

74. Developing accurate methods for calculating real offense rates is challenging, in part because the potential measures for which data is most readily available—such as arrest data—are likely to be distorted by the same racial biases that influence the ultimate incarceration disparity. One common method for estimating real crime

The most convincing objection to racial profiling does not challenge these established facts, but instead debunks the implicit moral premise that high levels of criminal offending by *some* blacks justifies treating *all* blacks as criminals. Most racially-targeted stops and searches turn up no evidence of crime and do not result in arrest.<sup>75</sup> In these instances, the “only” harm done is the deep humiliation and indignity to the innocent black person who was treated like a criminal solely because of his or her race.<sup>76</sup> Sadly, this harmful experience is shared in some form by virtually all black Americans,<sup>77</sup> and it serves as a constant and vivid reminder that color-blind white America does, in fact, “see” race.

The problem with racial profiling is not only that it frequently ensnares innocent blacks, but also that it unevenly burdens blacks who do commit crimes with a criminal record for doing the same sorts of things that whites consistently get away with. The Supreme Court has authorized the police to engage in pretextual stops,<sup>78</sup> and officers routinely use technical traffic laws against blacks as a pretext for drug searches. They target black drivers—hence the phrase “driving while black”—for minor traffic violations, not because they care about punishing those infractions (which they ordinarily excuse), but as a justification to search for drugs or weapons.<sup>79</sup> The result is that a higher fraction of factually-guilty blacks than factually-guilty whites get caught, arrested, convicted, and imprisoned.

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rates within crime categories in which the victim is also a witness relies on the victim’s report on the race of the perpetrator. *See, e.g.,* Michael Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93 (1978) (discussing victim reports). Such data is likely to be accurate in a strong majority of cases, although, as with any method, it does have shortcomings. *See* MANN, *supra* note 3, at 30–32 (discussing several problems with victim reports, including “[reliance] on the victim’s definition of criminal acts,” which may be influenced by the race of the offender). Recent victim-report statistics for a wide range of crimes, including robbery, rape, and assault, suggest that the offending rates among blacks are considerably higher than their fractional share of the overall American population. *See, e.g.,* U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006, STATISTICAL TABLES, at tbl. 40, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus06.pdf>.

75. *See* Bernard E. Harcourt, *Henry Louis Gates and Racial Profiling: What’s the Problem?* 1–4 (Univ. of Chi. L. & Econ., Olin Working Paper No. 482, 2009) (summarizing numerous studies showing that blacks are stopped more frequently than whites for searches that, on average, turn up less evidence of illegal behavior).

76. For a discussion of the under-appreciated costs of these dignity violations to black Americans, see JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 53 (1997).

77. *See* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1560–68 (1989) (discussing the high percentage of the black population that has been subjected to such experiences). Despite its prevalence, this dignity-based harm frequently goes unnoticed because it does not eventuate in arrest or formal processing within the criminal-justice system. Numerous scholars have identified the tendency to overlook racism in the informal stages of criminal-justice processes as a frequent defect in color-blind criminology. *See, e.g.,* Dragan Milovanovic & Kathryn K. Russell, *Introduction: Petit Apartheid*, in *PETIT APARTHEID*, *supra* note 70, at xv–xxiii.

78. *See* *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that pretextual stops of automobiles are permissible so long as there is any valid reason for the stop).

79. *See* Alberto B. Lopez, *Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation’s Roads*, 90 KY. L.J. 75, 80–84, 101 (2002) (discussing the frequent use of minor traffic violations as pretexts for drug or weapons searches).

Many police officers implicitly profile entire neighborhoods and communities, which enables them to identify and investigate alleged racial “intruders.” Blacks who enter “white” neighborhoods are frequently questioned about the reasons for their presence and harassed by police.<sup>80</sup> This sort of policing was an integral feature of Jim Crow segregation: officers constantly harassed minorities who “ventured outside of their neighborhoods” and went “out of their place” as a way of maintaining the racial order.<sup>81</sup> Although neighborhood profiling is far less prevalent than it was during the Jim Crow years, its persistence continues to “perpetuate an apartheid-like relationship between minorities and the police.”<sup>82</sup>

Unlike many of the other sources of racial injustice in the criminal-justice system (discussed further below), color blindness is theoretically capable of recognizing and condemning racial profiling. Racial profiling is by definition racial classification, and it is often intentional; therefore, it fits comfortably within the color-blind definition of racism.<sup>83</sup> Thus, there is greater potential for color-blind and color-conscious individuals to build alliances in this area than elsewhere.

However, color-blind Americans are just as likely to deny or minimize the reality of racial profiling as they are to acknowledge and oppose it, due to their firm *a priori* assumption that anti-black racism in the post-segregation era is “rare,” irrational, and “hateful.”<sup>84</sup> Racial profiling is unethical, but it is not necessarily irrational or malicious. As explained previously, there is a statistical rationale for profiling: the fact of disproportionate commission of non-white collar crime by blacks.<sup>85</sup> This fact serves to obscure the extent of profiling and to supply grounds for viewing profiling as rational and, therefore, non-racist. Consequently, color blindness frequently underestimates both the empirical prevalence and the moral injustice of profiling. Color consciousness is not burdened by these misperceptions, because it rejects the narrow color-blind conception of racism and evaluates racial profiling with reference to its historical and institutional context, which exposes it as an instrument of oppression and an obstacle to de-segregation.<sup>86</sup> Thus, color consciousness provides a more reliable basis than color blindness for condemning the practice of racial profiling.

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80. See Capers, *supra* note 69, at 46. Police also use racial-incongruity profiles, though in a different way, for whites who wind up in urban black neighborhoods; police will frequently assume either that they are lost, or that they are there to purchase drugs from inner-city blacks. See KENNEDY, *supra* note 73, at 141–42.

81. Sandra Bass, *Out of Place: Petit Apartheid and the Police*, in PETT APARTHEID, *supra* note 70, at 46.

82. *Id.*

83. See generally *supra* Part I.A.1 (describing the color-blind definition of racism as intentional racial classification).

84. BARBARA TREPAGNIER, SILENT RACISM: HOW WELL-MEANING WHITE PEOPLE PERPETUATE THE RACIAL DIVIDE 3 (2006); see *supra* Part I.A.1.

85. See *supra* notes 72–74 and accompanying text.

86. See *supra* notes 81–83 and accompanying text.



## 2. *The Social Context for Assigning Moral Blame and Responsibility for Black Crime*

The previous subsection established the uncomfortable yet accurate fact that, within certain crime categories, blacks as a group commit crime at higher rates than other racial groups.<sup>87</sup> This fact has a troubling yet understandable propensity to legitimize the status quo. Color blindness concludes—more precisely, it *assumes*—that insofar as blacks commit a disproportionate share of crime, then the severely disproportionate incarceration of blacks is justified, blacks are fully to blame for their high incarceration rates, and remedial interventions are uncalled for.<sup>88</sup>

This ethical conclusion, however, does not follow from the factual premise. Assigning all of the blame for black criminality to the individual perpetrators and the communities from which they come is sociologically naïve and ethically irresponsible. It obscures the fact that black crime takes place within a historical and social context, and that all Americans—past and present, of all racial groups—are collectively responsible for producing that context.<sup>89</sup> Studies have demonstrated that social conditions imposed upon black communities during centuries of slavery and segregation—conditions of poverty, educational deprivation, familial disruption, social disorganization, civic alienation, among others—endure to this day and are the fundamental causes of high crime rates within those communities.<sup>90</sup>

Even though most whites who live today have never personally contributed to the Jim Crow regime of prior decades, they are the beneficiaries of a racially stratified system of privilege that came at the expense of past and present generations of blacks.<sup>91</sup> The ethical responsibility of white Americans in our generation is to voluntarily relinquish this racial privilege in favor of a more equitable society. This obligation requires taking measures that enhance the social position of blacks. At the very least, it means putting an end to policies and practices that further reinforce the subordination of blacks. If, as individuals and as a community, we are unwilling to make genuine progress in these areas, then we cannot disclaim our individual and collective complicity in racial inequality.

I do not mean to suggest that blacks are not personally responsible for their actions, or that blacks do not have a central role to play in overcoming criminality

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87. See *supra* notes 72–74 and accompanying text.

88. Cf. *supra* notes 43–45 and accompanying text.

89. See Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 844 (1997) [hereinafter Butler, *Affirmative Action*] (“[B]ut for the fruits of slavery and entrenched racism, African Americans would not find themselves disproportionately represented in the criminal justice system.”).

90. See SHAUN L. GABBIDON, *CRIMINOLOGICAL PERSPECTIVES ON RACE AND CRIME* 49–82 (2007) (summarizing scholarship on the social causes of racially disproportionate criminality).

91. This dynamic is frequently referred to as “white privilege.” See generally ROBERT JENSEN, *THE HEART OF WHITENESS: CONFRONTING RACE, RACISM AND WHITE PRIVILEGE* (2005).

and deprivation. Rather, my analysis calls for expanding responsibility to all racial groups by revealing how Americans “as a collective body are implicated in [the criminal-justice] disparity.”<sup>92</sup> All Americans—whites, blacks, and others—must jointly bear responsibility for achieving a genuine end to racially linked deprivation. Collectivizing responsibility for black criminality provides the normative foundation for the color-conscious interventions that I will propose later in the Article.

### *C. Psychological Consciousness: Detecting Unconscious Racism*

The historical oppression of racial minorities has left a deep imprint on the American psyche. Racism is not, as color blindness would suggest, limited to the malicious and intentional subordination of racial minorities. More commonly, racism involves widely shared unconscious stereotypes about blacks: stereotypes that were initially forged by the engineers of racial animosity in the days of slavery and Jim Crow, but which remain with us today as the psychological residue of the past.<sup>93</sup>

This Section begins by introducing the concept of unconscious racism and the related cognitive phenomena of in-grouping and out-grouping. I then proceed to document a cluster of mutually reinforcing stereotypes about blacks—their perceived dangerousness, criminality, and culpability—and a number of ways in which those stereotypes operate to the disadvantage of blacks within the criminal-justice system.

#### *1. The Structure of Unconscious Racism*

The nature of racism in American society has evolved substantially since the days of Jim Crow. The labels “racism” and “racist” are considered grave insults today, and racial prejudice is no longer socially acceptable.<sup>94</sup> Studies report that over the past few decades, the number of Americans who publicly express negative attitudes about race has declined precipitously.<sup>95</sup> Color blindness takes these self-reported attitudes at face value and concludes that Americans, by and large, no longer harbor racial prejudice.

This premature inference arises out of the “inability [of color blindness] to recognize the changing face of racism in America.”<sup>96</sup> Racial bias is drastically

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92. GLENN LOURY, *RACE, INCARCERATION, AND AMERICAN VALUES* 36 (2008).

93. See *infra* Part I.C.1.

94. See Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443, 456 (2010) (“Our society has reacted strongly to the issue of race, making the overt racial reference unacceptable and the term ‘racist’ one of the worst insults in the language. This result has caused racial discrimination against racial minorities to go underground . . .”).

95. See JAMES WALLER, *FACE TO FACE: THE CHANGING STATE OF RACISM ACROSS AMERICA* 107 (1998) (summarizing relevant studies).

96. *Id.* at 100.

underreported for two primary reasons. First, Americans who are aware and accepting of their own racial stereotypes “know better than to say so, except to a secure, like-minded audience, given that many people live and work in environments where they can be slapped on the wrist, publicly humiliated, or sacked for saying anything that smacks of an ‘ism.’”<sup>97</sup>

Perhaps more importantly, many Americans are simply unaware of their own biases. Color blindness instructs white Americans to think no evil and speak no evil: they must not only refrain from racist actions, but they must purge and deny all conscious racial distinctions.<sup>98</sup> As a general matter, color-blind Americans sincerely believe that they have little or no racial bias worth reporting.

However, a well-developed body of psychological research has proven otherwise. Many studies have utilized what is called an implicit association test (“IAT”), which measures cognitive associations by examining people’s response speed and accuracy in linking faces with concepts.<sup>99</sup> The IAT has diverse applications outside the context of race as well, but one of the most well-known IATs asks participants to pair together words representing “Good” and “Bad” with photos of black and white individuals.<sup>100</sup> Studies of this type have consistently found that a strong majority of test subjects tended to pair good with white and bad with black.<sup>101</sup> Significantly, blacks, Latinos, and Asian Americans all share this implicit white preference, though their preference is not as strong or consistent as that of whites.<sup>102</sup> One particularly relevant and recent IAT study found strong implicit associations between black faces and the concept of criminal guilt.<sup>103</sup> These findings have been further confirmed by studies using different, non-IAT methodologies,<sup>104</sup> some of which are discussed in the next subsection.

Race also continues to be an important factor in the psychological construction of in-groups and out-groups. In-grouping and out-grouping are more-or-less universal psychological shortcuts that human beings use in order to determine, based on a limited amount of information, who seems familiar, safe, and trustwor-

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97. CAROL TAVRIS & ELLIOTT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 62–63 (2007).

98. See *supra* Part I.A.2 (discussing color blindness’s unwillingness to recognize either benign or malignant racial distinctions).

99. See generally Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998) (describing the IAT).

100. See, e.g., *id.* at 1464–65.

101. See, e.g., *id.* at 1464–66, 1474.

102. See Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 105 (2002) (providing preference statistics of the various racial groups).

103. See Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010) (discussing the so-called guilty/not guilty IAT).

104. Some alternative methods for exploring implicit bias include subliminal priming techniques and brain-imaging techniques. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1198 n.9 (2009) (citing studies).

thy.<sup>105</sup> People are drawn to those whom they perceive as more like themselves, and they tend to be suspicious and cautious with those whom they view as different.<sup>106</sup> In present-day America, race remains highly salient for in-grouping and out-grouping among both blacks and whites.<sup>107</sup>

Race-based out-grouping has predictable implications that are discussed further in the next subsection (such as whites perceiving blacks as presumptively dangerous and culpable), but also some less well-recognized consequences. For instance, people tend to notice the unique and individual characteristics of familiar, in-group members, whereas they are prone to focus on the stereotypical, group-based characteristics of out-group individuals.<sup>108</sup> When a white person encounters another white, he or she does not focus on the other's race, but instead processes the unique, individuating attributes (both physical and personal) of the other person.<sup>109</sup> By contrast, when a white interacts with a black stranger (or vice versa), psychological processing of the other is much more likely to emphasize race and attributes that are implicitly associated with race (such as "threat"), and to downplay personal traits that do not conform to racial stereotypes.<sup>110</sup>

There is nothing intentional or malicious about this psychological process. Nonetheless, in the criminal-justice context, it can result in cross-racial misidentifications by witnesses and, consequently, false convictions. Numerous studies have documented "a significant difference in the ability of white American subjects to recognize white and black faces,"<sup>111</sup> and these findings comport with the feeling of many white Americans that members of other racial groups "all look alike to me."<sup>112</sup> Because the outcome of many criminal trials hinges on the eyewitness testimony of one person or a small group of people, the inability of many whites to visually distinguish in an effective way between black individuals presents a serious obstacle to racial justice and the presumption of innocence.

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105. See, e.g., MARY MAXWELL, *HUMAN EVOLUTION: A PHILOSOPHICAL ANTHROPOLOGY* 155–56 (1984) (discussing racial stereotyping as an evolutionary trick by which persons can quickly be sorted into in-groups and out-groups).

106. See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1795 (2003) ("In concrete terms, people are more likely to demonstrate [trust, fairness, and loyalty] to those they perceive to be members of their in-group. Conversely, they are more likely to discriminate against those they perceive to be members of an out-group." (footnotes omitted)).

107. See *id.* at 1795–96 ("Race, being both socially salient and facially visible, is one of the primary categories along which people make initial in-group and out-group categorizations.").

108. Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 1091, 1101 (2008).

109. See *id.* at 1102.

110. *Id.*

111. Sherri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 938 (1984).

112. Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups*, 7 PSYCHOL. PUB. POL'Y & L. 36, 36 (2001).

## 2. Stereotypes of Black Dangerousness, Culpability, and Criminality

Furthermore, psychological research at the intersection of race and crime has consistently shown that whites perceive blacks as more dangerous, more crime-prone, and more blameworthy than whites. For instance, Sandra Graham and Brian Lowery designed a study in which they read police officers and juvenile-justice officials a fact pattern describing a shoplifting crime or an assault committed by a hypothetical adolescent whose race was not specified.<sup>113</sup> For the experimental group, the test subjects were subliminally exposed (i.e., exposed outside of the part of their visual range that is consciously processed) to words associated with black people.<sup>114</sup> The control group was subliminally exposed to words that have no racial associations.<sup>115</sup> As the researchers predicted, the racially primed group judged the hypothetical adolescent as being more hostile, more adult-like and blameworthy, more likely to possess internal criminal motivation, and more likely to recidivate.<sup>116</sup> Other similarly designed studies have yielded the same findings.<sup>117</sup>

One important psychological process that helps explain these results is the fundamental attribution error.<sup>118</sup> When people evaluate their own negative behavior, or the undesirable actions of in-group members, they tend to excuse the behavior by attributing it to external circumstances rather than to personal character.<sup>119</sup> By contrast, when evaluating other people, and particularly members of an out-group, people tend to chalk up negative behavior to personality and to downplay mitigating circumstances.<sup>120</sup>

Because race is still a salient part of the cognitive process of in-grouping and out-grouping in contemporary America,<sup>121</sup> whites are prone to interpret "bad behavior by blacks as stemming from some fundamental flaw in their nature, from an irredeemably unworthy core rather than from an unfortunate situation."<sup>122</sup> In other words, the instinct of many white Americans is to do *exactly the opposite of*

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113. See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 490 (2004) (introducing the study's use of "crime reports").

114. See *id.* at 489 (discussing the study's use of "priming manipulations," which flashed "prime words," such as "Harlem, homeboy, dreadlocks, [and] basketball," on a screen for 150 milliseconds each).

115. See *id.* at 489–90 (discussing the use of race-neutral words such as "heaven, kindness, devil, [and] loneliness" in the "priming manipulations" performed with the control group).

116. See *id.* at 493 (summarizing results of the study).

117. See, e.g., Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 8–12 (1989) (detailing earlier studies).

118. See generally LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1991) (describing the fundamental attribution error).

119. See, e.g., Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 227 (1985) (explaining the role of bias in fundamental attribution error theory).

120. See, e.g., *id.*

121. See Carbado & Gulati, *supra* note 106, at 1796 (discussing the prevalence of race-based in-grouping and out-grouping).

122. Taslitz, *Judging Jena's D.A.*, *supra* note 19, at 418.

what I suggested should be done in the previous Section.<sup>123</sup> Rather than evaluating the culpability of black criminals within the social context of segregation and white privilege, for which we are collectively responsible, the fundamental attribution error leads Americans to interpret black criminal behavior as an ineradicable stain on the character of black individuals and communities.

White Americans also tend to perceive threats and anger in the ambiguous actions of black individuals, but not in similar actions by white people. One study showed test subjects a number of black and white faces that were emotionally ambiguous: they could be reasonably interpreted as angry, but could also be interpreted in other ways.<sup>124</sup> The study concluded that participants with high levels of implicit racial bias more readily detected anger in the black faces than in highly similar white faces.<sup>125</sup> The result has been confirmed in other studies.<sup>126</sup> In another striking experiment, test subjects played a video game in which they were supposed to shoot and kill armed criminals, but not innocent bystanders or fellow police officers.<sup>127</sup> When confronted with ambiguous-looking white and black individuals who could not be clearly classified as criminal or innocent, participants were substantially more likely to shoot the black characters than the white ones.<sup>128</sup>

The tendency of whites to over-detect threats and anger in situations involving blacks helps explain why police officers often treat blacks as dangerous individuals who must be subdued with force.<sup>129</sup> The undue harshness of law enforcement toward blacks further reinforces the powerful sense of distrust, betrayal, and anger that many blacks feel toward the police.<sup>130</sup> The result is a vicious cycle of mutual wariness, aggression, and escalation between black communities and law enforcement.

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123. See *supra* Part I.B.2 (suggesting the collectivization of responsibility for black criminality).

124. See Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 642 (2003) (employing a facial emotion change-detection task to determine whether racial prejudice biases people's perceptions of other's facial emotions).

125. See *id.* at 643 (summarizing results of the study).

126. See, e.g., Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 730–34 (2000) (detailing results of similar racial bias studies).

127. See Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapon Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399, 399 (2003) ("Rapid actions to persons holding weapons were simulated using desktop virtual reality. . . . In one of two tasks Black males holding guns were police officers while White males holding guns were criminals. In the other, Whites with guns were police and Blacks with guns were criminals. In both tasks Blacks or Whites holding harmless objects were citizens.").

128. See *id.* at 403 ("[S]ubjects had greater difficulty distinguishing weapons from harmless objects when the weapons were in the hands of simulated Blacks than Whites and . . . subjects were response-biased in the sense of giving the weapon-appropriate response more readily to Black than to White targets.").

129. See Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314–15 (2002) (discussing studies showing similar behavior to be considered more threatening when subject is black).

130. See Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 AM. J. POL. SCI. 762, 763 (2005) (noting that most black Americans do not consider the criminal justice system to be fair, while most white Americans do).

In addition to negative stereotypes of blacks as a racial group, psychologists have also identified bias relating to two characteristics that are related to, but distinct from, race: bias based on skin color, and stereotypes based on Afrocentric physical features.<sup>131</sup> Although research in these areas is less developed than it is for race, existing studies suggest that black people with darker skin color and Afrocentric features are evaluated as being less virtuous and more crime-prone than those with lighter skin and non-African features.<sup>132</sup> The result is that such individuals are given longer prison sentences<sup>133</sup> and also have a much higher risk of receiving the death penalty.<sup>134</sup>

Racial stereotypes influence not only the severity of the sentence, but also the evaluation of factual evidence of guilt or innocence. For instance, one study asked test subjects to review evidence of a crime, including both incriminating and exculpatory evidence, and assess the suspect's guilt.<sup>135</sup> Participants who were told that the suspect was a racial minority were better able to recall the incriminating evidence against him, and less able to recall evidence tending to prove the suspect not guilty.<sup>136</sup> These findings strongly suggest that a confirmation bias is at work,<sup>137</sup> in which the test subjects who know the defendant is a racial minority initially presume his or her guilt, and subsequently process and remember only the evidence that confirms the original impression, forgetting the rest.<sup>138</sup>

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131. Most studies of race and crime evaluate "race" as the independent variable. Race is a social construction that is related to skin color, but not reducible to it. *See* Gotanda, *supra* note 33, at 23. With few exceptions (such as the category "mulatto"), the white/black racial divide is socially constructed as binary: regardless of how light or dark a person's skin is along a spectrum from light to dark, or how much a person's features resemble those that are typical of Africans, the American conception of race categorizes that person as either white, black, or biracial. *See id.* at 23–25 (describing the social "rules" that consider anyone with visible Black-African ancestry to be black and anyone of mixed race to be "mulatto"). Thus, studies that focus on "race" can obscure shades of difference within the categories of skin color and Afrocentricity.

132. *See, e.g.*, S. PETERSON-LEWIS, *EVALUATING THE CRIMINAL OFFENDER: THE EFFECTS OF OFFENDERS' SOCIO-ECONOMIC STATUS, ACADEMIC ACHIEVEMENT AND COLOR ON PERSONALITY* (1983) (addressing skin color); Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 *PSYCHOL. SCI.* 674, 678 (2004) (arguing that the association between Afrocentric features and stereotypic traits leads judges to associate such features with heightened dangerousness and culpability).

133. *See* Blair et al., *supra* note 132, at 676–77 ("Afrocentric features were a significant predictor of sentence length over and above the effects of the other factors.").

134. *Cf.* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383, 385 (2006) ("[D]efendants who were perceived to be more stereotypically Black were more likely to be sentenced to death only when their victims were White.").

135. *See* Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 *J. PERSONALITY & SOC. PSYCHOL.* 726, 728–29 (1988) (assessing whether information-processing mechanisms contribute to judgmental discrimination in a mock juror decision-making task).

136. *See id.* at 734 (summarizing results of the study).

137. *See generally* Peter C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 *Q. J. EXPERIMENTAL PSYCHOL.* 129 (1960) (describing confirmation bias).

138. Bodenhausen, *supra* note 135, at 734.

### 3. *Racial Hostility and the Substantive Criminal Law*

Color-blind criminology frames the search for racism within the criminal-justice system in terms of the question: do blacks commit more crime, as defined under existing law, *or* is there discrimination against blacks?<sup>139</sup> However, psychological research has demonstrated that these binary options present a false choice because unconscious race-related hostility and failures of cross-racial empathy help determine what counts as a crime and how heavily certain crimes get punished. Existing legislative definitions of crime and punishment, therefore, cannot automatically be presumed race neutral.

“Dozens of studies . . . have found that white Americans’ political preferences are shaped by predispositions that characterize African Americans as lazy, welfare-dependent, violent, or demanding special favors.”<sup>140</sup> One study found that viewing a news segment involving a black crime suspect significantly increased white experimental subjects’ support for punitive criminal-justice policies; by contrast, when the news segment featured a white criminal suspect, the viewers’ support for punitive policies did not increase.<sup>141</sup> Another study has shown that among white test subjects, negative racial stereotypes closely correlate with support for punitive crime-control policies.<sup>142</sup> Many other studies have reached similar results using a wide variety of different research approaches,<sup>143</sup> lending credence to Michael Tonry’s pithy observation that in the escalating tough-on-crime politics of the last several decades, “[t]he text may be crime,” but “[t]he subtext is race.”<sup>144</sup>

#### *D. Political Consciousness: Institutional Racism and the Consequences of Mass Incarceration*

##### *1. Institutional Racism: Shifting the Spotlight from White Intentions to Black Consequences*

The last Section concluded by showing that the political views of whites about the seemingly race-neutral processes of defining crime and calibrating punishment are shaped in part by subconscious hostility and indifference to blacks. Because whites generally still control the levers of power in American society, most of the criminal laws and punishments that are imposed upon black individuals and communities are devised by people who harbor subconscious attitudes of hostility

139. See *supra* Part I.A.1.

140. Tali Mendelberg, *Racial Priming Revived*, 6 PERSP. ON POLS. 109, 109 (2008).

141. See Franklin D. Gilliam & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 567–68 (2000) (summarizing results of a study evaluating the effects of crime script on crime attitudes).

142. See Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 393 (1997) (finding a strong relationship between whites’ images of blacks and judgments of crime and punishment, but only for black criminals who commit violent crimes).

143. See Mendelberg, *supra* note 140 (reviewing relevant literature).

144. MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 6 (1995).



and lack of empathy toward them. Consequently, the outcomes of majoritarian political processes reflect what Lani Guinier has referred to as “legislative racism”: “a pattern of actions [that] persistently disadvantag[e] a fixed, legislative minority and encompass[] conscious exclusion as well as marginalization that results from ‘a lack of interracial empathy.’”<sup>145</sup>

In the criminal-law context, the costs to the black community of not having their voices adequately heard within democratic processes have been crushing. When democracy functions properly, laws change when they become vastly more harmful than helpful to their constituents.<sup>146</sup> However, under conditions of institutional racism,<sup>147</sup> legislatures and other institutions of power are slow to respond to the needs of minority communities. Thus, in identifying and combating racism within the criminal-justice system, we should look not only to the superficial race-neutrality of laws and the discoverable intentions of lawmakers, but also to the consequences of law for minority communities.<sup>148</sup>

This Section examines the vast costs that mass incarceration imposes on poor black communities and argues that these consequences should be taken into account in judging the racial justice of the substantive criminal law. Determining which areas of the substantive criminal law require intervention, and how prosecutors should take account of consequences, is a complex matter that will be discussed in more detail in later parts of the Article.

## 2. *Grappling with the Costs of Mass Incarceration*

Prison imposes severe costs on prisoners, their families, and their communities, and “[n]owhere are these effects more highlighted than in the African American community.”<sup>149</sup> The already-enormous costs of imprisonment on communities are exacerbated by the spatial density of incarceration: “the exit and reentry of inmates is geographically concentrated in the poorest, minority neighborhoods.”<sup>150</sup> In

145. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1444 (1991).

146. For one of the leading analyses of the ideal conditions for majoritarian politics, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* chs. 4–6 (1980).

147. Institutional racism is related to, but conceptually distinct from, both conscious racism and unconscious racism, because it completely shifts the spotlight away from the mental perspective of whites, and instead defines racism in terms of the lived experience of oppression and inequality for racial minorities. “The key issue is *result*, not *intent*.” D. Georges-Abeyie, *Criminal Justice Processing of Non-White Minorities*, in RACISM, EMPIRICISM AND CRIMINAL JUSTICE 28 (B.D. MacLean & D. Milovanovic eds., 1990). One source helpfully explains that institutional racism is present where “the social, political, economic, religious, and educational structures, or the major institutions in a society benefit a particular race—the ‘white’ race in the United States—at the expense of other races.” MANN, *supra* note 3, at 21.

148. See, e.g., Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1276 (2004) [hereinafter Roberts, *Social and Moral Costs*].

149. Marc Mauer & Meda Chesney-Lind, *Introduction*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 2 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter INVISIBLE PUNISHMENT].

150. Roberts, *Social and Moral Costs*, *supra* note 148, at 1276.

some of these minority neighborhoods, as many as twenty-five percent of the adult male residents are locked up on any given day.<sup>151</sup> These extraordinary imprisonment rates shatter the institutions that traditionally lend stability and control—marriage, employment, civic engagement, etc.—in these communities to such an extent that additional incarceration may be producing *more* crime, not less.<sup>152</sup>

The most immediate harm of imprisonment is to the prisoner and his or her family, friends, and romantic relationships. Prison disrupts the intimacy and everyday connections between the prisoner and his or her loved ones, and it imposes serious obstacles for their ongoing relationships.<sup>153</sup> It makes prisoners less marriageable and increases the risk of divorce for prisoners with existing marriages.<sup>154</sup> It vastly diminishes a prisoner's future employment prospects,<sup>155</sup> placing enormous strains on his or her family even after his or her release.

Imprisonment deprives prisoners' children of a parent (occasionally both parents) and provides those children with an early and intimate connection with the prison system; unsurprisingly, the children of incarcerated parents are much more likely than other children to become involved in criminal activity.<sup>156</sup> This is a serious problem considering that, according to a 1999 study, 7.0% of black children and 2.6% of Hispanic children (compared to 0.8% of white children) had a parent in prison.<sup>157</sup> The net effect of these and other factors devastates the lives of prisoners and their families.<sup>158</sup>

The negative consequences of imprisonment reverberate throughout the prisoner's neighborhood and city communities—particularly in communities with high incarceration rates. Mass imprisonment disrupts the already-fragile social networks and human capital of poor communities.<sup>159</sup> Rather than rehabilitating prisoners, modern incarceration tends to make prisoners more violent, antisocial, and prone to criminality: "Most who study prison life believe there are significant brutalizing effects to imprisonment that impair prisoners' inclinations to conform

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151. See Todd R. Clear, *The Problem with "Addition by Subtraction": The Prison-Crime Relationship in Low-Income Communities*, in *INVISIBLE PUNISHMENT*, *supra* note 149, at 184 (providing incarceration statistics).

152. See Roberts, *Social and Moral Costs*, *supra* note 148, at 1297 ("Incarceration is no longer simply an outcome of neighborhood crime, but is integrated in the damaged social fabric of communities that produces crime.").

153. See WESTERN, *supra* note 4, at 136 (discussing familial relationships and the hardships imposed by incarceration).

154. See *id.* ("Survey data show that imprisonment further reduces the marriage prospects of poor and minority single men. Marriages interrupted by incarceration are unlikely to survive.").

155. See *id.* at 129 (discussing diminished employment prospects, including the aggregate earnings penalty).

156. Cf. Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence, and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 206 (2008) ("[T]hese children face a very high risk of future criminal involvement.").

157. CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *INCARCERATED PARENTS AND THEIR CHILDREN 2* (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf>.

158. See generally John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999) (describing the collateral effects of imprisonment).

159. See Fagan & Meares, *supra* note 156, at 210 (discussing the effects of imprisonment on communities).

to the law.”<sup>160</sup> The predictable results are a high rate of recidivism when prisoners are released back into the community,<sup>161</sup> and thus, a rapid cycle of imprisonment and release that continues to disrupt the fabric of the community.

Furthermore, communities coping with high levels of incarceration often have less respect for the law and for social norms of law-abidingness, in large part because they view themselves as victims of a discriminatory and unduly harsh criminal-justice system.<sup>162</sup> In many poor, minority communities, the incarceration of adolescents and young men is so common that it has become an expected “rite of passage.”<sup>163</sup>

In response to the normalization of imprisonment, an entire culture has emerged—a culture that is strongly reflected in hip-hop media—that promotes social norms that challenge those embodied in the criminal law.<sup>164</sup> These sources stigmatize the government (especially the police) for inflicting imprisonment, rather than stigmatizing criminals for being imprisoned.<sup>165</sup> Under these conditions, the criminal law ceases to command respect from communities faced with mass imprisonment, and instead becomes a source of alienation, resentment, and civic isolation.

Furthermore, felon-disenfranchisement laws ensure that communities with large convict populations lose much of their voting potential. Every state except Maine and Vermont prohibits felons from voting during their term of incarceration, and most states extend the prohibition beyond incarceration to cover parole and probation as well; a handful of states continue to disenfranchise some or all felons even after they complete their sentences.<sup>166</sup> As a result of racially disproportionate rates of incarceration, felon-disenfranchisement laws disproportionately deprive black people of the right to vote. Across almost the entire nation, five percent or

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160. Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441, 465 (1998).

161. See Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 591–93 (2009) (detailing high rates of recidivism due to over-reliance on imprisonment and lack of efforts to rehabilitate offenders).

162. See Fagan & Meares, *supra* note 156, at 214–15, 219–20 (discussing the undermining effects of stigmatization and discrimination on community perceptions of fairness within the criminal-justice system).

163. Jerome Miller, *Bringing the Individual Back in: A Commentary on Wacquant and Anderson*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 142 (David Garland ed., 2001).

164. See generally PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 130–33 (2009) (discussing the emergence of this hip-hop culture).

165. See *id.* at 130–33.

166. Forty-eight states and the District of Columbia disallow felons from voting during their term of incarceration; thirty-five states disallow voting by felons during their prison and parole terms; thirty states disallow felon voting during probation; two states (Kentucky and Virginia) presumptively disenfranchise all felons even after they have completed their sentences, whereas nine other states do so only for felons who committed certain types of offenses. SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1, 3 (2008), [http://www.sentencingproject.org/doc/publications/fd\\_bs\\_fdlawsinus.pdf](http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus.pdf). These states allow various processes by which felons can apply for restoration of their voting rights, but these processes are “so cumbersome that few ex-offenders are able to take advantage of them.” *Id.* at 1.

more of the black voting-age population has been disenfranchised under these laws; in fourteen states, the number is over ten percent, and in five states, it exceeds twenty percent.<sup>167</sup> This political exclusion cripples the ability of many poor, minority communities to have their voices heard by their elected representatives<sup>168</sup> and to protect themselves against (among other things) the harsh laws that produced widespread felony convictions and disenfranchisement in the first instance.

Finally, the disproportionate incarceration of racial minorities tends to reproduce itself by validating and intensifying the conscious and unconscious racist attitudes that help create disparate criminal-justice outcomes. Racially disproportionate imprisonment, whatever its cause, has the effect of confirming and legitimizing these attitudes.<sup>169</sup> It seems to statistically “prove” that blacks and other minorities are dangerous, and it therefore fuels the so-called “rational discrimination” that is praised and practiced by numerous scholars, news sources, police officers, and others who claim that associating blackness with danger and crime is statistically rational and, therefore, morally justified.<sup>170</sup>

These reinforced biases, in turn, generate and legitimize the next generation of racially biased policing, prosecution, adjudication, and legislation. Even outside the criminal-justice system, these biases ensure that blacks will have to endure a vast range of humiliations and disadvantages: the suspicions and stereotypes of ordinary people on the street, potential employers, mortgage lenders, fearful cab drivers, and numerous other indignities.<sup>171</sup> This “Black Tax” is especially crippling for economically disadvantaged blacks, but to a large extent it is shared by all blacks: both the innocent and the guilty.<sup>172</sup>

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167. See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 79–80 (2006) (providing disenfranchisement statistics).

168. In fact, Christopher Uggen and Jeff Manza have convincingly shown that felon-disenfranchisement laws determined the outcome of the 2000 election. See Christopher Uggen & Jeff Manza, *Democratic Contraction?: Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792–93 (2002). According to projections, if felons were permitted to vote, Al Gore would have received an additional 60,000 votes in Florida, which would have sufficed to win Florida and the overall election. See *id.*

169. See David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2561 (1995) (“Criminal law enforcement is expressly designed to have a stigmatic effect . . . . The criminal justice system’s stigma is not expressly race-based . . . . But when the results of the criminal justice system are as racially disproportionate as they are today, the criminal stigma extends beyond the particular behaviors and individuals involved, to reach all young black men, and to a lesser extent all black people.”).

170. For one of the leading defenses of “rational discrimination” against blacks, see DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 285 (1995).

171. See, e.g., CHARLES J. OGLETREE, JR., *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES, JR. AND RACE, CLASS, AND CRIME IN AMERICA*, at epilogue (2010) (providing 100 vivid stories of black individuals being held in suspicion in a wide variety of social contexts).

172. See ARMOUR, *supra* note 76, at 13–17 (discussing the so-called Black Tax).

### 3. *Collateral Benefits of Law Enforcement for Black Communities*

It is important to acknowledge an important fact that adds balance to the prior discussion. Blacks may suffer the most from mass imprisonment, but they also reap a disproportionate share of its benefits. Most interpersonal crime committed by blacks has a black victim,<sup>173</sup> and the social damage of nonviolent crimes committed by blacks, such as drug possession and distribution, is likely to be felt most acutely by other blacks.

Thus, insofar as crime-control policies succeed in deterring crime and protecting victims, black individuals and communities stand to benefit from those results. It is an exaggeration to conclude, as some scholars have, that “the main problem confronting black communities in the United States is not excessive policing and invidious punishment but rather a failure of the state to provide black communities with the equal protection of the laws.”<sup>174</sup> However, we must bear in mind that incarceration—including the incarceration of blacks—brings both benefits and costs to black communities, and the ratio of benefits to costs varies depending on the situation. Solutions to mass incarceration must be based on a nuanced and context-sensitive consideration of costs and benefits of various criminal laws and law-enforcement strategies, rather than a reflexive aversion to (or promotion of) the enforcement of the criminal law.

## II. COLOR-CONSCIOUS PROSECUTION

The last Part outlined a tragic cycle of race-related disadvantage, crime, unconscious racism, and imprisonment that will continue and potentially worsen unless crucial actors—black communities, prosecutors, police, jurors, legislators, voters, and others—in the criminal-justice system challenge the pattern. The point is not to promote despair, but to lay the groundwork for progress and healing. This Part explores a variety of ways that one important set of actors—criminal prosecutors—can become a positive force for change by confronting bias in themselves and others, and also by coming to grips with the crippling social consequences of mass imprisonment. In doing so, I also aim to explain why color-conscious prosecuting is justified as a matter of professional ethics.

It might initially seem that the second conclusion follows inexorably from the first, but it does not. Even if prosecutors are capable of contributing to racial fairness in the criminal-justice system by their actions, there is still a case to be made that color consciousness—particularly color consciousness that redounds to the benefit of criminal defendants—violates the professional obligations of

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173. See, e.g., John J. DiIulio, Jr., *The Question of Black Crime*, 117 PUB. INT. 3, 3 (1994).

174. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994). For a powerful criticism of Professor Kennedy's position, see Cole, *supra* note 169.

prosecutors as articulated in the American Bar Association's *Model Rules of Professional Responsibility* (and corresponding state rules). This counterargument rests on the premise that the American legal system is an adversarial one in which the lawyers of each side ought to zealously present the strongest version of their client's case, and leave it to the judge and jury to determine which side is correct.<sup>175</sup> The goal of this Part is not to wage general war on the adversarial system, but instead to advance a context-specific argument that prosecutors should adopt a non-adversarial, justice-seeking approach when addressing the racial dimensions of their cases.

In many areas of their work, prosecutors already make important contributions to racial justice, and it is important to acknowledge these efforts in order to present a balanced narrative. Prosecutors are responsible for enforcing hate-crime laws. They routinely interact with black witnesses, vindicate the dignity of black crime victims, and protect many predominantly black communities from the scourge of crime.<sup>176</sup> After many dark years of governmental indifference to criminal acts with a black victim,<sup>177</sup> these are no small accomplishments.

Those developments have been extensively documented and analyzed by other scholars and embraced by many prosecutors, perhaps because they are the dimensions of color consciousness that are consistent with an adversarial conception of the prosecutor's role.<sup>178</sup> Consequently, I will focus primarily on the less discussed yet equally important non-adversarial aspects of color-conscious prosecution—the ways in which prosecutors can help promote racial justice for black *defendants*, and not just for black *victims*.

One more caveat is appropriate at this juncture. I recognize that individual prosecutors do not call all of their own shots regarding how to properly exercise discretion. They must consider not only their own personal conception of justice, but also the culture and policies of the office in which they work. A few of my recommendations will be difficult, or even impossible, for some prosecutors to implement within their institutional environments; others may find their institutions more accepting, and even encouraging, of interventions in the service of racial fairness. In order to do justice to the complex institutional constraints that individual prosecutors are faced with, I will temporarily set those issues aside in this Part and provide them with comprehensive treatment in the next Part.

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175. See generally *infra* Part II.A (describing the nature of the American adversarial system).

176. See generally KENNEDY, *supra* note 73 (praising vigorous law enforcement in black communities for ending a legacy of indifference to black-on-black crime).

177. See *id.*

178. See Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227, 2242–43 (2001) (explaining why color consciousness resonates with traditional conceptions of a prosecutor's ethical duties in cases involving racially motivated violence).

### A. *The Adversarial System and the Prosecutor's Dual Role*

Within America's adversarial legal system, the "standard conception of the lawyer's role" consists primarily of two principles: neutrality and partisanship.<sup>179</sup> The principle of neutrality requires the lawyer to divorce his or her ethical and political beliefs from his or her legal service, and instead to adopt the goals and perspective of the client.<sup>180</sup> The principle of partisanship states that the lawyer must energetically pursue the interests of his or her client, even to the detriment of others.<sup>181</sup> According to these standards of professional ethics, the principal duty of most American lawyers is to seek an outcome favorable to his or her client, *not* to seek outcomes that are also fair to the opposing party or to third parties who are uninvolved in the adversarial showdown.<sup>182</sup>

Despite the centrality of the principles of neutrality and partisanship in the American conception of the lawyer's role, the *Model Rules of Professional Conduct* recognize countervailing principles in certain contexts as well. For instance, lawyers may not obstruct an opposing party's access to evidence,<sup>183</sup> deceive the Court,<sup>184</sup> or bypass counsel by communicating directly with represented opposing parties.<sup>185</sup> Lawyers are expected to be civil<sup>186</sup> and to conduct themselves as "officer[s] of the legal system."<sup>187</sup> Although American lawyers frequently push the envelope on, and even transgress, these and other non-adversarial requirements in the course of zealously representing their clients, it is worth noting that the *Model Rules of Professional Conduct* do not dictate a purely adversarial role for lawyers.<sup>188</sup> Instead, they supply a multivalent set of principles that can often come into tension with one another, demanding that lawyers creatively navigate through the resulting conflicts.<sup>189</sup>

179. Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980).

180. *See id.*

181. *See id.*

182. Lord Henry Brougham famously (or infamously, depending on perspective) described the absolute partisan loyalty that a lawyer must show to his or her client in the following way:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

2 THE WHOLE PROCEEDINGS ON THE TRIAL OF HER MAJESTY, CAROLINE AMELIA ELIZABETH, QUEEN OF ENGLAND 2 (John Fairburn ed., 1820).

183. MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2010).

184. *Id.* at R. 3.3.

185. *Id.* at R. 4.2.

186. *Id.* at Preamble ¶ 9.

187. *Id.* at Preamble ¶ 1.

188. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1133 (1988).

189. *See generally id.* ("Regardless of what the 'adversary system' means, it does not adequately describe the relevant aspects of the American tradition of advocacy. In that tradition, the lawyer has been both an advocate and an 'officer of the court' with responsibilities to third parties, the public, and the law. There has never been a

The non-adversarial dimension of a prosecutor's professional ethics is broader and more well-defined than that of other lawyers. Prosecutors have a "dual role" to serve both as advocates for the government within an adversarial system, and also as "officers of justice."<sup>190</sup> Their obligation is to "seek justice, not merely to convict."<sup>191</sup> Nonetheless, due to the ambiguous meaning of the prosecutor's duty to seek "justice" and the internal dissonance within the prosecutor's "dual role," there are many conflicting views about how a prosecutor should reconcile these competing obligations.<sup>192</sup> The weight that a prosecutor should give to each part of his or her professional duty in any particular setting is not pre-ordained, and the prosecutor must frequently make judgments about the strength of the justifications for (and objections to) adversarialism in various situations.<sup>193</sup> These assessments are necessarily context sensitive, because the adversarial norm is valuable in some situations and destructive in others.<sup>194</sup>

Normative scholarship about the adversarial system is vast, and it is neither viable nor necessary to provide a comprehensive summary of it here. Three portions of the debate over adversarial lawyering are relevant to the upcoming discussion of color-conscious prosecution. The first dispute addresses whether adversarial legal norms advance or degrade human dignity. Proponents of adversarialism contend that it safeguards dignity by valuing the client's autonomy<sup>195</sup> and embodying the virtues of loyalty and friendship.<sup>196</sup> Detractors counter that partisanship degrades the dignity of opposing parties and fosters alienation instead of dignity-enhancing reconciliation between adversaries.<sup>197</sup>

The second area of controversy is whether adversarial norms provide the best way to discern truth. Proponents of adversarial legal practice contend that vigorous and partisan presentation of both sides of an issue is the best way to arrive at truth, because it ensures that no stone is left unturned, and it encourages creative

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consensus about where to draw the line between these two aspects of the lawyer's role, and the two have always been in tension within the professional culture.").

190. See RHODE & LUBAN, *supra* note 31, at 356–575.

191. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987) (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 7–12 (1982)).

192. See Fred Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991) ("The 'do justice' standard . . . establishes no identifiable norm. Its vagueness leaves prosecutors with only their individual sense of morality to determine just conduct. Some will decide that justice lies in conviction at all cost; others will bend over backwards to vindicate defendants' rights . . . ." (footnotes omitted)).

193. David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (1983) (arguing that the justifications for and against the adversarial norm are inconclusive and context sensitive).

194. *Id.*

195. See, e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (3d ed. 2004).

196. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

197. See, e.g., DEBORAH TANNEN, THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE (1998).



advocacy on behalf of unpopular truths that might otherwise go overlooked.<sup>198</sup> Detractors counter that aggressive partisanship leads to deceptive advocacy, secrecy, and sensationalistic diversions calculated to undermine the quest for truth.<sup>199</sup>

Finally, there is an additional argument for neutral partisanship—based on majoritarian political theory—that is unique to prosecutors.<sup>200</sup> Some scholars take the position that prosecutors should generally charge whatever statutory crimes apply to a defendant's actions in order to give full effect to the political values reflected in legislation which, in turn, are the values of the legislators and the people who elected them.<sup>201</sup>

The remainder of this Part will explain why prosecutors should embrace a color-conscious and non-adversarial norm in relation to the racial issues that are implicated in their cases. The following Sections provide concrete examples of some of the most significant and recurrent racial issues, such as profiling and discriminatory jury selection. I will show that a color-conscious, justice-seeking approach in these areas promotes human dignity, furthers the quest for truth, and advances the worthy political value of protecting minorities who are at risk of oppression at the hands of a hostile majority. Thus, prosecutors should emphasize the justice-seeking component of their “dual role”<sup>202</sup> over the adversarial component when their cases involve issues of race.

### *B. Confronting Implicit Racial Bias in Discretionary Decision-Making*

As I explained in Part I, racism does not ordinarily manifest itself in deliberate choices or easily detectable racial hostility. Rather, it most often takes the form of implicit bias and stereotypes that negatively influence the way Americans subconsciously evaluate blacks. The same is true of prosecutors. Gone are the days when a prosecutor could ask the jury, “[a]re you gentlemen going to believe that nigger sitting over there (pointing at the defendant), with a face on him like that, in preference to the testimony of [white] deputies?”<sup>203</sup>

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198. See, e.g., FREEDMAN & SMITH, *supra* note 195.

199. See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

200. Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 (2010).

201. In fact, the Western European model of prosecution provides less discretion as a way to promote democratic accountability:

Despite their quasi-judicial role and independence, prosecutors are held accountable through a hierarchical system and series of guidelines . . . It is widely believed that the lack of such measures would leave prosecutors free to interpret the needs of justice as they alone see fit, regardless of the democratically supported goals of government. No less than undue political meddling in individual cases, a free-wheeling prosecution would be perceived as undermining the legitimacy of the criminal justice system.

*Id.* at 1469.

202. RHODE & LUBAN, *supra* note 31, at 355.

203. *James v. State*, 92 So. 909, 909 (Ala. Ct. App. 1922).

Today, the most important way in which prosecutors contribute to racial injustice—or promote racial justice—lies in their discretionary decisions before and after trial: whether to indict or dismiss charges, whether to offer a generous plea agreement, and which sentence to recommend for a convicted defendant. In many prosecutorial offices around the country, these judgments are not governed by rigid guidelines. Due to the wide discretion entrusted to prosecutors in these crucial areas, many commentators consider them to be the “most powerful figure[s] in the administration of criminal justice.”<sup>204</sup> Defense attorneys have no comparable power: their role consists largely in awaiting the prosecutor’s decision and reacting to it.<sup>205</sup>

Prosecutorial discretion is full of both peril and promise. When burdened by unrecognized racial bias, a prosecutor’s discretion will be guided by factual misperceptions and an unjustified propensity for retribution in cases involving black defendants. However, when liberated by color consciousness, discretion contains the potential not only to be fair and non-discriminatory, but even to affirmatively advance the dignity and social position of blacks who are under attack by racial profiling and unjust laws. This Section explains why discretionary decision-making is susceptible to implicit racial bias and how prosecutors can confront their own stereotypes so as to improve the quality of the justice they deliver. The next Section will show how color-conscious prosecutors can utilize their discretion to actively promote racial equity.

### *1. The Perils of Prosecutorial Discretion*

Studies investigating cognitive bias have consistently shown that discretionary decisions without clear guidelines present the highest risk of racial bias.<sup>206</sup> When the proper course of action is definite and obvious, deviations are typically the result of conscious mental processes. Because racial discrimination is rarely based on deliberate hostility in contemporary America, it is less likely to come into play

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204. Charles P. Bubby & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 477 (1976). I, like some others, rank the police—who also exercise an impressive amount of discretion at crucial junctures in the criminal-justice process—as being at least as important as prosecutors. See, e.g., Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 968 (2008) (“Functionally speaking, . . . the investigative sphere is the most powerful adjudicative arena, in which police and prosecutorial decisions about information and potential liability determine the circumstances under which individuals must confront the coercive powers of the state.”). In fact, one of the most important ways that prosecutors can contribute to racial justice is by using their discretion to counteract racial profiling by the police and by encouraging police officers to exercise their own discretion in racially equitable ways. See *infra* Part II.C.1–2.

205. See, e.g., William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 287 (1991).

206. See, e.g., John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 317 (2000) (presenting one such study).

when the parameters of a situation are well-defined.<sup>207</sup> By contrast, when judgments are to be made on the basis of undefined criteria and subjective assessments, there is more room for racial bias to drive the decision-making process.<sup>208</sup>

Prosecutors and police are constantly called upon to make judgments that involve unstable and contested criteria. Before police may arrest a suspect, they are constitutionally required to have “probable cause” to believe that the suspect is guilty of a crime.<sup>209</sup> Thus, even when an officer believes a crime has been committed, the officer must use his or her discretion to determine—based on largely undefined factors—whether the crime is a serious enough matter to justify an arrest, or whether a slap on the wrist will suffice.

Similarly, prosecutors must dismiss charges when they believe that the police lacked probable cause to justify the arrest.<sup>210</sup> However, they may also dismiss a case for other, less tangible reasons, such as a strategic assessment that the jury is not likely to find the defendant guilty, or a moral judgment that the defendant deserves a break.<sup>211</sup> If a prosecutor views the defendant as a dangerous person who is likely to flee or commit additional crimes prior to trial, he or she may request that the court detain the person until trial; otherwise, the prosecutor may consent to pretrial release.<sup>212</sup> Prosecutors make similar judgments regarding the defendant’s factual guilt, dangerousness, and moral culpability in determining which plea agreement (if any) to offer, which charges to pursue, and which sentence to recommend to the judge or jury at the end of trial.<sup>213</sup>

Some cases involve facts that make the correct course of action fairly obvious, largely removing the discretionary element from the decision. For instance, when the facts strongly suggest the guilt of a defendant charged with a serious violent crime, it is not difficult to conclude that the defendant is dangerous and therefore should not be released prior to trial. These circumstances do not provide much room for implicit bias to influence outcomes.

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207. See, e.g., Gordon Hodson et al., *Processes in Racial Discrimination: Differential Weighting of Conflicting Information*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 460, 461 (2002).

208. *Id.* at 469.

209. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .”). See generally WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 3.1 (5th ed. 2009) (discussing the probable-cause requirement for making an arrest).

210. MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2010).

211. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” (internal quotation marks omitted)).

212. See 18 U.S.C. § 3142(f)(2) (2006) (laying out the standards for detaining defendants before trial on the basis of flight risk and dangerousness to community).

213. See generally Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 266–74 (2001) (discussing prosecutors’ discretion in making plea agreements, bringing charges, and recommending sentencing).

However, most cases are less clear cut: there may be unresolved questions regarding whether the evidence points toward the defendant's guilt, or, even if the defendant is guilty, it is often debatable whether he or she is a danger to society, capable of rehabilitation, or morally deserving of a long prison sentence. These ambiguities present a serious risk that the stereotypes described in the last Part—that blacks are angry, dangerous, culpable, and criminal—may adversely shape the prosecutor's subjective evaluation of the defendant, resulting in harsher discretionary treatment.<sup>214</sup>

None of the justifications in favor of adversarial lawyering introduced in the last Section—promoting human dignity, democratic values, or the quest for truth—can justify passivity in the face of potentially outcome-determining racial stereotypes. Nor can color-conscious advocacy by defense counsel compensate for the misguided exercise of prosecutorial discretion. It is for the prosecutor to make the fateful decisions about charging, plea bargaining, and influential sentencing recommendations.<sup>215</sup> Defense counsel is left to react.<sup>216</sup>

## 2. *Ameliorating Implicit Racial Bias in the Exercise of Discretion*

There is no easy or complete solution to the problem of implicit bias, but psychological research again charts the way forward. As I explained in the previous Part, most Americans simultaneously embody three traits: (1) at the conscious level, they oppose racism and want no part in it; (2) at the subconscious level, they are beholden to racist stereotypes about blacks; and (3) they are in denial about their subconscious racism.<sup>217</sup> Because these individuals are unaware of their implicit biases, they are unable to mobilize their conscious egalitarian beliefs as a counterweight to those biases.<sup>218</sup>

Prosecutors (and others) must give up on the color-blind strategy for combating racism, which emphasizes repression and denial, and instead seek racial awareness. Racial awareness is multidimensional. It includes the various aspects of historical, psychological, and political consciousness introduced in Part I. For prosecutors, the first step toward color consciousness is to acknowledge and strive to understand their own racial stereotypes about blacks, and to identify the

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214. For a useful summary of a segment of the existing research on the influence of racial bias on prosecutorial discretion, see Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 130, 130–33 (2003) (“[R]acial bias is present in every stage of prosecutorial discretion, including the decision to investigate, the initial assessment of the severity of the offense, the charging decision, and the decision whether to seek the death penalty in homicide cases.”).

215. See generally Griffin, *supra* note 213, at 266–74 (describing the prosecutor's discretion).

216. See *supra* note 204 and accompanying text.

217. See *supra* Part I.C.

218. See, e.g., Devine, *supra* note 117, at 15 (“[C]ontrolled processes can inhibit the effects of automatic processing [of racial stereotypes] when the implications of such processing compete with goals to establish or maintain a nonprejudiced identity.”).

situations in which those biases are likely to influence their decision-making. Wielding this knowledge would enable prosecutors to leverage their anti-racist beliefs and consciously inhibit their stereotypes in situations where those stereotypes would ordinarily be activated.<sup>219</sup>

One high-impact way to acquire awareness about stereotypes is to take an IAT,<sup>220</sup> which provides a large volume of information for little or no cost: it is simple, freely available online, and minimally time-consuming.<sup>221</sup> Whether or not they decide to take an IAT, prosecutors should compare the way in which they assess blacks and whites in a variety of everyday situations. When walking down a city street at night, do they have the same reaction when approached by a group of young white men as they do when approached by young black men? Similarly, prosecutors should bring awareness-raising, de-biasing practices into their daily work. One way prosecutors can do this is by mentally switching the defendant's race and observing whether they would reach the same conclusion about whether to dismiss charges, offer a generous plea, emphasize retribution or rehabilitation, etc.<sup>222</sup> De-biasing measures such as these are simple, non-burdensome, and realistic. If implemented, they hold considerable promise for enhancing racial fairness in prosecutorial decision-making.

### *C. Promoting Racial Equity Through the Exercise of Discretion*

Color consciousness not only helps to diminish bias in prosecutorial decision-making, but it also provides ways for prosecutors to make affirmative contributions to racial justice. A prosecutor's interactions with police, charging decisions, and sentencing recommendations all present opportunities to challenge racial profiling.<sup>223</sup> Furthermore, prosecutors can blunt the force of unjust criminal laws by deciding not to seek indictments based on those laws, offering more equitable plea arrangements based on other laws, or recommending sentences that are commensurate with the true nature of the offense.<sup>224</sup>

Most of the commentators who are worried about racial unfairness in the criminal-justice system are also deeply concerned about prosecutorial discretion, in large part due to the reasons described in the last Section.<sup>225</sup> They may be

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219. *See id.*

220. *See supra* Part I.C.1 (introducing and discussing various IATs).

221. Harvard University, Washington University, and the University of Virginia operate a research website that provides free and easy access to a variety of IATs, including the classic racial-bias IAT. *See* PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited Mar. 12, 2012).

222. *See, e.g.,* Capers, *supra* note 69, at 75 (recommending switching as a technique for ameliorating bias in the exercise of discretion by police officers).

223. *See infra* Part II.C.1–2.

224. *See infra* Part II.C.3.

225. *See, e.g.,* Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1327 (1997) ("Given the statistics regarding race and federal crack prosecutions, and more importantly the perceptions of racial bias that

skeptical that discretion can be used as a positive force for racial justice. I do not take a position on the highly controversial subject of whether prosecutorial discretion is, on the whole, a good or a bad thing, or how it should be constrained.<sup>226</sup> In our current system of criminal justice, the fact is that prosecutors have discretion—more in some jurisdictions than others—and no major social or political currents suggest that this reality will change in a meaningful way anytime soon.<sup>227</sup> As long as prosecutors are authorized and expected to exercise discretion, it is important to understand how they can employ that discretion in the service of racial justice. This Section explores several concrete ways in which they can do so.

### 1. *Challenging Racial Profiling*

As I explained in Part I, the profiling of suspects on the basis of race is an explicit and accepted part of policing in some jurisdictions, and a deeply entrenched, implicit law-enforcement practice in others. Consequently, many more innocent blacks are monitored, stopped, questioned, and harassed by police than similarly situated innocent whites, and far more factually guilty blacks wind up with criminal records for the same behaviors that whites routinely get away with.<sup>228</sup>

Prosecutors are uniquely well-positioned to challenge these forms of racial profiling. They work directly with arresting officers to build the case against a criminal defendant, and, on occasion, they may begin coordinating with investigative officers before an arrest is made. These interactions enable prosecutors to question officers about their reasons for investigating defendants and educate (or remind) officers that racial profiling is not only morally unacceptable, but that it may even jeopardize the government's ability to secure a conviction or, more likely, expose the police department to civil litigation.<sup>229</sup>

Existing data suggests that certain types of cases—such as traffic infractions,<sup>230</sup>

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stem from these statistics, nowhere is a careful reexamination of the prosecutorial discretion doctrine more warranted than in the context of race-based selective prosecution claims.” (footnote omitted)).

226. For a summary of various positions regarding the desirability of prosecutorial discretion and strategies for regulating it, see Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002).

227. In recent decades, the most significant movement among prosecutors has been community prosecution, which in many respects enhances rather than diminishes prosecutorial discretion (in particular, the discretion to choose between prison-based and rehabilitative sentences). See generally JOHN S. GOLDKAMP, CHERYL IRONS-GUYNNE & DORIS WEILAND, U.S. DEP'T OF JUSTICE, COMMUNITY PROSECUTION STRATEGIES: MEASURING IMPACT 2 (2002), <https://www.ncjrs.gov/pdffiles1/bja/192826.pdf> (discussing the history of community prosecution and its key dimensions). For a discussion of this movement, see *infra* Part III.B.3.

228. See *supra* Part I.B.1.

229. See Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 60–81 (2001) (summarizing the judiciary's treatment of various legal theories for challenging racial profiling).

230. See, e.g., David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 560–76 (1997).

minor public-order violations,<sup>231</sup> and drug possession and distribution<sup>232</sup>—are especially likely to originate in racial profiling by law enforcement. Prosecutors should carefully scrutinize the basis for the officer’s suspicion and investigation in cases falling within these categories.<sup>233</sup> When the officer provides a flimsy *ex ante* justification for investigating the defendant, and the prosecutor suspects that racial bias may have been a consideration, he or she should directly ask the officer whether race was the basis for the investigation. Even though it is unlikely that the officer will directly admit to racial profiling, these interactions can serve as vital teaching moments.

If it is clear that racial profiling took place, the prosecutor “may legitimately decide to exercise her discretion to decline prosecution.”<sup>234</sup> In many situations, it may not be possible or desirable to dismiss charges, even when the arrest was the result of profiling. To use an extreme case, a prosecutor should not exercise his or her discretion to dismiss murder or rape charges based on police misconduct: everyone in society—white, black, and others—would be put at risk by such an outcome. Each case is unique and multifaceted. Prosecutors must use their own judgment in discerning which cases are appropriate to dismiss based on racial profiling, versus those for which such a remedy is too drastic. However, a pure adversarial approach that reflexively ignores or excuses racial profiling in all cases perpetuates law-enforcement habits that degrade the dignity of blacks and further impedes the full integration of American society.

## 2. *Assessing the Weight of Prior Criminal History*

Prosecutors can also help guard against segregationist policing in the way they choose to evaluate and make use of prior criminal history. A defendant’s criminal record pervasively influences prosecutorial decision-making, because it can often help predict the defendant’s dangerousness to society and likelihood of recidivism. Among the factors that help predict the likelihood of future violence and criminality, “no risk factor has been more thoroughly studied [than past violence and criminality] and none have generated more reliable results.”<sup>235</sup> Thus, prosecutors often consider criminal history in deciding which charges (if any) to bring, how lenient of a plea agreement to offer, whether to seek statutory penalty enhance-

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231. See, e.g., Capers, *supra* note 69, at 69–70.

232. See, e.g., Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 23–29 (2008).

233. Cf. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 165 (2008) (arguing for a proactive approach in which prosecutors seek not only to eliminate their own racial biases, but also to “push back against problems that originate outside the office”).

234. Davis, *Prosecution and Race*, *supra* note 19, at 31.

235. John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 423 (2006).

ments (for instance, under “Three Strikes” laws)<sup>236</sup> and what sentence to recommend to the judge after a defendant is convicted.<sup>237</sup> When permitted by the rules of evidence, prosecutors frequently seek to disclose the defendant’s prior crimes to the jury in order to impeach the defendant’s trial testimony or to provide substantive evidence of the defendant’s guilt.<sup>238</sup>

Like their peers, color-conscious prosecutors should consider a defendant’s prior record in appropriate situations. However, they should also strive to discern which portions of the defendant’s record truly reflect his or her actual criminal propensity, and which parts are more likely to have resulted from the arresting officers’ racially charged criteria for deciding who is suspicious enough to investigate.

Judge Nancy Gertner’s sentencing decision in *United States v. Leviner*<sup>239</sup> helpfully illustrates a color-conscious approach to prior criminal history. By way of background, the *U.S. Sentencing Guidelines* (“Guidelines”) require judges to mathematically factor all of a defendant’s prior convictions into the initial calculation of the defendant’s recommended sentencing range, often called the “Guidelines range.”<sup>240</sup> The Guidelines do not dictate where within the Guidelines range the ultimate sentence must fall;<sup>241</sup> instead, the sentencing judge may authorize upward or downward departures from the Guidelines range when the defendant’s criminal-history category misstates the “seriousness of the defendant’s criminal history.”<sup>242</sup>

As she was required to do, Judge Gertner initially accounted for all of the defendant’s prior convictions in calculating the Guidelines range.<sup>243</sup> However, she authorized a downward departure from the recommended Guidelines range in part because several of the defendant’s prior convictions were for driving with a suspended license.<sup>244</sup> She referred to scholarship and news reports showing that “[m]otor vehicle offenses, in particular, raise deep concerns about racial disparity,” arguing that counting those offenses would “effectively replicate[] disparities in sentencing” that had been introduced in the earlier criminal cases.<sup>245</sup> Although she

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236. See generally Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 400–22 (1997) (describing the history and spread of Three Strikes laws in America).

237. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 4B (2011) (providing for sentencing based on criminal history).

238. For a general discussion of when the rules of evidence permit the use of prior crimes evidence, see Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135 (1989).

239. 31 F. Supp. 2d 23 (D. Mass. 1998).

240. See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 237, at § 1B1.1 (setting forth the Guidelines’ application instructions).

241. See generally *id.*

242. *Id.* at § 4A1.3(a)–(b).

243. *Leviner*, 31 F. Supp. 2d at 31.

244. See *id.* at 32–33.

245. *Id.* at 33 (footnotes omitted).



acknowledged her lack of definitive proof that segregationist policing was behind these particular prior convictions, she relied on statistical information about the prevalence of racial profiling in the applicable crime categories to infer that profiling partially explains the defendant's prior record.<sup>246</sup>

Color-conscious prosecutors should model several aspects of Judge Gertner's analysis. They should rely on prior criminal history in appropriate situations and abide by the rules—such as the Guidelines—that govern how criminal record influences discretionary decision-making. However, where the applicable rules leave room for discretion—as the Guidelines do in determining where a defendant falls within the Guidelines range and whether a downward departure from the range is justified<sup>247</sup>—prosecutors should take into consideration the race of the defendant, the crime categories reflected in the defendant's prior record, and the statistical evidence of racial profiling within those crime categories. Attentiveness to these factors can help prosecutors determine whether the defendant's prior record reflects his or her actual dangerousness, or just his or her race.

Finally, even when a prosecutor concludes that race is reflected in the defendant's prior record, he or she must carefully assess whether it is justifiable to discount the weight of criminal history on that basis. A criminal record involving serious, violent crimes is not the appropriate place for prosecutors to stage their color-conscious interventions, even when racial profiling may have prompted the underlying investigations that gave rise to that criminal record.<sup>248</sup> Less dangerous crimes, however, may provide promising opportunities for corrective action.

### 3. *Discretion as Legal Reform*

One of the most high-impact—but also complex and controversial—ways that prosecutors can contribute to racial justice is by creatively using their discretion to reshape the law according to the demands of racial justice.<sup>249</sup> As I discussed in Part I, a pervasive problem with color-blind analyses of the criminal-justice system is that they assume that the substantive criminal law is race neutral, and that the only place where racism has room to maneuver is in the enforcement of the criminal law: police and prosecutorial discretionary decisions, jury verdicts, sentencing decisions, etc.<sup>250</sup> This assumption should be rejected because institutional racism excludes minorities from democratic political processes and prevents the substan-

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246. *See id.* ("While I can make no judgment about what happened specifically with Leviner's motor vehicle charges, surely, the studies described above raise questions about what drew the officer's attention to Leviner in the first place.").

247. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 237, at § 1B1.1.

248. *See* Butler, *Affirmative Action*, *supra* note 89, at 877–78 (explaining that affirmative action within the criminal law should operate primarily within the realm of nonviolent crimes, not violent offenses).

249. *See* Podgor, *supra* note 19, at 474 ("Broad prosecutorial discretion provides prosecutors with the ability to move beyond merely matching conduct with statutes. It allows prosecutors to correct bias within our legal system.").

250. *See supra* Part I.C.3.

tive law from responding to minority voices or taking into account the suffering that the law imposes upon them.<sup>251</sup>

Consequently, prosecutors should not embrace a vision of their professional duties that is grounded exclusively in majoritarian, democratic values. Under conditions of institutional racism, some of the laws erected by the majority impose vast burdens on minority communities that are not commensurate with their benefits, and those laws would look different if minority perspectives were adequately represented and taken into consideration. A prosecutor's voluntary exercise of discretion to enforce laws that reflect hostility or calloused indifference to the aspirations of minority communities makes that prosecutor an unintentional, but very real agent of institutional racism.

However, prosecutors can utilize their discretionary functions, particularly their power over charging and plea bargaining, to mitigate the harshness of criminal laws that reflect the under-representation of minorities within American political institutions. Identifying precisely which laws and criminal penalties are racially unjust requires a complex contextual judgment, and it is beyond the scope of this Article to provide detailed critiques of specific areas of law. However, scholars concerned about racial disparities in the criminal-justice system have identified and criticized a wide range of laws that have severe and foreseeable racial impacts, including minor public-order offenses (like graffiti);<sup>252</sup> the stiff penalties attached to drug laws generally,<sup>253</sup> and especially the exorbitant penalties that the federal system attaches to crack cocaine offenses (for which almost all of the defendants are black) compared to the much lighter penalties for powder cocaine offenses (for which a larger proportion of defendants are white).<sup>254</sup> Many commentators have also argued that a general shift away from retributive goals toward rehabilitation, and a new focus on violent offenses instead of nonviolent crimes, would go a long way toward alleviating the strains that mass incarceration has inflicted on struggling black communities.<sup>255</sup>

Although I agree with many of these proposals, I offer them here only as illustrations. Color-conscious prosecutors must use their expertise in crime and punishment to form their own judgments about which criminal laws resonate with justice, and which ones are crippling black communities or otherwise generating social problems. Forming judgments in this area is unavoidably challenging, but it is essential if prosecutors are to serve as counterweights to, rather than agents of, institutional racism.

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251. See *supra* Part I.D.1.

252. See, e.g., Capers, *supra* note 69, at 69–70.

253. See, e.g., Tonry & Melewski, *supra* note 232, at 23–29.

254. See, e.g., David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1285–1302 (1995).

255. See, e.g., Butler, *Affirmative Action*, *supra* note 89, at 877–78.

### D. Color-Conscious Trial Strategy

Even when a prosecutor has made the decision to go forward with a criminal case against a defendant, he or she must still be vigilant to ensure that the defendant is treated fairly at trial and that the jury convicts (if at all) on the basis of the facts of the crime, not the defendant's race. This principle has practical implications from the very beginning of trial through sentencing. During jury selection, prosecutors should cease the common practice of striking jurors who share the defendant's race.<sup>256</sup> In fact, they should do precisely the opposite: whenever possible, prosecutors should coordinate with defense counsel to empanel a jury that is genuinely representative of our diverse society and, in particular, of the racial groups involved in the immediate case.<sup>257</sup>

Once a jury is selected, it is essential that the arguments of the lawyers, testimony of witnesses, and instructions by the judge be presented in a way that is least likely to activate any implicit racial biases that jurors may hold. I have previously explained that prosecutors are best able to minimize the influence of bias on their own decision-making when they acknowledge their stereotypes and consciously work to counteract them.<sup>258</sup> This Section will show that the same is true of jurors. Stereotypes are most potent when subtle racial dynamics lace through the fabric of the trial and are permitted to go unnamed and unchecked. Conversely, bias is least salient when the racial dimensions of the case are confronted directly and jurors are reminded by the lawyers and the judge of their duty to render a verdict that is not based on the defendant's race. Thus, color-conscious prosecution is essential for upholding the dignity of criminal defendants, the integrity of the trial process, and the truth-seeking function of the jury's verdict.<sup>259</sup>

#### 1. Selecting a Racially Balanced Jury

Racial politics and tensions lurk just beneath the surface of jury selection in many criminal trials involving black defendants. Historically, the use of peremptory challenges to strike black jurors from the *venire* "was an incredibly efficient final racial filter."<sup>260</sup> In 1963, the Alabama Supreme Court stated that "Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury."<sup>261</sup> Today, the situation is much improved, but recent studies continue to reveal that many prosecutors and defense attorneys heavily emphasize race in

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256. Cf. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids prosecutors from challenging potential jurors solely on account of their race).

257. See *infra* Part II.C.1.

258. See *supra* Part II.B.

259. See *infra* Part II.D.2.

260. Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 829 (1997).

261. *Swain v. State*, 156 S.2d 368, 375 (Ala. 1963), *aff'd*, 380 U.S. 202 (1965).

deciding which jurors are likely to favor their case, and which they should strike from the jury pool.<sup>262</sup> The motivation behind this practice is not so much hostility toward members of the excluded racial group as stereotypes about “how . . . black and non-black jurors view issues of criminal responsibility, culpability, and punishment.”<sup>263</sup>

Much like with racial profiling,<sup>264</sup> there is some statistical foundation for these stereotypes. Studies have shown that in certain situations, the racial identity of jurors is one factor that helps predict the decisions they will ultimately reach.<sup>265</sup> There are a number of different explanations for this phenomenon. A common hypothesis offered by many observers is that some black jurors, angry about the injustice reflected in certain areas of the substantive criminal law and the discriminatory enforcement of those laws, favor verdicts that effectively nullify those laws.<sup>266</sup>

Jury nullification occurs when the jury delivers a “not guilty” verdict despite concluding that, factually speaking, the defendant is guilty as charged.<sup>267</sup> When a jury chooses nullification, it is sending the message that applicable statutes (or the mode of enforcing those laws, i.e. racial profiling or aggressive order-maintenance policing) are in need of reform and that, in their present form, they are not worthy of being enforced.<sup>268</sup> There is a small but vocal movement among blacks to promote jury nullification, in cases involving nonviolent crime, as a racial self-help strategy for protecting black defendants and communities against the onslaught of mass incarceration.<sup>269</sup>

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262. See, e.g., David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 121–22 (2001) (“Our findings indicate that venire member race was a major determinant in the use of peremptories by both prosecutors and defense counsel, with the prosecution disproportionately striking black venire members and defense counsel disproportionately striking non-blacks.” (footnotes omitted)).

263. *Id.* at 122.

264. See *supra* notes 70–72 and accompanying text.

265. See, e.g., Thomas W. Brewer, *Race and Jurors’ Receptivity to Mitigation in Capital Cases: The Effect of Jurors’, Defendants’, and Victims’ Race in Combination*, 28 LAW & HUM. BEHAV. 529, 542 (2004) (“[W]hen Black jurors are faced with a situation where an in-group member, Black defendant, is faced with killing an out-group member, White victim, . . . they become significantly more receptive to mitigation than their White colleagues on the jury.”).

266. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) [hereinafter Butler, *Jury Nullification*] (“[L]awyers and judges increasingly perceive that some African-American jurors vote to acquit black defendants for racial reasons, a decision sometimes expressed as the juror’s desire not to send yet another black man to jail.” (footnote omitted)).

267. See generally Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 959 (2006) (“While nominally the jury is only a finder of fact, criminal juries occasionally defy their instructions and oaths by acquitting a defendant they believe to be guilty—jury nullification.”).

268. Cf. *id.* (“When juries refuse to convict on the basis of what they think are unjust laws, they are performing their duty as jurors.” (citing Jack B. Weinstein, *Considering Jury “Nullification”: When, May, and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 240 (1993))).

269. The seminal thinker behind this movement is Paul Butler. See Butler, *Jury Nullification*, *supra* note 266.

Race-based jury nullification does take place in a small subset of cases, predominantly in drug cases,<sup>270</sup> but it is not the only or even the most important way that blacks contribute a unique perspective to the jury pool. In the social context of present-day America, blacks experience many aspects of life differently than whites do, and these experiences shape their understanding and interpretation of ambiguous facts. Whites are not subjected to suspicion by their neighbors, strangers, shop owners, taxi-cab drivers, or police on account of their race; however, a large number of blacks have had these and other degrading experiences.<sup>271</sup> Furthermore, because America remains a predominantly *de facto* segregated society, whites rarely have the chance to interact with blacks to learn of these experiences, whereas blacks typically grow up in the company of other blacks who share stories of race-related suspicion and abuse at the hands of non-blacks.<sup>272</sup>

These disparate collective experiences shape the way blacks and whites process factual data that is central to a criminal case. Although test data suggests that both blacks and whites harbor some implicit bias against blacks in dimensions that are pertinent to criminal cases, the negative associations tend to be far less severe among blacks than whites.<sup>273</sup> Consequently, in cases involving black defendants, black jurors are better equipped to pick up on potentially exculpatory or mitigating facts that might be missed by jurors whose factual perception is filtered through *a priori* cognitive assumptions about the criminal tendencies of blacks.<sup>274</sup>

Furthermore, polling data consistently reveals that whites generally have a deep trust for the police and the fundamental fairness of America's criminal-justice system.<sup>275</sup> Blacks, by contrast, are much more likely to doubt the veracity of police testimony and suspect the worst from criminal justice.<sup>276</sup>

The point of all this is not to suggest that the perspective blacks bring to the table is more valuable than that of whites. On the contrary, it is that the two perspectives are diverse and complementary. Each is capable of detecting aspects of reality that are relevant to some criminal cases, but each also suffers from blind spots and, taken in isolation, is vulnerable to exaggeration and a slanted view of the facts. An all-white jury may have difficulty spotting deception by police officers and their informants, whereas an all-black jury may unjustly discount the testimony of an

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270. See, e.g., CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 149 (1998).

271. See *supra* note 171 and accompanying text (discussing the suspicions and stereotypes of potential employers, mortgage lenders, cab drivers, and others).

272. See *supra* note 68 and accompanying text (discussing the dimensions of *de facto* segregation that continue to afflict America's residential areas, schools, hospitals, churches, and other social institutions).

273. See *supra* notes 100–03 and accompanying text (discussing the implicit white preference suggested by results of various IATs).

274. For a discussion of how confirmation bias leads individuals with racial stereotypes to over-emphasize incriminating information and fail to perceive or remember exculpatory evidence, see Bodenhausen, *supra* note 135 (testing process models of stereotype use in a mock jury trial setting).

275. See, e.g., Georgia Ackerman et al., *Crime Rates and Confidence in the Police: America's Changing Attitudes Toward Crime and Police: 1972–1999*, 28 J. SOC. & PUB. WELFARE 43 (2001).

276. See, e.g., William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1796–97 (1998).

honest law-enforcement agent who is diligently doing his/her job.

Both of these propositions are over-generalizations that do not extend to every all-white or all-black jury, but they do capture genuine statistical trends that reflect the varied experiences of many blacks and whites in contemporary America.<sup>277</sup> Consequently, the ideal jury would be racially diverse so as to represent a broader range of knowledge and experience that is relevant in reaching a factually accurate and morally just verdict. The racial composition of a jury is by no means its most important characteristic, but it is a factor that cannot be ignored.

It is a lamentable fact, however, that in cases involving black defendants, prosecutors all too frequently use their peremptory challenges to disproportionately strike blacks from the jury pool, with the goal of excluding unique black perspectives from the jury's deliberations; conversely, defense attorneys more often blacklist white jurors.<sup>278</sup> Although it is unconstitutional for prosecuting attorneys to expressly base their strikes on the race of a juror, the legal test erected by the Supreme Court for detecting discriminatory jury selection is lax and forgiving.<sup>279</sup> The prosecutor need only provide some sort of race-neutral explanation for the challenge—not necessarily a plausible or sensible one—in order to evade constitutional scrutiny.<sup>280</sup> As a result, in many cases, racial discrimination is at its most conscious and potent before the trial even begins. Perceptive jurors pick up on what is going on, and the attorneys, intentionally or not, are effectively teaching the jury—and the interested public—to pick sides and polarize into camps on the basis of their race.

This state of affairs is unacceptable, and it must end. Prosecutors should immediately cease the practice of excluding black jurors as a way of securing a jury sympathetic to the government's case. Fortunately, many prosecutors already appear to have made a conscious commitment to avoid racial discrimination in jury selection. However, even these well-intentioned prosecutors can do more. They should actively seek to create racially diverse juries that are genuinely representative of the racial groups involved in their cases and, more generally, in American society. This would not only bolster the accuracy of fact-finding in criminal trials, but it would also build trust between blacks and whites, improve the legitimacy of the criminal-justice process in the eyes of black Americans, and model racial integration and collaboration instead of polarization and tension.

## 2. *Color-Conscious Advocacy*

Earlier in this Part, I explained that the most promising strategy for prosecutors to diminish the influence of racial bias on their decisions is through racial

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277. Cf. OGLETREE, JR., *supra* note 171.

278. See *supra* notes 265–66 and accompanying text (discussing the effect of the racial identity of jurors).

279. See *Batson v. Kentucky*, 476 U.S. 79, 96–97 (1986) (describing the legal test that governs the application of the Equal Protection Clause to race-based peremptory challenges).

280. See *Purkett v. Elem*, 514 U.S. 765, 767–78 (1995) (*per curiam*).

awareness, not denial.<sup>281</sup> The same is true for jurors. They, too, are more likely to be swayed by implicit stereotypes when the racial dimensions of a case remain unnamed. By contrast, jurors are better able to overcome their partiality when they can identify it and consciously resist the grip that it holds over their cognitive processing of information.<sup>282</sup>

Thus, not all references to race during a criminal trial undermine the integrity of the fact-finding process. Instead, when there is a serious risk that the implicit biases of jurors may be activated by subtle racial triggers during a trial, it may actually “enhance the rationality of the decisionmaking process for attorneys explicitly to challenge factfinders to confront their biases.”<sup>283</sup> This vital insight from cognitive-bias research provides the central justification for color-conscious legal advocacy, or, as Gary Blasi has called it, “advocacy against the stereotype.”<sup>284</sup>

Jody David Armour has helpfully illustrated the nature of color-conscious advocacy by recounting the facts and closing argument from a 1925 murder trial.<sup>285</sup> The black defendant in the case, Dr. Ossian Sweet, moved into a predominantly white neighborhood.<sup>286</sup> The family correctly anticipated that they would be confronted with anti-integrationist threats and violence for intruding upon a white neighborhood, so they came prepared with weapons for protection.<sup>287</sup>

The angry white community quickly mobilized itself.<sup>288</sup> A crowd of several hundred hostile whites surrounded the house and threw stones while uttering racial slurs.<sup>289</sup> When a large stone broke an upstairs window and the crowd made a sudden movement, Dr. Sweet fired a warning shot above the heads of the mob, killing one of its members.<sup>290</sup> He was arrested and charged with murder.<sup>291</sup>

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281. See *supra* Part II.B (explaining that awareness of bias helps people overcome it).

282. See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1376 (2000) (finding that white jurors convict black defendants less frequently in cases that are “race-salient” than those in which the racial dynamics are more subtle).

283. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 737 (1995).

284. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1241 (2002).

285. See ARMOUR, *supra* note 76, at 141.

286. *Id.*

287. See *id.* (“When Dr. Ossian H. Sweet and his wife moved into the neighborhood with their baby daughter, they knew that other Blacks who had bought homes in White neighborhoods had been forced to move by ‘Improvement Associations.’ Accordingly, Dr. Sweet brought along his brothers, several friends, and an ample supply of guns and ammunition.”).

288. See *id.* (“Two nights after [Dr. Sweet’s] arrival, a large White crowd, estimated at several hundred, gathered around the house and began throwing stones at the house amid cries of ‘Niggers.’”).

289. *Id.*

290. *Id.*

291. *Id.*

Clarence Darrow, one of the most famous lawyers in the history of the NAACP, defended the case in front of an all-white jury with a self-defense theory.<sup>292</sup> He faced a serious uphill battle, not because the facts disfavored the defense—they did not—but because many whites in early twentieth-century America held strong implicit and explicit beliefs about race that were at odds with the idea that blacks should be permitted to venture into white neighborhoods and expect to avoid retribution.<sup>293</sup>

Rather than ignoring the obvious racial dimensions of the case in his closing argument, Darrow made powerful rhetorical use of a racially themed counterfactual to explain to the jurors how the race of the defendant and the victims shaped their moral perception of the case:

I insist that there is nothing but prejudice in this case; that if it was reversed and 11 Whites had shot and killed a Black while protecting their home and lives against a mob of Blacks, nobody would have dreamed of having them indicted. They would have been given medals instead.<sup>294</sup>

He explicitly acknowledged the probable racial prejudice of the jurors—“I haven’t any doubt but that every one of you is prejudiced against color people”—and urged them to “guard against” that prejudice.<sup>295</sup> He urged cross-racial empathy and identification: “Here were eleven colored men, penned up in the house. Put yourselves in their place. . . . Suppose you were Black. . . . Suppose you had to watch every point of contact with your neighbor and remember your color . . . .”<sup>296</sup>

Dr. Sweet was found not guilty by the jury, which makes his trial “a compelling narrative of hope and redemption that stands in marked contrast to the pessimism of many current discussions of prejudice in the courtroom.”<sup>297</sup> Admittedly, the story is just one data point, not decisive proof that can be generalized to all cases; furthermore, the characteristics of modern racism and the racial dynamics of twenty-first-century criminal cases are far different from those of one hundred years ago. Nonetheless, the general principles and rhetorical devices of color-conscious advocacy that are reflected in Darrow’s closing argument—open and candid recognition of the potency of racial stereotypes, morally eloquent exhortations to guard against those stereotypes, and the cultivation of interracial empathy<sup>298</sup>—have enduring relevance and powerful contemporary applications in modern criminal practice.

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292. *See id.* at 141–42 (discussing Darrow’s participation in Dr. Sweet’s trial and his trial strategy).

293. *See id.* at 142–43.

294. *Id.* at 142.

295. *Id.*

296. *Id.* at 142–43.

297. *Id.* at 143.

298. *See id.* at 141–43.



Adversarial norms would suggest that, insofar as color-conscious advocacy on behalf of criminal defendants is necessary at all, the job should be left to the defense attorney, not the prosecutor. However, there is simply no substitute for the rhetorical power of anti-racist advocacy coming from the mouth of the prosecutor, who, unlike Darrow, is viewed as the defendant's adversary. Efforts by defense attorneys to address racial themes are also very important, but, like Johnny Cochran's attack on the credibility of the then-police officer, Mark Fuhrman, in the O.J. Simpson case, such efforts are frequently viewed as "irrelevant, self-serving, and maliciously advanced."<sup>299</sup> Color-conscious interventions by prosecutors (or joint efforts by prosecutors and defense attorneys) on behalf of criminal defendants cannot be dismissed as "playing the race card"<sup>300</sup> so easily. They have the potential to surprise jurors and supply them with a moving and memorable reminder of their obligation to reach a verdict that is fully based on facts and their sense of fairness, not prejudice.

Still, it may be difficult to achieve this goal in practice due to restrictive judicial interpretations of the rules of evidence and the genuine importance of excluding improper references to race. Attorneys may only make arguments based on the evidence introduced during the trial,<sup>301</sup> and the only evidence that may be admitted at trial is "relevant" evidence.<sup>302</sup> Judges who are unable to understand the way in which unconscious racial stereotypes shape our perception of the relevant evidence may fail to grasp when race becomes relevant to the jurors' evaluation of the facts.

Furthermore, most defense attorneys would likely be presumptively suspicious of any reference to race by the prosecution. The prosecutor would thus need to assuage their fears and even promote collaboration by disclosing and agreeing upon the precise nature of the proposed color-conscious intervention.

There are a number of ways that prosecutors can work in tandem with defense attorneys to productively address racial issues with jurors without coming into conflict with the rules of evidence. In many cases, the time to initiate a discussion of the problem of racism with jurors is during voir dire. The informal question-and-answer format provides jurors with an opportunity to affirmatively declare to themselves and others that they will guard against racial bias in their decision-making. Research has shown that "individuals who make public commitments to behave in a certain manner are more likely to ultimately behave in that way."<sup>303</sup>

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299. Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 792 (1997).

300. See *id.* at 793 (discussing the vulnerability of defense attorneys to charges of "playing the race card" when they engage in color-conscious advocacy).

301. MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (2011).

302. FED. R. EVID. 401(a)-(b) ("Evidence is relevant if: it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.").

303. JOEL D. LIEBERMAN & BRUCE D. SALES, AM. PSYCHOLOGICAL ASS'N, SCIENTIFIC JURY SELECTION 27 (2007).

The point of asking jurors questions about whether they can deliver a racially fair verdict is not primarily to identify and exclude jurors who are willing to affirm their intention to make a race-based decision—this will virtually never happen. Rather, the goal is to educate the typical juror about the problem of unconscious racism and encourage the jury to make an affirmative commitment to guard against it.

In some situations, it may be necessary for the prosecutor and/or defense attorney to discuss with the jury the danger and inappropriateness of racially biased decision-making after voir dire, during the trial. For example, if the testimony of a witness implicates racial stereotypes—whether obvious or subtle—then it may be appropriate to ask the judge for a jury instruction underscoring the inappropriateness of stereotypes and race-based decision-making in the courtroom.<sup>304</sup> Closing arguments present another under-utilized opportunity for intervention in cases implicating race: the prosecutor, when appealing to the jury to deliver a guilty verdict, can simultaneously urge the jurors to ensure that their verdict is based on the facts, not their racially coded perception of the facts.

Finally, race not only shapes the way jurors and others perceive black criminal defendants, but also their assessment of crime victims, witnesses, and others involved in the case.<sup>305</sup> Color-conscious advocacy is not merely a way to improve the lot of black defendants within the criminal-justice system; rather, it upholds the dignity of all those involved in a criminal trial, allies and adversaries alike. By visibly and conscientiously attending to the racial fairness of criminal trials, prosecutors can make important strides toward repairing the damaged legitimacy of criminal justice in the eyes of the many blacks in America who view the criminal law as something that is there to oppress instead of protect.<sup>306</sup>

### III. INSTITUTIONAL SUPPORT AND RESISTANCE TO COLOR-CONSCIOUS PROSECUTION

As individual prosecutors decide whether to incorporate my proposals into their everyday practice, they must consider not only their own views about race and justice, but also the external constraints that influence their work. Their actions are necessarily shaped by the institutional culture, expectations, and policies of the

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304. See, e.g., Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQ. 1, 56–57 (2007). One recent article has even suggested requiring potential jurors to take an IAT in order to weed out unusually biased jurors and ameliorate the biases of the other jurors by promoting awareness. See Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139, 141 (2010). Whatever the wisdom of this idea as a matter of theory, even the author acknowledged that “current norms and judicial culture” probably render it unachievable in the foreseeable future. *Id.* at 169. Cautioning jurors about the reality of implicit bias, and asking them whether they can confidently commit to reaching a racially equitable verdict, is more realistic within the current ideological context of the American judiciary.

305. See, e.g., Brewer, *supra* note 265, at 542.

306. For a discussion of polling data reflecting negative black views about the criminal-justice system, see *supra* note 276 and accompanying text (discussing blacks’ greater likeliness to doubt the veracity of police testimony and suspect the worst from criminal justice).

prosecutor's office in which they work. A prosecutor's institutional context largely determines which color-conscious interventions are realistically available to the individual prosecutor.

In this Part, I explore how color-conscious prosecutors can navigate the complexities of institutional resistance. I will also identify concrete ways that prosecutorial offices can adjust their policies and practices so as to enable and encourage their line prosecutors to pursue racial justice.

### *A. Negotiating the Institutional Dynamics of Race and Adversarialism*

This Section describes the challenges that institutional culture and policy present for prosecutors who wish to integrate color-conscious insights into their practice, and how they can constructively approach these problems.

#### *1. Office Policies and Supervisor Expectations*

Some of the dimensions of color-conscious prosecution that I described in Part II are unlikely to come into conflict with institutional policy. For instance, it is unimaginable that a prosecutor's supervisors or office policies would condemn his or her decision to take an IAT or to practice cognitive de-biasing techniques. Furthermore, even though racially discriminatory jury selection is fairly common, it is not actively promoted at the institutional level—nor could it be, due to constitutional restrictions.<sup>307</sup> It lies within the control of the individual prosecutor to decide whether to strike black jurors on the ground of race, or whether to cease the practice.

However, other facets of color-conscious prosecution are more controversial and therefore more likely to generate institutional resistance. For instance, confronting police officers about racial profiling or dismissing charges on the basis of racial-justice considerations have real potential to draw the attention and ire of a prosecutor's supervisors. Academics crafting theoretical scholarship can choose to ignore these realities, but prosecutors cannot. Their jobs are on the line, and they cannot hope to make longstanding positive contributions unless they are willing to respectfully operate within and interact with the culture, policies and practices of the office in which they work.

Nonetheless, prosecutors can take steps to negotiate the obstacles presented by their work environment. This task is a delicate one, so it must be approached with sensitivity and creativity. When a prosecutor believes that the expectations of a supervisor conflict with the demands of racial justice, the prosecutor should raise his or her concerns with the supervisor in an open-minded and non-condemnatory fashion. Prosecutors tend to be talented advocates, and a prosecutor with a keen

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307. See *Batson v. Kentucky*, 476 U.S. 79, 96–97 (1986) (holding that the Equal Protection Clause forbids challenging potential jurors solely on account of their race); see also *supra* notes 262–63 and accompanying text (discussing race-based strikes in the jury context).

understanding of how race influences criminal-justice processes in contemporary America could make a strong case for color-conscious interventions on a case-by-case basis.

These difficult conversations should not be approached in a confrontational, accusatory way. This method of discourse would not only be ineffective, but it would also miss the point. As I have explained in previous Parts, racial bias is widespread and potent, but it is also, in most cases, subconscious and unintentional.<sup>308</sup> Understanding the psychological and cultural roots of contemporary racism “obviates the need for fault, as traditionally conceived,” because “[w]e cannot be individually blamed for unconsciously harboring attitudes that are inescapable in a culture permeated with racism.”<sup>309</sup> Thus, color-conscious prosecutors should focus on “persuading” their supervisors and peers, “not as adversaries, but as equal partners” in promoting racial equity.<sup>310</sup>

Similarly, if a prosecutor believes that office-wide policies or priorities unnecessarily produce racially inequitable outcomes, he or she can press for reform of those policies. The prosecutor can seek out positions with greater influence over policymaking and share his or her ideas with those who do. Even as a line prosecutor with no direct input into policy, an individual can make positive contributions by, for example, suggesting and offering to lead a task force to study the costs and benefits—including race-related consequences—of potentially unjust policies or priorities.<sup>311</sup> Needless to say, such a prosecutor will not always win these battles, particularly in the short term. Yet, his or her efforts to raise awareness and highlight dimensions of injustice that might otherwise get overlooked has real potential to plant the seeds for future change at the institutional level.

## 2. Institutional Culture

Even when no specific office-wide policy demands that prosecutors embrace an adversarial and/or color-blind stance in a particular area, patterns of discourse and other dimensions of culture within the office can interpose additional obstacles. Within some offices, it is common for prosecutors to speak of criminal defendants in dehumanizing and degrading ways<sup>312</sup> and to celebrate the single-minded pursuit

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308. See *supra* Part I.C.

309. Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 325–26 (1987).

310. Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 514 (2007).

311. Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 222–24 (2007) (discussing examples of how prosecutorial task forces that investigated intra-office racial bias helped spur reform initiatives).

312. See, e.g., Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2154–56 (2010) (discussing the common practice of depersonalizing defendants within prosecutors’ offices).

of convictions and high sentences instead of fair outcomes.<sup>313</sup> Consequently, “even the best of the prosecutors . . . are easily caught up in the hunt mentality of an aggressive office” and “corrupted by the institutional ethic of combat.”<sup>314</sup>

However, prosecutors need not passively accept all of the cultural dynamics of their institutional environment. They help to shape that culture, for better or worse, in a variety of ways. Individual prosecutors influence the cultural trajectory of their office through their discretionary and discursive choices, such as the way they address race, characterize criminal defendants, conceptualize their professional goals, build community identity, and mentor less experienced prosecutors.

Prosecutors contribute to a positive institutional culture when they educate others about issues of race in informative yet non-condemnatory ways, measure success in terms of fairness, and speak about defendants and witnesses—particularly blacks and other members of disadvantaged social groups—in respectful ways that recognize their humanity and dignity (without, of course, approving of their crimes). Conversely, they foster a destructive cultural dynamic when they use dehumanizing and racially coded language to describe criminal defendants, or when they evaluate themselves and their peers by the sheer quantity of convictions they secure from juries or the severity of the sentences imposed by judges. The overall culture of a prosecution office is merely the sum of its parts. A single prosecutor cannot single-handedly overhaul the prevailing cultural dynamics of the office, but he or she can model an alternative way of envisioning the prosecutorial role that others may find compelling and attractive.

### *B. Color-Conscious Prosecution at the Institutional Level*

The last Section has shown that individual prosecutors are far from powerless to implement color-conscious insights into their work and to encourage co-workers to do the same. However, the potential for color-conscious prosecution at the individual level does not obviate the need for institutional reform. This Section introduces three areas in which prosecution offices can sharpen their commitment to racial justice: training and performance criteria, data collection and dissemination, and community prosecution.

#### *1. Personnel Management and Supervision*

The most central way in which prosecution offices construct their institutional identity lies in how they choose to train, guide, and evaluate their trial attorneys. To begin with, the manner in which new recruits are trained is vital because it “sets a

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313. See, e.g., Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388 (2001) (“In view of the institutional culture of prosecutor’s offices and the culture of the adversary system generally, it is perhaps inevitable that the overriding interest of prosecutors would be winning.” (footnotes omitted)).

314. H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1702 (2000).

tone for the office and helps to inculcate new lawyers into the culture of the office.”<sup>315</sup> The content and quantity of training varies among jurisdictions, but the typical prosecutorial training program “concentrate[s] exclusively on what one might consider traditional advocacy skills.”<sup>316</sup>

However, depending on the resources available for training within a particular jurisdiction, prosecution offices should consider incorporating lessons about implicit racial bias (and perhaps even request that new prosecutors take a short IAT), detecting and responding to racial profiling, and teaching the importance of not only securing convictions and severe sentences, but also fair outcomes—in particular, outcomes that are not the result of racial prejudice. Ideally, training would guide new prosecutors in the just exercise of their discretion by discussing not only the benefits of rigorous enforcement of criminal law, including incarceration in appropriate cases, but also the costs of mass incarceration and the potential benefits of rehabilitation-oriented alternatives to prison time.

Furthermore, prosecution offices shape the incentives and vision of their attorneys in the performance criteria they use for decisions regarding hiring, promotion, retention, and supervision. Many offices place overwhelming emphasis on simple and adversarial measures of success, such as the number of convictions secured and the length of sentences imposed.<sup>317</sup> However, this sort of one-dimensional performance evaluation teaches prosecutors to pursue victory at all costs, and it punishes prosecutors for calibrating their aggressiveness to the demands of justice. Prosecution offices can make great strides in the direction of better accommodating justice-seeking, color-conscious prosecution by abandoning over-simplistic and oppositional performance criteria and instead conducting a more holistic assessment of their attorneys’ understanding of and abilities to pursue justice.

Finally, institutional priorities and guidelines structure and limit the discretion of individual prosecutors in their charging decisions, plea offers, and sentencing recommendations in ways that have real potential either to promote racial justice or exacerbate current disparities. Each prosecuting agency must make crucial decisions regarding which subsets of the vast body of criminal law to make their priorities, what punishments to seek when prosecuting those laws (i.e., the death penalty, incarceration, probation, community services, fines, and others), and how to allocate decision-making authority in these areas between the elected prosecutor, intermediate supervisory attorneys, and individual prosecutors. The decision to vigorously prosecute and prioritize drug offenses, immigration violations, and public-order offenses will have a dramatically different set of costs (and benefits) to minority communities than a focus on violent crime, white collar crime, and

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315. Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 337 (2002).

316. *Id.* at 369.

317. See, e.g., Lisa M. Budzilowicz, *Holding Prosecutors Accountable: What Is Successful Prosecutorial Performance and Why Should It Be Measured?*, 41 PROSECUTOR 22, 26 (2007).

public corruption. Each jurisdiction should make these difficult choices on the basis of the needs of the local community, taking into full account any stresses that law enforcement and mass incarceration may already present for parts of the community.

## 2. *Data Collection and Racial Impact Statements*

Another promising avenue for elevating racial awareness at the institutional level is data collection and racial impact statements. Given the widespread decline in overt racial prejudice (by contrast with unconscious racial bias),<sup>318</sup> I suspect that very few modern prosecutors actively desire to exacerbate racial inequalities. Instead, it seems likely that many individual prosecutors would seriously consider the racial consequences of their actions if only they knew what those consequences were. However, jurisdiction-specific information about the racial impacts of prosecutorial decision-making is generally not available.<sup>319</sup> It is unrealistic to expect that busy prosecutors will take the time to investigate these matters on their own.

Thus, institutional collection and dissemination of data about the racial impacts of various prosecutorial functions is essential. Several prosecution offices around the country have already blazed a trail in this area by partnering with the Vera Institute of Justice's Prosecution and Racial Justice Program, which helps prosecution offices establish methods for gathering data regarding the racial impact of discretionary charging decisions.<sup>320</sup> By making an office-wide commitment to maintaining and disseminating data about the race of criminal defendants and tracking how race correlates with outcomes across a wide range of discretionary decisions, individual prosecutors and their supervisors will become more aware of the danger of unconscious racism. As I discussed in previous Parts, this awareness is the first and most crucial step toward ameliorating the influence of implicit bias over discretionary decision-making.<sup>321</sup>

Furthermore, the individuals responsible for setting office-wide policies and priorities in prosecution offices should make a routine practice of calculating the racial impact of existing policies and alternatives to them. Many scholars have recently begun calling upon state legislators to require state governmental agencies to create racial impact statements, predicting the likely effects of policy proposals

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318. See *supra* Part I.C.1.

319. See WAYNE MCKENZIE ET AL., VERA INST. OF JUSTICE, PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 4 (2009), <http://www.vera.org/download?file=3482/Using-data-to-advance-fairness-in-criminal-prosecution.pdf> ("Prosecution offices often use electronic case management systems to follow the progress of their cases. Such systems are rarely designed to marshal the aggregate information required to track disparity, however.").

320. See *Prosecution and Racial Justice Program/Prosecutorial Discretion*, VERA INST. OF JUSTICE, <http://www.vera.org/project/prosecution-and-racial-justice> (last visited Feb. 27, 2012) (describing the program and its work within three jurisdictions—Milwaukee, Wisconsin; Mecklenburg, North Carolina; and San Diego, California).

321. See *supra* Parts I.C, II.B, II.D.2.

on racial minorities before adopting those proposals.<sup>322</sup> The idea has gained considerable momentum with its endorsement by the Model Penal Code Sentencing Project<sup>323</sup> and legislatures in Iowa, Minnesota, Wisconsin, and Connecticut.<sup>324</sup> Although these programs are still “too new to know how [they] will fare,”<sup>325</sup> they suggest a promising way for prosecution offices to determine how their current and future policies benefit and burden black communities that are already struggling.

### 3. Community Prosecution

Prosecuting agencies should also deepen their commitment to community prosecution as a way of entering into productive dialogue with the demographics that they protect and indict.<sup>326</sup> Experiments with community prosecution began during the past two decades,<sup>327</sup> and as of 2003, a survey conducted by the American Prosecutors Research Institute found that “nearly half of all prosecutors’ offices engage in some activity defined as community prosecution.”<sup>328</sup> The defining feature of community-prosecution initiatives is “a proactive approach to addressing crime and quality-of-life issues that brings prosecutors together with residents to identify problems and solutions.”<sup>329</sup>

The content and scale of community-prosecution programs varies considerably between jurisdictions. Some initiatives have done “little more than shake hands and hold meetings, in a semblance of engagement that yields no gains in public safety.”<sup>330</sup> Others, however, have developed meaningful channels of communication between prosecutors and communities impacted by crime and criminal-law enforcement.<sup>331</sup> Consequently, prosecutors have become “more willing to divert both juvenile and adult offenders, even felony offenders, into alternatives to

322. See, e.g., Marc Mauer, *Racial Impact Statements*, 23 CRIM. JUST. 16 (2009).

323. See Kevin R. Reitz, *Demographic Impact Statements, O’Connor’s Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 690–96 (2009) (discussing racial impact statements among selected legal-policy debates within the Model Penal Code Sentencing Project).

324. See MARC MAUER & RYAN S. KING, SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 18 (2007) (discussing the use of racial impact statements as part of “race neutral” policies), [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf).

325. Reitz, *supra* note 323, at 694.

326. See, e.g., Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465, 1469 (2002) (“Community-prosecution programs advance the civic and dignitary interests of victims, offenders, and communities of color by affording opportunities for citizen-state collaboration and by encouraging grassroots justice initiatives.”).

327. For a brief history of the community-prosecution movement, see Thompson, *supra* note 315, at 338–44.

328. NAT’L DIST. ATTORNEY’S ASS’N & NAT’L CTR. FOR CMTY. PROSECUTION, KEY PRINCIPLES OF COMMUNITY PROSECUTION 2 (2009), [http://www.ndaa.org/pdf/final\\_key\\_principles\\_updated\\_jan\\_2009.pdf](http://www.ndaa.org/pdf/final_key_principles_updated_jan_2009.pdf).

329. M. ELAINE NUGENT ET AL., AM. PROSECUTORS RESEARCH INST., THE CHANGING NATURE OF PROSECUTION: COMMUNITY PROSECUTION VS. TRADITIONAL PROSECUTION APPROACHES 1 (2004).

330. Cecelia Klingele et al., *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 982.

331. See, e.g., Walter J. Dickey & Peggy A. McGarry, *The Search for Justice and Safety Through Community Engagement: Community Justice and Community Prosecution*, 42 IDAHO L. REV. 313 (2006) (describing community policing and prosecution programs in parts of Milwaukee, Chicago, Minneapolis, and elsewhere, and concluding that they “add great value in the worlds they inhabit”).



incarceration, as can be seen in the proliferation of problem-solving courts, most notably drug courts.”<sup>332</sup> Furthermore, this collaboration has helped to shift the metric of success for prosecutors away from convictions and toward crime reduction, public safety, and community healing.<sup>333</sup>

Community prosecution is not without its drawbacks and critics. In particular, many outreach initiatives are designed in such a way that prosecutors only meet subgroups within the community, such as crime prevention groups (i.e., Mothers Against Drunk Driving) or victims.<sup>334</sup> It is crucial that outreach extend not only to natural allies, but also to other members of the community—such as mothers of juvenile offenders, ex-offenders who have reentered the community, and even gang members—in order to develop a comprehensive understanding of the entire community and the appropriate set of prosecutorial strategies for meeting that community’s needs.<sup>335</sup>

The central principles of community prosecution—direct engagement with the community and an approach to crime that focuses on problem solving rather than punishment—should not simply be “an ‘add-on’ to the case processing mission,” but rather should pervade the “entire operational structure” of prosecution offices.<sup>336</sup> However, many prosecutors continue to resist the evolution toward a community-prosecution model, complaining that it is a waste of resources, requires them to perform work for which they are not trained, and involves “social work,” which is not viewed as a “real” prosecutorial function.<sup>337</sup> Prosecution offices can gradually reconfigure these entrenched cultural norms by changing their personnel selection and promotion criteria,<sup>338</sup> revising their training priorities,<sup>339</sup> and involving a larger subset of their trial prosecutors in community initiatives.

## CONCLUSION

With remarkably few exceptions, commentators who are concerned about mass incarceration and the racial inequities generated by the criminal-justice system have given little thought to how well-meaning prosecutors can help the situation. Many have even rejected the possibility that prosecutors are capable of making positive contributions to racial justice, given the current state of the substantive

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332. Charles J. Hynes, *The Evolving Prosecutor: Broadening the Vision, Expanding the Role*, 24 CRIM. JUST. 1, 40–41 (2009).

333. See, e.g., Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 35 (2007).

334. Cf. Thompson, *supra* note 315, at 358–59 (“[A] prosecutor should not be content merely to secure the participation of local representatives of Mothers Against Drunk Driving.”).

335. See *id.*

336. Taslitz, *Judging Jena’s D.A.*, *supra* note 19, at 454.

337. Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1129 (2005).

338. See *id.* at 1130.

339. See Thompson, *supra* note 315, at 370–71.

laws they must enforce and the professional pressures they are under to seek convictions and severe sentences above all else.<sup>340</sup>

A small group of scholars have recently begun to contribute important insights and suggestions regarding how prosecutors can contribute to racial justice.<sup>341</sup> In this Article, I have articulated a theoretical vision of the prosecutorial role—a justice-seeking, color-conscious understanding of the prosecutor’s professional obligations—that unifies the insights of these scholars and supplies a normative foundation for prosecutors to actively promote racial equity.<sup>342</sup> I have explored a variety of concrete, high-impact ways that prosecutors can work toward that goal.<sup>343</sup> I have identified ways in which prosecutors can realistically implement at least some aspects of color-conscious prosecution despite the institutional constraints under which they work.<sup>344</sup> Finally, I have shown how prosecutorial offices can create an institutional environment that not only accommodates, but actively promotes, racially equitable prosecution.<sup>345</sup>

The chasm that separates those who value prosecutors and their function in American society, on the one hand, and those who lament the severe racial disparities in the criminal-justice system, on the other, has persisted for too long. The latter group has focused so intently on criticizing the arbitrariness and potential for bias in prosecutorial and police discretion—which, as I have discussed, is a valid concern<sup>346</sup>—that it has largely overlooked the opportunity to help well-meaning prosecutors re-envision their role. My hope is that this Article will help lessen the division between these two groups and substitute in its place a constructive dialogue about how prosecutors can use their power as decision-makers and advocates in the service of both public order and racial justice.

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340. See, e.g., BUTLER, *supra* note 164, at ch. 6.

341. See *supra* note 19 (identifying this recent scholarship).

342. See *supra* Parts I–II.

343. See *supra* Part II.

344. See *supra* Part III.A.

345. See *supra* Part III.B.

346. See *supra* Part II.B.1.

