

Judging Jena's D.A.: The Prosecutor and Racial Esteem

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I. INTRODUCTION

A. Prosecutor Reed Walters's Actions

This Article uses the views of the Jena Six prosecutor, Reed Walters, concerning the justifications for his role in the Jena Six affair, as a foil for exploring the proper role of prosecutors more generally in our system of justice.¹ Walters's actions indicate that he favors the traditional prosecutor-as-advocate role, which is focused on the individual case. In addition to other attendant harms, this role ignores how each such case harms the social esteem of the suspect's racial group. A better conception of the prosecutor's role would recognize his part in this economy of racial disesteem.

The Jena Six were African American students at Jena High in Louisiana, who were arrested for their alleged assault on a white student, Justin Barker.² The assault on Barker occurred in the wake of a series of events that began when three white students hung nooses on a "white tree" after black students sat under it.³ The details of the case are well-summarized

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¹ See Reed Walters, Op-Ed., *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A27.

² Detailed citations supporting the brief fact summary here can be found earlier in Andrew E. Taslitz & Carol Steiker, *Introduction to the Symposium: The Jena Six, the Prosecutorial Conscience, and the Dead Hand of History*, 44 HARV. C.R.-C.L. L. REV. 275 (2009).

³ See Richard G. Jones, *In Louisiana, a Tree, a Fight, and a Question of Justice*, N.Y. TIMES, Sept. 19, 2007, at A14; *All Things Considered: Beating Charges Split La. Town Along Racial Lines* (NPR radio broadcast July 30, 2007), available at <http://www.npr.org/templates/story/story.php?storyid=12353776> [hereinafter *All Things Considered*]; Barbara Mikkelson & David Mikkelson, SNOPE.COM, Jena 6 (Dec. 30, 2007), <http://www.snopes.com/politics/crime/jena6.asp> (reprinting and analyzing a widely forwarded e-mail about the Jena Six events); *Nightly News: In Depth; Racial Divide in Jena, Louisiana* (NBC television broadcast July 31, 2007). The Jena Six teens were originally arrested and charged with aggravated second-degree battery, but on December 11, 2006, the prosecutor amended the charges to attempted second-degree murder and conspiracy to commit second-degree murder. See Supplemental Motion for New Trial at 1, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. Sept. 4, 2007). On the eve of Bell's trial, prosecutor Reed Walters amended his complaint once more, this time charging Bell again with aggravated second-degree battery and conspiracy to commit aggravated second-degree battery. See *id.* Second-degree murder is a charge for which a juvenile over the age of fifteen must be tried in adult court upon return of an indictment or a finding of probable cause that the

elsewhere in this Symposium, and I will refer to a few of them later in this Article. What matters for the purposes of this Article is the central role that the local prosecutor, Reed Walters, played in these events. Notably, Walters:

- declared, at a student assembly in which black students say he addressed his comments specifically at them, “I can be your friend or your worst enemy. I can ruin your lives [and/or make them disappear] with the stroke of a pen”⁴;
- sanctioned charging a white assailant of one of the soon-to-be Jena Six with simple battery, resulting in a sentence of probation only⁵;
- permitted some members of the Jena Six to be charged with robbery and assault for snatching a rifle away from a white male who threatened to use it on them⁶;
- tried and convicted one of the Jena Six, Mychal Bell, as an adult, exposing him to a potential twenty-two-year sentence for an assault that resulted in Barker’s hospitalization for two hours⁷;
- refused to charge the noose-hangers with any crime whatsoever⁸; and

offense was committed. LA. CHILD. CODE ANN. art. 305A. However, the juvenile procedures transfer statute does not require mandatory transfer of *attempted* second-degree murder. The statute grants the prosecutor *discretion* whether to seek transfer to adult court of *attempted* second-degree murder or a second or subsequent aggravated battery but *not* of a first charge of aggravated second-degree battery. LA. CHILD. CODE ANN. art. 305B. Neither provision permits transfer solely on conspiracy charges. See LA. CHILD. CODE ANN. art. 305; see also Motion in Arrest of Judgment at 1, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. July 27, 2007). Therefore, the late reduction of the charges may have created the appearance of charge-manipulation by the prosecutor to empower him to seek trial in adult court. Cf. Memorandum in Support of Motion in Arrest of Judgment, at 5-6, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. July 27, 2007) (arguing that indictment was defective due to its lack of several critical details). These observations explain why I say that the prosecutor “chose” to proceed in adult court.

⁴ See Jason Whitlock, *Jena 6 Case Caught Up in Whirlwind of Distortion, Opportunism*, KAN. CITY STAR, Sept. 30, 2007, at B11; *All Things Considered*, *supra* note 3.

⁵ See Whitlock, *supra* note 4; Abbey Brown, *Official Sought to Clear Up ‘Jena Six’ ‘Misinformation,’* TOWN TALK (Alexandria, La.), July 31, 2007, <http://www.thetowntalk.com/apps/pbcs.dll/article?AID=/99999999/NEWS/399990004>.

⁶ See Whitlock, *supra* note 4; *All Things Considered*, *supra* note 3 (describing the incident).

⁷ See Supplemental Motion for New Trial at 1, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. Sept. 4, 2007); Abbey Brown, *Jury Unanimously Convicts First ‘Jena 6’ Teen to Face Trial*, NEWS-STAR (Monroe, La.), June 29, 2007, at 1B. However, an appellate court eventually overturned the transfer to adult court, resulting in sentencing for Bell as a juvenile. See *Mychal Bell of ‘Jena 6’ Ordered to Juvenile Facility*, CNN.com, Oct. 12, 2007, <http://edition.cnn.com/2007/US/law/10/11/bell.jail/index.html>.

⁸ See Brown, *supra* note 5; Walters, *supra* note 1 (attempting to defend this refusal); see also Anthony V. Alfieri, *Prosecuting the Jena 6*, 93 CORNELL L. REV. 1285, 1302-06 (2008) (arguing that an “outsider’s perspective” should have governed Walters’s decisions and that he could and should have charged the noose-hangers with a crime); David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1462-65 (2008) (arguing that Walters had no legal route for prosecuting the noose-hangers but that many of Walters’s actions and positions were unconscionable and either disingenuous or deluded in being portrayed as race-neutral actions beyond Walters’s control).

- approved Barker's release on \$5000 bond on a charge of bringing a loaded rifle onto school grounds, while requesting bonds of between \$70,000 and \$138,000 for the various Jena Six members.⁹

B. *Do-Justice Adversarialism*

Walters ultimately defended his actions in an op-ed piece published in several leading national newspapers.¹⁰ The details of his op-ed piece will follow later in this Article.¹¹ The piece's primary importance is that it reflected Walters's embrace of a purely adversarial prosecutorial role. Walters focused solely on the case before him, ignoring the history that brought Mychal Bell and the other black students to this point, and likewise ignoring whether Bell's case was being handled in an equal fashion to those involving the white students. Walters saw himself as having "no choice" but to prosecute Mychal Bell as an adult on the most serious conceivable charge.¹² Walters expressed no feelings of an obligation to calm the racial tensions at Jena High or to heal the community.¹³ In Walters's view, he achieved Justice by playing the role of zealous advocate for his client (the "People"), where zeal meant seeking the greatest possible prison sentence.

Although Walters articulated a purely traditional adversarial role—much like that played by most lawyers other than prosecutors—the dominant model of prosecutorial ethics is one that I call "Do-Justice Adversarialism."¹⁴ This model recognizes that prosecutors must moderate their zeal so that they may "do justice." This ambiguous and contested term is usually understood to mean avoiding conscious and overt actions in an individual case that undermine fair procedures, where "fairness" is narrowly defined. For example, hiding indisputably exculpatory evidence from the defense

⁹ See *Court Rules 'Jena 6' Defendant to Stay Behind Bars*, CNN.com, Sept. 21, 2007, <http://www.cnn.com/2007/US/law/09/21/jena.hearing/index.html> (stating the bond amounts for the Jena Six); Abbey Brown, *Student May Be Expelled for a Year*, TOWN TALK (Alexandria, La.), May 12, 2007, <http://www.thetowntalk.com/apps/pbcs.dll/article?AID=/99999999/NEWS/70916032> (discussing Barker's bond). Bell's high bond reportedly resulted from his having a prior juvenile conviction arising from a December 25, 2005 battery, and facing juvenile charges arising from three other incidents allegedly connected to the Jena noose-hangings while Bell was still on probation for the first offense. See Abbey Brown, "Jena Six" Defendant's Criminal History Comes to Light; Bond Denied, SHREVEPORT TIMES, Aug. 25, 2007, <http://www.shreveporttimes.com/apps/pbcs.dll/article?AID=/20070825/NEWS03/708250353>. State and federal prosecutors investigating the case concluded, however, that the assault on Barker was unconnected to the noose-hanging incident, see Walters, *supra* note 1, although the media, protestors, and many students and parents reached very different conclusions, see generally Jena 6, http://en.wikipedia.org/wiki/Jena_Six (serving as a compendium of public views on the case, if not necessarily a recounting of the true events).

¹⁰ See Walters, *supra* note 1.

¹¹ See *infra* Part V.

¹² See Walters, *supra* note 1.

¹³ See *id.*

¹⁴ See *infra* Parts IV and V.A (coining and explaining this term).

would be “unfair.”¹⁵ Do-Justice Adversarialism can, however, be understood to entail certain broader prosecutorial obligations than are generally currently recognized, resulting in a “Modified Do-Justice Adversarialism” that requires greater deliberation about the raced cultural meanings of prosecutorial actions. I will in this Article elaborate on just what those obligations are.¹⁶

C. *The Medical Model*

Do-Justice Adversarialism has its place—an important place—in models of prosecutorial conduct, but there are times when an alternative model of prosecutorial ethics, one increasingly recognized in prosecutorial practices across the nation, better serves social welfare. I call this model the “Medical Model,” for it views both crime and aspects of how society addresses crime as illnesses afflicting the political nation or its subsets.¹⁷ That nation, or “the People,” is the patient, and the prosecutor has an obligation to *cure* the patient, not simply to excise some of the disease.

The Medical Model has three broad tenets: first, prevention (of crime) is better than treatment; second, if treatment is necessary, at least do no harm; and third, treat the Body of the People holistically, recognizing that the health of the mind (including the subconscious mind) and the health of the Body interact. These broadly stated guiding principles do not alone solve particular ethical problems, but the same is true of concepts like “zealous representation” and “doing justice.”¹⁸ The metaphor of treating the patient suggests new avenues for prosecutorial ethical reasoning not entailed by the metaphor of adversarial combat. In particular, the prosecutor must at least consider the third-party effects of her decisions: the innocents temporarily ensnared by the system, the neighborhoods devastated by both under-enforcement (stealing citizens’ safety) and over-enforcement (breeding more crime and disrespect for the law) by the state, the tarnished reputations of individuals never suspected of crime but linked by their group membership to the stigma of crime. These are issues that Walters entirely ignored, especially as they affected the fate of racial minority groups. My articulation of the Medical Model will suggest how Walters could have better addressed these issues.

D. *On the Esteem Economy*

A case for both Modified Do-Justice Adversarialism and for its supplement by the Medical Model turns primarily on understanding the prosecu-

¹⁵ See *infra* text accompanying notes 383-84 (summarizing the roots of this obligation in both constitutional case law and ethics codes).

¹⁶ See *infra* text accompanying notes 415-20.

¹⁷ See *infra* Part V.B (summarizing the elements of the Medical Model).

¹⁸ See *infra* text accompanying notes 363-82.

tor's role in the economy of racial disesteem.¹⁹ The details of that role occupy the bulk of this Article. I prefer to leave the reader in suspense about those details in the Introduction. It is sufficient to note here that "esteem" is a comparative attitude of approval of a person or group's actions or dispositions for which observers conclude the person or group may fairly be held responsible.²⁰ Esteem can be directed toward individuals or groups, including racial groups, and brings with it material and psychic rewards, just as disesteem brings corresponding punishments.²¹ Because esteem is scarce, competition for it is intense, creating an "esteem market." One of the criminal justice system's purposes is to interfere with this market's operation by imposing deserved disesteem on the criminal law's violators. The system goes awry when it imposes excessive disesteem or visits it upon the undeserving, such as when it affects the fate of entire racial groups. Prosecutors are too often unaware of how their own actions—from charging, to making statements to the media, to negotiating plea deals, to going to trial—can help the system go wrong. Self-awareness of how this happens and what can be done about it is the first step in reform. Promoting such self-awareness is part of this Article's task. But, as I will argue, acting on that awareness is best served by changes in the structure of prosecutor's offices and the philosophy under which they operate rather than by new ethics rules potentially subjecting prosecutors to discipline. The war I wage here thus appeals to the prosecutorial conscience.²²

E. A Roadmap to Esteem

Part II explains what "esteem" is and how it can operate in a world of market exchange. Part II also addresses the special role of *racial* disesteem and offers an overview of how the law can alter operation of the racial disesteem market for good or for ill. Next, Part III explores in detail the primary ways by which well-meaning prosecutors can tilt the esteem economy harshly against minority racial groups. Part III discusses in particular the prosecutors' role in the charging decision (what I call the "pricing" decision in plea bargaining) and in anti-defendant publicity—a role that controls raced social norms, regulates the standards for esteem-allocation, and denies procedural justice. For each of these actions, Part III explores the potential harms prosecutors can inflict by ignoring group esteem and disesteem.

Part IV compares the traditionally understood role of the prosecutor with an evolving one. Five prosecutorial functions contribute to the evolu-

¹⁹ See generally GEOFFREY BRENNAN & PHILIP PETTIT, *THE ECONOMY OF ESTEEM* (2004) (first articulating a theory of the esteem economy).

²⁰ See *id.* at 15-23 (defining "esteem").

²¹ See Part II, *infra*, for detailed support for this summary of the esteem economy.

²² See generally Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573 (arguing that prosecutors' duty to "seek justice" should give rise to a host of obligations, not shared by other lawyers, that are not sufficiently recognized in existing ethical codes).

tion of this new role: the preventative, healing, procedural justice, unconscious non-adversarialism, and accuracy functions. This new model requires prosecutors to consider the impact of their choices on the economy of racial disesteem and to act to minimize its harmful effects.

Part V suggests solutions to the problem, outlining and defending the “Modified Do-Justice Adversarial” and “Medical” models of prosecutorial ethics. It then examines the actions of Jena prosecutor Reed Walters, evaluating his conduct in light of the proposed models.

Part VI concludes the piece with a summary and an eye toward the future.

II. THE ECONOMY OF ESTEEM

Understanding the prosecutor’s role in the racial esteem economy first requires defining what constitutes esteem and disesteem, and why we care. Likewise, it is important to understand with specificity the role of racial groups in this economy. Laying this groundwork is the task of this section.

A. *Defining Terms*

To reiterate, esteem is a comparative attitude of approval of a person or group’s actions or dispositions for which observers conclude that the person or group may fairly be held responsible.²³ Although esteem is an attitude, not an action, it is linked to action because esteem stems from one’s performance on some expressed good characteristic. Esteem must, unlike its close cousin, social status, be earned.²⁴ Furthermore, esteem, though bestowed based upon actions, is often seen as revealing a deeper character trait of a virtuous nature.²⁵

²³ See BRENNAN & PETTIT, *supra* note 19, at 15-23.

²⁴ See *id.* at 16-17; MICHAEL MARMOT, THE STATUS SYNDROME: HOW SOCIAL STANDING AFFECTS OUR HEALTH AND LONGEVITY 1, 11 (2004) (defining status as “[w]here you stand in the social hierarchy”). Marmot notes that income and one’s parents’ social class are important determinants of status. *Id.* at 15. Parents’ social class at a child’s birth, I note, is logically independent from whether the newborn child has yet done anything to deserve his good fortune. This distinction between earned and unearned status is my own. Brennan and Pettit did not address this distinction and sometimes conflate “status” with “esteem.” See BRENNAN & PETTIT, *supra* note 19, at 26-28, 31-33; see also Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1031 (1995) (defining “social status” as the aggregation of esteem judgments). Status and esteem and their respective economies are certainly importantly linked, and the study of each concept informs the other, but as will soon be clear, the emphasis here on esteem as being perceived as *earned*—rather than simply inherited—is critical to understanding its role in the criminal justice system.

²⁵ Brennan and Pettit put it this way: “If I esteem someone positively I will do so for their being kind or fair, brave or bold, a good parent, a conscientious colleague. . . . And if I disesteem someone I will do so for their being cruel or unjust, cowardly or snide, an uncaring parent or a sloppy colleague” See BRENNAN & PETTIT, *supra* note 19, at 17. For an explanation of how and why we readily make character judgments (general judgments about someone’s disposition to think or act in a certain way across some specified range of situa-

Because esteem is comparative, it requires some understanding of average performance.²⁶ The absence of esteem occurs, therefore, if others view someone as merely an average achiever.²⁷ "Disesteem" occurs whenever someone is seen as being above average on a negative trait,²⁸ such as being crueler than others.

B. Why Esteem is Valued

Esteem is valued by those who hold it for both instrumental and inherent reasons. Those holding us in high esteem trust us, increasing the chances that they will aid our endeavors and seek closer relationships with us.²⁹ Closer relationships themselves bring material benefits, perhaps in job or educational opportunities.³⁰ Like social status, high esteem also brings political power, longer lives, better health, and more resource-rich mates.³¹ Those holding high status or esteem receive the deference of those lower on the totem pole, are perceived as more competent and credible, and gain more speaking time and attention in public settings.³² They are thus more effective persuaders, increasing access to money, psychic satisfaction, and power.³³

Esteem is valued as of inherent worth, too.³⁴ The inherent psychic value of esteem is so great that, for example, some professors might sacrifice money and family peace to accept an offer to teach at a more prestigious

tions), see Andrew E. Taslitz, *Myself Alone: Individualizing Justice through Psychological Character Evidence*, 52 MD. L. REV. 1, 89-91 (1993) [hereinafter Taslitz, *Myself Alone*].

²⁶ See BRENNAN & PETTIT, *supra* note 19, at 69, 92-94.

²⁷ This point seems implicit in the idea that esteem and disesteem are assigned relative to an average or zero point, though Brennan and Pettit do not clearly say so. See *id.* at 17-18 (discussing zero point idea on an esteem/disesteem scale); *id.* at 92-94 (discussing average performance).

²⁸ See *id.* at 17-18.

²⁹ See *id.* at 26 (noting esteem-trust connection and resulting relationship advantage).

³⁰ See ABRAHAM TUCKER, *THE LIGHT OF NATURE PURSUED* 179 (1805) ("[W]e find it so extremely and continually useful to have the good opinion and esteem of others, which make them friendly and obsequious to our desires, that this is enough to give us a liking to esteem, and consequently to those actions or qualities tending to promote it."). Cf. ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 112 (1999) [hereinafter TASLITZ, *RAPE AND CULTURE*] (discussing material benefits of high status).

³¹ Cf. BRENNAN & PETTIT, *supra* note 19, at 26 (noting that another instrumental benefit of enjoying the esteem of those whom one esteems is providing one with grounds to think well of herself, too); MARMOT, *supra* note 24, at 1-12, 154-58 (arguing that higher social status— independent of other factors—leads to longer, healthier lives and that low social status reduces marriageability); TASLITZ, *RAPE AND CULTURE*, *supra* note 30, at 112 ("High status may also bring . . . more access to money, jobs, and political power.").

³² Cf. TASLITZ, *RAPE AND CULTURE*, *supra* note 30, at 69-74 (defending similar point, albeit concerning gendered status).

³³ See *id.* at 111-13.

³⁴ Compare BRENNAN & PETTIT, *supra* note 19, at 29 (arguing that esteem has intrinsic value), with ALAIN DE BOTTON, *STATUS ANXIETY* 3 (2004) (summarizing instrumental value of high social status as including "resources, freedom, space, comfort, time and, as importantly perhaps, a sense of being cared for and thought valuable—conveyed through invitations, flattery, laughter (even when the joke lacked bite), deference and attention").

institution in a remote corner of the country. They will do so merely to receive the enhanced esteem from being associated with the new academic home.³⁵ Commentators from ancient Greece to modern times—including Cicero, Aquinas, Hobbes, Locke, Voltaire, Hume, Kant, and John Adams—have sung esteem’s praises.³⁶ Philosopher Adam Smith phrased the point thus:

Nature, when she formed man for society, endowed him with an original desire to please, and an original aversion to offend his brethren. She taught him to feel pleasure in their favourable, and pain in their unfavourable, regard. She rendered their approbation most flattering and most agreeable to him for its own sake; and their disapprobation most mortifying and most offensive.³⁷

Modern disciplines as diverse as neuroscience, evolutionary psychology, and behavioral and bio-economics confirm the factual accuracy of Smith’s position.³⁸ It is important to remember that Smith spoke of “unfavourable regard” too—of disesteem. Disesteem is esteem’s mirror, bringing just the opposite ill consequences to esteem’s positive ones.³⁹

³⁵ See BRENNAN & PETTIT, *supra* note 19, at 71 (using similar example).

³⁶ See *id.* at 24-25.

³⁷ ADAM SMITH, *THE THEORY OF THE MORAL SENTIMENTS* 212 (Liberty Classics, 1976) (1759).

³⁸ Brennan and Pettit argue that biology probably explains why esteem has *inherent*, not solely instrumental, value for human beings:

[T]here is evidence that to some extent esteem also has an intrinsic or unconditional hold on us, being something that nature has primed human beings to find attractive, perhaps for reasons of biological fitness. We often care about esteem where there is little or nothing to be gained in pragmatic or evidentiary terms. We care about our standing among people we are unlikely to meet—say, those who come after us—and among people who know so little about us that their opinions can hardly give evidentiary support to our view of ourselves.

BRENNAN & PETTIT, *supra* note 19, at 29. Cf. DONALD W. PFAFF, *THE NEUROSCIENCE OF FAIR PLAY: WHY WE (USUALLY) FOLLOW THE GOLDEN RULE* 61-79, 99-120 (2007) (arguing that there is a biological basis for the Golden Rule rooted in our ability to view ourselves as connected to others and nurtured by reciprocal social relationships of mutual care and concern); Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 *PSYCHOL. BULL.* 497, 497 (1995) (discussing psychological evidence of the central value of belongingness in humans).

³⁹ Cf. DE BOTTON, *supra* note 34, at 3-5 (noting that “status anxiety” about lost, losing, or low status can give us the sense of being stripped of human dignity and respect; that status anxiety leaves us in constant worry that our status hangs in the balance should we fail to achieve; and that from failure stems humiliation, “a corroding awareness that we have been unable to convince the world of our value and are henceforth condemned to consider the successful with bitterness and ourselves with shame”); MARMOT, *supra* note 24, at 1-12 (noting that low social status causes poor health); TASLITZ, *RAPE AND CULTURE*, *supra* note 30, at 69-75, 136-37, 141-45 (noting the ill effects of low social status of women in the context of sexual assault). Marmot posits that low status harms health and lifespan because it decreases autonomy (the sense of control over the direction of our lives) and social integration (the sense of connectedness to others). See MARMOT, *supra* note 24, at 11, 158-63. Marmot argues, therefore, that some of the ill social effects of status inequality can be reduced via social

C. *How the Economy of Esteem Works*

i. *Basic Model*

Because esteem is scarce, competition for it is fierce, creating a market for it.⁴⁰ The quest for esteem can be conscious or subconscious, and most details of its operation are unimportant here.⁴¹ A few key points are relevant, however. First, esteem is “demanded” because people are willing to pay in time, money, and other resources for the tools to achieve it.⁴² Second, esteem-bestowal works as a reward, and its denial as a punishment, even if we are unaware that it does so.⁴³ For example, if we target a behavior for reasons unrelated to esteem, that behavior will be reinforced by esteem-bestowal and extinguished by esteem-denial.⁴⁴ Third, esteem cannot be directly supplied because it is an attitude. Direct purchase would not bring true esteem because the latter requires sincere belief that it has been *earned*, not bought.⁴⁵

Persons or groups *can*, however, supply “esteem services.”⁴⁶ Such services can include agreeing to pay attention to another’s performance, for one cannot esteem another for actions of which the former is unaware.⁴⁷ Another

institutions being modified so that low status does not translate into minimal autonomy and high social isolation. *See id.* at 240-57.

Professor Robert Fuller, the former President of Oberlin College, concedes that power differences cannot be eliminated, and that what he calls “rank differences” closely “reflect power differences.” *See* ROBERT W. FULLER, *SOMEBODIES AND NOBODIES: OVERCOMING THE ABUSE OF RANK 4* (2003). But abuses of rank—using power differences “as an excuse to abuse, humiliate, exploit, and subjugate”—are a social ill that can be cured, he insists. *Id.* at 4. Indeed, as he maintains, accurate ranking based on fair standards and limited solely to the domain in which an individual performs—and not extending to his entire character and life—is a social good essential to economic efficiency, electoral choice, and political legitimacy. *See id.* at 15-17. Yet just this sort of global ranking occurs when race becomes the basis for judging value. The ranking is factually defective—race does not determine individual performance or value—and is normatively defective—an unacceptable standard of judgment in a society purportedly constitutionally committed to the fundamental equality of individuals. *Cf. infra* text accompanying notes 103-107 (explaining the disesteem that attaches from a felony conviction). Furthermore, esteem—based on perceived performance—differs from recognition or respect, that is, from treating others in a way that recognizes the fundamental equality of *all* humans in certain crucial respects, an equality not to be denied even to those who have done evil deeds. *Cf.* Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 27-28 (2003) [hereinafter Taslitz, *Respect and the Fourth Amendment*] (defining “respect”).

⁴⁰ *See* BRENNAN & PETTIT, *supra* note 19, at 2-3, 34.

⁴¹ *See id.* at 34-77 (recounting those details).

⁴² *See id.* at 35 (“[S]ocial esteem is something that everyone desires, and . . . how much esteem people receive depends on how they perform in this or that domain.”). This observation does not mean that “effective” demand therefore arises in the usual sense of that term, but it does arise often in an analogous, “virtual” sense of demand. *See id.* at 35, 40.

⁴³ *See id.* at 40-46.

⁴⁴ *Cf. id.* at 36-37 (making a similar argument).

⁴⁵ *See id.* at 52.

⁴⁶ *See id.* at 55.

⁴⁷ *See id.* at 56. *See generally* RICHARD A. LANHAM, *THE ECONOMICS OF ATTENTION: STYLE AND SUBSTANCE IN THE AGE OF INFORMATION* (2006) (articulating one theory of an

esteem service is to “testify” or speak on another’s behalf in an effort to enhance the breadth and depth of various audiences’ esteem for that other.⁴⁸ If testimony is highly effective, it may lead to “common belief” in the other’s virtue—just about everyone thinking well of her.⁴⁹ Common belief can stem from informational cascades in which so many people value *you* that more “choose” to share the belief, creating a bandwagon effect.⁵⁰ Once common belief in virtue is achieved, it is hard (though far from impossible) to dislodge by contrary evidence.⁵¹

ii. Strategies for Gaining Esteem

There are a variety of strategies to compete for esteem. A performance-based strategy specializes performance in the areas in which one does best and seeks the maximum performance achievable at an acceptable cost.⁵² A publicity-based strategy aims to publicize and categorize positively a person’s achievements in as large and diverse an audience as is feasible.⁵³ Correspondingly, the performer can seek to hide or downplay her failures.⁵⁴ A related tactic is to aim publicity only at those audiences likely to be receptive to the person’s performance.⁵⁵ A rabid liberal chooses to give a red-meat speech to left-wing Democrats, not equally rabid right-wing conservatives. The quality of the audience matters too. The acclaim of the Democratic Presidential Convention means more than that of a local block captain.⁵⁶

Presentation strategies offer a third option.⁵⁷ The effort here is to challenge the standards for esteem rankings: what qualities or accomplishments should be valued more than others? What dimensions and persons should be the comparators, and what measurement used to determine the average?⁵⁸ The debate on many law school faculties about the relative merits of teaching versus scholarship as grounds for merit pay is just such an effort to mold esteem-evaluative standards.

attention economy); MAGGIE JACKSON, *DISTRACTED: THE EROSION OF ATTENTION AND THE COMING DARK AGE* (2008) (analyzing the social and psychological forces that erode or promote attention).

⁴⁸ See BRENNAN & PETTIT, *supra* note 19, at 56-57.

⁴⁹ See *id.* at 57.

⁵⁰ See *id.*; accord CASS SUNSTEIN, *REPUBLIC.COM 2.0*, at 84-85, 90-91 (2007).

⁵¹ See BRENNAN & PETTIT, *supra* note 19, at 57.

⁵² See *id.* at 69-70.

⁵³ See *id.* at 70.

⁵⁴ See *id.* at 70-71.

⁵⁵ See *id.* at 70 (“[T]hey will want the audience to share a common awareness that their relative merits [but not demerits] are recognized.”); *id.* at 142, 204 (analyzing audience choice).

⁵⁶ See *id.* at 204-08 (analyzing audience quality).

⁵⁷ See *id.* at 70-71.

⁵⁸ See *id.*

D. Racial Groups and the Esteem Economy

Esteem and disesteem can accrue to groups as well as individuals.⁵⁹ Some of these groups are voluntary, some involuntary.⁶⁰ It is the involuntary ones on which I want to focus here. Involuntary associations are those for which membership is “thrust upon” members by society, with no individual or collective ability to exit or disband the group and no collective veto over membership.⁶¹ A person sharing the characteristics defining the group is an automatic member.⁶² Stereotypes, cognitive biases, and cultural narratives define the group collectively, and its members individually, as sharing certain traits and behaviors associated with fundamental moral qualities.⁶³ These assertions may be conscious or unconscious.⁶⁴ In either case, however, their moral connotations mean that the group and its members gain presumptive esteem or suffer disesteem based on group membership. In the case of disesteem, racial minority groups serve as the clearest example.⁶⁵

The United States Supreme Court, speaking both about reputation and esteem, has recognized this interactive link between a racial group's fate and that of its members. In *Beauharnais v. Illinois*,⁶⁶ the President of the White Circle League challenged his conviction under a criminal statute prohibiting the defaming of groups of people, arguing that free speech guaranteed him the freedom to distribute a pamphlet spewing racial hatred. The pamphlet read: “If persuasion and the need to prevent the white race from being mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns, and marijuana of the negro surely will.”⁶⁷ The Supreme Court affirmed *Beauharnais*'s conviction and rejected his free speech claims, explaining:

It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him

⁵⁹ See *id.* at 195-96, 223.

⁶⁰ See *id.*

⁶¹ See *id.* at 223-24.

⁶² See *id.*

⁶³ See Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 124-29 (2006) [hereinafter Taslitz, *Wrongly Accused*] (discussing moral associations triggered in many whites' minds upon seeing a black face).

⁶⁴ See Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1 (2007) [hereinafter Taslitz, *Racial Blindsight*] (analyzing barely conscious racial biases); Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 38 SW. U. L. REV. (forthcoming 2009) [hereinafter Taslitz, *Redux*] (analyzing subconscious racial biases).

⁶⁵ See BRENNAN & PETTIT, *supra* note 19, at 222-29. Brennan and Pettit note that even mere association between esteemed and disesteemed groups' members reduces the former group's esteem. See *id.* at 228.

⁶⁶ 343 U.S. 250 (1952).

⁶⁷ *Id.* at 252.

may depend as much *on the reputation of the racial and religious group to which he willy-nilly belongs as on his own merits*.⁶⁸

Although *Beauharnais* has never been expressly overruled, its current precedential vitality is in doubt. Its insight, however, is not.⁶⁹

Disesteemed group members have several options. Exit is costly and, for racial group members, generally impossible.⁷⁰ One strategy to improve esteem, therefore, is to look to the group itself for affirmation rather than to the broader society.⁷¹ This can be a positive approach if the group accepts generally-stated societal standards for evaluation but rejects society's low rating of the group as based upon factual inaccuracies.⁷² This inner-focused approach can also be helpful if the group instead rejects broader evaluative standards, replacing them with reasoned and morally-defensible alternatives.⁷³ But the approach can be destructive if it adopts anti-social standards for awarding esteem—for example, by approving of violence rather than peace, theft rather than honesty, ignorance over education.⁷⁴ Where group members or sub-groups choose this strategy, social disesteem of the group can end up increasing crime.⁷⁵ Moreover, this anti-social strategy by sub-group members can feed group stereotypes that are attributed to all group members, even if most group members take more positive approaches to their plight.⁷⁶

Groups can take more outward-looking approaches as well. They can seek to publicize group members' accomplishments of which the larger society approves and to hide those of which it disapproves.⁷⁷ Groups and their

⁶⁸ *Id.* at 262-63 (emphasis added). The Court subsequently equated reputation with esteem, noting the plausibility of group defamation harming an individual "whose position *and esteem* in society" are inextricably linked to those of her group. *See id.* (emphasis added).

⁶⁹ *See generally* Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345 (2001).

⁷⁰ *See* BRENNAN & PETTIT, *supra* note 19, at 222-23, 226-28.

⁷¹ *See id.* at 227-29 (explaining that members of disesteemed racial groups who do well on wider societal performance measures still face disesteem or reduced esteem merely by virtue of membership in the excluded group, and that they therefore form their own "esteem associations" of persons like them to esteem one another; they do so without rejecting the wider society's values, other than the value that disesteems them simply by virtue of their skin color).

⁷² *See id.* at 225.

⁷³ *See id.* at 226-27. Brennan and Pettit choose a less than laudatory term for this approach, describing it as a subset of the "sour grapes" outsider response. *See id.* at 225 (arguing that an outsider group member "will find herself inclined to the view that the values that make for the esteem of others are wrong-headed or pretty silly or not to be taken too seriously").

⁷⁴ *See id.* at 225-26 (describing the rise of countercultural groups, which may or may not adopt normatively undesirable alternative evaluative standards). *Cf.* ELIJAH ANDERSON, *CODE OF THE STREET* (2000) (offering an extended examination of a negative set of countercultural norms); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 L. & CONTEMP. PROBS. 221, 284-87 (2003) [hereinafter Taslitz, *Racial Auditors*].

⁷⁵ *See infra* text accompanying notes 317-21.

⁷⁶ *See infra* text accompanying notes 322-60.

⁷⁷ *See* BRENNAN & PETTIT, *supra* note 19, at 230, 234-37 (analyzing "secrecy" and "publicity" strategies).

members can, alternatively, agitate to change the broader societal standards by which they are judged.⁷⁸ Because esteem is a scarce commodity and brings with it money, power, and life satisfaction, any change in the existing group distribution of esteem means losses for some and gains for others. Many of those standing to lose will mount counter attacks.⁷⁹ Struggles over esteem become struggles over emotionally meaningful symbolism, over the existence, meaning, and evolution of social norms, and over basic principles of social and political morality.⁸⁰ Because so much is at stake, and because collectivities can mount more resources than individuals, struggles waged over esteem by disesteemed minorities contending with esteemed majorities can be particularly brutal.⁸¹ Once again, much of this struggle can be waged unconsciously.⁸² Because of the law's power to reflect and shape social norms and the central moral role assigned to criminal law in our culture, the criminal justice system—and the primary voice of the state in that system, the prosecutor—plays a particularly important role in waging esteem warfare.⁸³

⁷⁸ See *id.* at 236-37.

⁷⁹ See RICHARD ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* 69-124 (1999) (describing struggle for respect when respect is a zero-sum game).

⁸⁰ Reference to these “broader societal standards” is but another way of explaining the link between the esteem economy and social norms—regularities in behavior in society or a group. See Lynn Stout, *Social Norms and Other-Regarding Preferences*, in *NORMS AND THE LAW* 1, 28 (John N. Drobak ed., 2006) (defining “social norms”). A regular behavior is a norm only if most persons in a society comply with it and people generally approve of those complying with it and disapprove of those doing the opposite. See BRENNAN & PETTIT, *supra* note 19, at 270. The approval or disapproval, whether conscious or not, must partly explain the behavior. See *id.* Furthermore, the approval or disapproval manifests itself with strong moral overtones, and moral talk plays a role in the rise, fall, and evolution of social norms. See generally *EVOLUTIONARY ORIGINS OF MORALITY: CROSS-DISCIPLINARY PERSPECTIVES* (Leonard D. Katz ed., 2000) (discussion of the role of evolution in development of morality). Expression of the attitudes here called esteem and disesteem are thus both shaped by norms and instantiate them. See BRENNAN & PETTIT, *supra* note 19, at 285-87. Cf. RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 67-68, 180-82 (2008) (illustrating how people change behavior based upon perceived social norms). Changing norms can therefore change economies of esteem and disesteem and vice-versa. See BRENNAN & PETTIT, *supra* note 19, at 285-88. Brennan and Pettit describe using esteem to prompt good behavior and discourage bad by harnessing or modifying social norms as the “intangible hand.” See *id.* at 246.

⁸¹ Cf. ABEL, *supra* note 79, at 7-23 (illustrating this point); Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 306, 376-79 (2001) [hereinafter Taslitz, *Civil Society*] (analyzing this point's implications for regulating harmful speech).

⁸² This observation follows from the frequently “virtual,” unconscious operation of the esteem economy. See *supra* Part II.C.1.

⁸³ See *infra* Part III.

III. THE PROSECUTOR'S ROLE IN THE ESTEEM ECONOMY

A. *Criminal Prosecution and (Racial) Disesteem*

Understanding the prosecutor's role in the economy of racial esteem first requires understanding the criminal justice system's broader role in that economy. The key point is that the criminal justice system, in theory and in practice, is *designed* to impose disesteem on *individuals*. However, the system has the *effect* of imposing such disesteem on racial minority *groups*, particularly African Americans, as well. The system imposes disesteem via three primary mechanisms: (1) the speech act of conviction; (2) the expressive function of conviction and sentence; and (3) the continuing incapacities facing convicted persons even after serving their sentences.⁸⁴

i. *Speech Acts*a. *General Concept*

"Speech acts" occur when words themselves *are* deeds.⁸⁵ Kent Greenawalt thought the phrase "situation-altering utterances" more clearly expressed the idea, defining such utterances as a "means for changing the social context in which we live."⁸⁶ The legal system is filled with such utterances—words that, merely by being spoken or written, and regardless of the truth of their content, alter individuals' legal status and obligations and, thereby, their social world.⁸⁷

Consider the marriage ceremony. The priest, rabbi, other religious leader, or magistrate asks each member of the couple: "Do you promise to love, honor, and cherish your soon-to-be spouse in sickness and in health, in wealth and in poverty, until death do you part?" So long as a valid marriage license has been prepared (itself another speech act), each member of the couple changes her legal status by merely speaking the words "I do." They are no longer simply "John and Mary" but "husband and wife."⁸⁸ This new status carries with it a wealth of new rights—presumptive joint ownership of property, access to a portion of the other's social security benefits, inheritance rights, and eased access to joint medical insurance benefits being but a

⁸⁴ See *infra* Part III.A.1.

⁸⁵ See FRANKLIN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT 10-11 (1993) (explaining the "speech acts" concept, which is rooted in the work of philosopher Ludwig Wittgenstein). See generally J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962) (examining the broad spectrum of possible interpretations of mere utterances); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1970) (offering a theory of speech acts and their meaning).

⁸⁶ See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 57 (1989).

⁸⁷ Every law student is exposed to the speech act concepts when studying "verbal acts" as a classic example of words that are not hearsay. See, e.g., STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, *EVIDENCE LAW AND PRACTICE* 359-61 (2000).

⁸⁸ See *id.*

few of the prominent examples.⁸⁹ Similarly, the new status carries with it legal *obligations*. For example, in fault-based divorce states, spouses have the obligation of sexual fidelity to one another.⁹⁰ Furthermore, marriage also changes a couple's social status, for parents and friends now treat them differently. Finally, marriage further enhances a couple's power resources—the material and psychic gains from pooling their finances, social support systems, and affections.⁹¹ The combination of these factors with the exalted status of marriage in our culture means that marriage both reflects and improves the esteem in which many others hold the new couple.⁹²

b. *Criminal Convictions*

A criminal conviction can be understood as a negative counterpart to the marriage example. An accused felon is *legally* presumed innocent unless and until she is convicted.⁹³ The conviction consists of a single word spoken by the jury foreperson on behalf of the jury: “guilty.”⁹⁴ Only then does the

⁸⁹ See, e.g., John G. Culhane, *Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage*, 17 L. & SEXUALITY 7, 14-15, 17, 26 (2008) (noting many of the legal rights created by marriage).

⁹⁰ See, e.g., *Diosado v. Diosado*, 118 Cal. Rptr. 2d 494 (Cal. Ct. App. 2002) (holding that a post-nuptial agreement providing penalties for adultery was unenforceable because it reintroduced a fault-based concept of divorce that California has now rejected); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 955 (Mass. 2003) (noting that many of marriage's benefits are available only to those who have “accepted the correlative responsibilities of marriage”); Karin Johnsrud, *Same Sex Relationships: From “Odious Crime” to “Gay Marriage,”* 35 INT'L J. LEGAL INFO. 301, 301 (2007) (noting that adultery can be the basis for dissolution of marriages); Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 842, 867 (2005) (“Marriage tends to instill and bring with it certain relational benefits for the adults, like permanence, commitment, and even sexual fidelity, which redound to the benefit of children in the household. . .”).

⁹¹ See EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 7 (2008) (cataloguing many of the benefits of marriage, including better health, longer life, and greater overall happiness); JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 18-28 (2004) (summarizing the material, social, and psychological benefits of marriage, including enhanced social status, the behavior and attitude-regulating effects of “social opinion,” the creation of kin, and the individual and social support stemming from the expression of firm commitment to another's well-being).

⁹² Cf. RAUCH, *supra* note 91, at 20 (“Marriage confers status: to be married, in the eyes of society, is to be grown up.”); *id.* at 21 (explaining that the mere prospect of eventual marriage to someone creates pressure to “reach for respectability” and “try to build status”).

⁹³ See *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”); Larry King, *How Do Juries See Beyond a Reasonable Doubt?: A Historical View*, in BEYOND A REASONABLE DOUBT (Larry King ed., 2008).

⁹⁴ Philosopher Antony Duff and his colleagues powerfully capture the “performative” or speech act nature of a guilty verdict and its social consequences:

[W]hat is being said, what is being done, when the fact-finder brings in a verdict of ‘Guilty’ (or of ‘Not Guilty’)? . . . [Partly it is] a finding that this person committed this offence. But the formal declaration of a verdict of ‘Guilty’ in open court . . . is not just the assertion of a proposition, but a performative that condemns the defendant as a criminal wrongdoer. Its meaning lies not only in the proposition that the defendant committed the crime charged, but also in what is *done* by this formal

accused become a “felon.”⁹⁵ This change in status has enormous legal, psychological, and social consequences for the new felon. She may lose many rights, including the rights to vote, to locomote freely, to pick her social companions, and to choose what she will eat and when she will sleep, work, and travel.⁹⁶ She has new and painful obligations too: to report to a probation or parole officer or return to a halfway house, or instead risk imprisonment.⁹⁷ She may be barred from certain jobs, or required to register as a “sex offender,” or compelled to submit to treatment for substance abuse or psychological therapy.⁹⁸ Even if the sentencing judge shows leniency by, for example, granting probation with few conditions when the law permitted far harsher sanctions, the individual’s freedom is then *bestowed upon her* by the court; the probationer does not possess rights to these conditions.⁹⁹ These diminished rights and enhanced obligations mark the felon as an “other,” outside the community of citizens *deserving* of their full rights.¹⁰⁰ In our culture and perhaps most others, this mark will have powerful negative emotional resonance for observers.¹⁰¹ The felon’s new status—created by a speech act—brings with it disesteem in the larger community.¹⁰² Moreover,

declaration of guilt—the condemnation of his commission of that crime. . . . That is why for some people a conviction is itself a kind of punishment, indeed a severe punishment: they suffer the condemnation of their fellow citizens—a condemnation that can be acutely painful.

ANTHONY DUFF, LINDSAY FARMER, SANDRA MARSHALL & VICTOR TADROS, *THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL* 83 (2007).

⁹⁵ See SEAN McCONVILLE, *The Victorian Prison: England, 1865-1965*, in *THE OXFORD HISTORY OF THE PRISON* 132, 132 (Norval Morris & David J. Rothman eds., 1995) (defining “felon”).

⁹⁶ See JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 105-06, 130-33 (2003) (summarizing some of the many legal restrictions imposed upon felons, including frequent loss of voting rights); Norval Morris, *The Contemporary Prison, 1965-Present*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 95, at 227, 227-59 (describing life in prison and, more briefly, in less restrictive environments).

⁹⁷ See PETERSILIA, *supra* note 96, at 55, 82-83, 98-100.

⁹⁸ See *id.* at 82, 112-20, 127-29, 175-82.

⁹⁹ Cf. Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, in *PRISONS* 63, 102 (Michael Tonry & Joan Petersilia eds., 1999) (discussing how parole and probation give judges control over the population entering prisons).

¹⁰⁰ Criminologist Joan Petersilia notes that the law marks convicts as outsiders—as “back in society but not free”—in myriad ways even long after their sentences have ended. See PETERSILIA, *supra* note 96, at 105. For example, they often lose their right to vote and hold public office, or to obtain certain occupational or professional licenses. *Id.* Likewise, “[t]heir criminal record may also preclude their receiving government benefits and retaining parental rights, be grounds for divorce, prevent their serving on a jury, and nearly always limits firearm ownership.” *Id.*

¹⁰¹ See *id.* at 106 (noting the stigmatizing effect of a criminal conviction).

¹⁰² Criminologist Howard Zehr makes the point in a particularly powerful way:

In the popular view, guilt is not merely a description of behavior but a statement of a moral quality. Guilt . . . has a “sticky,” indelible quality. [It] adheres to a person more or less permanently, with few known solvents. . . . A person found guilty of theft becomes a thief, an offender. A person who spends time in prison becomes . . . an ex-con. This becomes part of his or her identity and is difficult to remove.

the criminal law purports to right public, not private, wrongs.¹⁰³ The jury's declaration of the offender's "felon" status thus labels her a community predator deserving of disesteem by all who learn of her status. Therefore, the speech act of finding a defendant "guilty" has significant social consequences. New status brings a new reality.

ii. The Expressive Function

Fully appreciating how the speech act of a conviction changes an offender's social status requires understanding law's expressive function, its ability to send messages about right and wrong thought, actions, and character—messages often capable of changing behavior, hearts, and minds.¹⁰⁴ The criminal law's expressive role is particularly important.¹⁰⁵ Scholars endlessly debate what the purpose of criminal law should be.¹⁰⁶ I will not rehash these debates here, but will simply note that the character-based variant of "communicative retributivism" is the theory I find most convincing and that best illustrates the points I want to make here.¹⁰⁷

HOWARD ZEHR, *CHANGING LENSES* 68-69 (1990); *see also* NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* 193 (2005) ("Stigma 'sticks' to the families of the afflicted as well.").

¹⁰³ *See generally* S.E. Marshall & R.A. Duff, *Criminalization and Shared Wrongs*, in *CRIMINAL LAW CONVERSATIONS* (Paul Robinson, Kimberly Ferzan & Stephen Garvey eds., forthcoming 2009) (manuscript at 214-21, on file with author) (defending the idea that crimes harm the "public," not merely individuals, and that convictions express public condemnation of the offender).

¹⁰⁴ *See generally* Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (explaining the law's expressive function, the resulting ability to alter social norms, and the function's limits).

¹⁰⁵ *See infra* notes 107-56 and accompanying text (defending this point); *see also* ERIC A. POSNER, *LAW AND SOCIAL NORMS* 108-10 (2000) (arguing that criminal punishment is partly a shaming mechanism, the intensity of the stigma imposed varying with the visibility and memorability of the punishment and the degree to which it is associated in the public mind with the "badness of the people who are punished"). Pointedly, Professor Bernard Harcourt argues that moral condemnation is not the sole, and perhaps not even the primary, expressive function of the criminal law:

[W]hile I agree . . . that there is an expressive dimension to punishment, I disagree that morality is in fact central to that function. Punishment usually also communicates, importantly, political, cultural, racial and ideological messages. The meaning of punishment is not so coherent or simple. Many contemporary policing and punitive practices, for instance, communicate a racial and political, rather than moral, message—a message about who is in control and about who gets controlled.

Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 *BUFF. CRIM. L. REV.* 145, 168 (2001).

¹⁰⁶ *See* Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 *ARIZ. ST. L.J.* 527, 548-53, 568-82 (2008) (summarizing some of the debates about the purposes of punishment and defending her own theory).

¹⁰⁷ *See generally* ELLEN S. PODGOR, PETER J. HENNING, ANDREW E. TASLITZ & ALFREDO GARCIA, *CRIMINAL LAW: CONCEPTS AND PRACTICE* 6 (2005) (concisely defining and illustrating "communicative retributivism").

Retribution and revenge are close cousins.¹⁰⁸ Both stem from a similar emotional need to see an offender suffer as a way of restoring the victim's status in the eyes of the community.¹⁰⁹ When a wrongdoer treats a victim badly, she devalues the victim and sends the message that the victim is unworthy of better treatment.¹¹⁰ When the state fails to condemn the wrongdoer, the state embraces and reaffirms that message.¹¹¹ "Through retribution, the community [instead] corrects the wrongdoer's false message that the victim was less worthy or valuable than the wrongdoer; through retribution, the community reasserts the truth of the victim's value by inflicting a publicly visible defeat on the wrongdoer."¹¹² The tort system contains a retributive component, but it is one that permits a more direct infliction of injury upon the defendant for the personal wrong she has done the plaintiff.¹¹³ Tort-based retribution channels and controls the victim's resentment, preventing her from seeking private vengeance against a wrongdoer.¹¹⁴ In the criminal context, by contrast, retribution is expressed by *the community* for a public wrong done to it.¹¹⁵ It is the community's righteous indignation, rather than the victim's personal resentment, that is channeled to social purposes.¹¹⁶ For this reason, a criminal conviction carries an expressive punch that a tort verdict does not.

Some important distinctions must be made here. Properly understood, just retribution must be proportionate and not demeaning to the individual.¹¹⁷ Most Western liberal theories of rights are rooted in a commitment to the equality of all persons, or at least of all citizens.¹¹⁸ Theorists dispute what quality inheres in equal amounts in all persons, but all agree that some such

¹⁰⁸ See CHARLES K.B. BARTON, GETTING EVEN: REVENGE AS A FORM OF JUSTICE 62 (1999) (noting similar, though not identical, emotional roots of revenge and retribution).

¹⁰⁹ Cf. Neil Vidmar, *Retribution and Revenge*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 31, 38-39 (Joseph Sanders & V. Lee Hamilton eds., 2001).

¹¹⁰ See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1697 (1992).

¹¹¹ See MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 48-49 (1993) (describing this effect in the context of hate speech). Cf. Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 749-53 (1999) (discussing the importance of hate crimes legislation as a means of society expressing its disapproval of hate crimes).

¹¹² MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 12 (1998).

¹¹³ This point follows from Alan Calnan's similar analysis. See ALAN CALNAN, JUSTICE AND TORT LAW 111-18 (1997).

¹¹⁴ See *id.* at 114. Calnan explains: "In this way, the judicial [tort] system serves the ends of private justice. It allows us to receive the cathartic release of doing something 'bad' to our wrongdoer, albeit in a controlled manner with strict limitations." *Id.*

¹¹⁵ See Marshall & Duff, *supra* note 103 (defending this point); Taslitz, *Civil Society*, *supra* note 81, at 348-49.

¹¹⁶ See Taslitz, *Civil Society*, *supra* note 81, at 348-49.

¹¹⁷ See *id.* at 335-38, 355-66.

¹¹⁸ See generally JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT 3-15 (1999) (analyzing the concept of human equality).

quality exists.¹¹⁹ That quality entitles all persons to equal respect, meaning in part that all are entitled to some minimal set of equal human rights.¹²⁰ To “demean” someone is to treat her as unworthy of such equal respect.¹²¹ The theory of communicative retributivism rejects any punishment that demeans the offender, even if the offender demeaned her victim.¹²² Indeed, communicative retributivists generally argue that offenders always demean their victims, treating them as less than full human beings. To topple the offenders from their unfairly assumed heights of worth relative to their targets requires a strong message from the community.¹²³ But the ultimate aim of criminal punishment is *to restore equality* and no more.¹²⁴

I do not believe that “putting criminals in their place” relative to their victims is the only expressive function of criminal law and punishment. Although all persons have equal worth that guarantees them some minimal level of respectful treatment, human beings are *not* equal in all respects, nor will our culture treat them as such.¹²⁵ In particular, Americans believe that people should get what they deserve, however much critics may bemoan society's failures to realize this ideal.¹²⁶ Moreover, Americans see deserving

¹¹⁹ See, e.g., *id.* at 13, 116-22 (comparing the Kantian theory of reason with a theory of capacity to strive for “moral goodness”); MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11-41 (1998) (arguing that the idea of equal human rights is “ineliminably religious”); WILLIAM F. SCHULZ, *IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL* 17-37 (2001) (offering pragmatic arguments for accepting the ideas of human rights and equality).

¹²⁰ See SCHULZ, *supra* note 119.

¹²¹ Jean Hampton distinguishes among three terms: “demeaning” (treating another as less worthy than he is entitled to be treated); “diminishing” (making the other *feel* like his worth has been reduced or his true lower worth has been revealed); and “degrading” (actually lowering a person's worth in some sense). See JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 44-53 (1998).

¹²² See Taslitz, *Civil Society*, *supra* note 81, at 338-39, 355-66.

¹²³ See MURPHY & HAMPTON, *supra* note 121, at 52-53 (defining a wrong as demeaning another); *id.* at 137-43 (justifying criminal punishment as necessary to reject the offender's message demeaning her victim and replace it with a message of their equal human worth). Importantly, Professor Deborah Hellman argues that discrimination, such as racial discrimination, is wrong when it *demeans* another, a point to which I will return. DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 29-31 (2008). I am unclear about whether Hellman defines “demeaning” identically to my use here (though I think she does) because at points she defines demeaning as treating others with unequal *moral* worth, *see id.* at 29, whereas I distinguish between unequal moral worth and unequal *human* worth. To do the former is to impose disesteem; to do the latter is one way to show disrespect. See *supra* text accompanying notes 20-39.

¹²⁴ See Taslitz, *Civil Society*, *supra* note 81, at 338-39.

¹²⁵ See *id.* at 356 (“[W]hile each of us is of equal worth as a human being, entitled to rights that recognize that worth, we are not of equal *moral* worth, and the immoral part of wrongdoers' natures must be rejected without denying them status as full human beings.”).

¹²⁶ See Paul H. Robinson, *Empirical Desert*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 103 (manuscript at 41-49, on file with author) (arguing that the criminal law must heavily weigh popular notions of desert if rules of criminal liability are to maintain their special stigmatizing power). See generally PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995) (empirical study of Americans' notions of desert in the context of criminal punishment).

behavior as reflective of a person's fundamental nature.¹²⁷ Given the criminal law's expressive, moral educative role in condemning breaches of society's most strongly held norms, behavior seen as indicative of core moral dispositions—what psychologists call “personality” traits and folk wisdom labels “character”—is of great consequence.¹²⁸ Good moral behavior marks good persons meriting rewards; ill behavior marks bad persons deserving punishment.¹²⁹ Good and bad are not dichotomous variables but relative points on a spectrum.¹³⁰ In other words, criminal punishment marks offenders as deserving of various degrees of disesteem, with the degree turning on the severity of the harm done, the context, and the offender's state of mind.¹³¹ Criminal punishment assumes, furthermore, that this mark will change minds: society will in fact embrace the attitude of disesteem toward the offender.¹³²

This description of our criminal justice system is, I think, an accurate one. As I have argued elsewhere, I also think it is a desirable one.¹³³ I say this with full recognition that it is an approach fraught with danger. If poorly implemented or understood, it can lead to viewing offenders as so unworthy as to be irredeemably evil, thus more demon than human.¹³⁴ I have explained, however, that appropriate safeguards against abuse are feasible, though in practice too often ignored.¹³⁵ But whether I am right that a character-based retributive criminal justice system is a desirable one, it is the one we have,¹³⁶ and the risks of its abuses are precisely why, as I shall ex-

¹²⁷ See ZEHR, *supra* note 102, at 68-69.

¹²⁸ See Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 45-52 (2000) [hereinafter Taslitz, *Two Concepts*] (defending a variant of character-based morality as the most appropriate justification for criminal punishment). See generally Taslitz, *Myself Alone*, *supra* note 25, at 7-9, 31-34 (1993) (discussing “personality” and “character”).

¹²⁹ See Taslitz, *Two Concepts*, *supra* note 128, at 45-52.

¹³⁰ See *id.* at 52 (“Evil comes in different forms and degrees and, in a complex world, actions and persons are often likely to embody aspects of both good and evil.”).

¹³¹ See *infra* text accompanying notes 216-17 (illustrating how the type and severity of the harm done affects the depth of the offender's demeaning message and thus the type and degree of punishment deserved); see also HELLMAN, *supra* note 123, at 27-29 (arguing context and culture affect what conduct is and is not “demeaning”); Taslitz, *Myself Alone*, *supra* note 25, at 3, 10-14, 21-22 (grading evil based on mental state).

¹³² See Robinson, *supra* note 126, at 41 (“[S]ome of the system's power to control conduct derives from its potential to stigmatize violators[,] . . . [b]ut the system's ability to stigmatize depends upon [it] having moral credibility with the community.”). See generally PAUL ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW* 139-40, 175-89, 198-212, 247-60 (2008) (arguing for distributive justice based on “empirical desert,” that is, for punishment in accord with popular intuitions about resolution of specific types of case facts, as a guide to crafting criminal law doctrine because such an approach best promotes compliance with the law and thus potential offender deterrence).

¹³³ See Taslitz, *Two Concepts*, *supra* note 128, at 45-58.

¹³⁴ See Taslitz, *Civil Society*, *supra* note 81, at 361-62 (“The danger . . . is that the very punishment that denounces offenders' immoral character may foster a sense that they are outside the human community, that they are ‘monstrous.’”).

¹³⁵ See *id.* at 330-42 (suggesting principles and procedures for properly limiting character-based retributive punishment to avoid dangers of abuse).

¹³⁶ See *supra* notes 125-32 and accompanying text.

plain below, prosecutors have an obligation to take care that their role in this disesteem-imposition system is an appropriate one.¹³⁷

Acceptance that character-based communicative retribution turns on criminal law's expressive function does not explain, however, why only punishment sends the right message. Why not instead issue a public proclamation that the offender and the victim are of equal human worth but, in my variant, that the former merits less esteem than the latter? Philosopher Jean Hampton, a leading exponent of communicative retributive theory who focused solely on the equal human worth part of this moral equation, examined this question. She discussed a heinous case in which a white farmer hung from a tree a black farmhand and his four sons in burlap bags.¹³⁸ The farmer next sliced off one man's penis and stuck it in his mouth, then burned all five victims to death.¹³⁹ Hampton, relying on the distinction between intended degradation (the desire actually to reduce another's value) and diminishment (the message or appearance of reducing value), had this to say about the incident:

For a judge or jury merely to announce, after reviewing the facts of the farmer's murder of the farmhand and his sons, that he is guilty of murder and that they were his equal in value is to accomplish virtually nothing. . . . Even if we believe that no . . . degradation actually took place, to be strung up, castrated, and killed is to suffer a severe *diminishment*. This representation of degradation requires more than just a few idle remarks to deny.¹⁴⁰

Hampton's example is an extreme one, but it makes the point that actions sometimes do indeed "speak" louder than words. Hampton recognizes, and I agree, that there are punitive elements in far lesser punishments for lesser crimes. Probation, compelled drug and psychological therapy, and even a mandate to obtain a high school equivalency diploma can all, under the right circumstances, serve as punishment able to send a message adequate for society to hear.¹⁴¹ But that message always includes a component of at least temporary disesteem.¹⁴²

¹³⁷ See *infra* Part III.B.

¹³⁸ See Hampton, *supra* note 110, at 1675.

¹³⁹ See *id.*

¹⁴⁰ *Id.* at 1686. Cf. HELLMAN, *supra* note 123, at 49-51 (arguing that, according to some theories, *proportionate*, non-discriminatory punishment is never itself demeaning). *But cf.* George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1895-1907 (1999) (arguing that many of our current punishment practices, especially felony disenfranchisement, racial discrimination, and our treatment of sex offenders, do unduly demean offenders).

¹⁴¹ See generally Taslitz, *Civil Society*, *supra* note 81, at 322-23 (supporting the proposition that lower punishments are often adequate to serve a social goal).

¹⁴² See BRENNAN & PETTIT, *supra* note 19, at 311-13 (discussing the unavoidable positives, and the avoidable pathologies, of the disesteem-imposing function of the criminal justice system).

Critics object that there is no empirical evidence to prove that criminal convictions and sentences are the major source of disesteem involved here.¹⁴³ To the contrary, it is simply the commission of the evil act itself that accounts for nearly the full measure of disesteem, these critics argue.¹⁴⁴ I offer several brief responses. First, disesteem-imposition, even if not phrased quite this way, is a clear goal of our criminal justice system. The system assumes that conviction carries stigma with it and that the degrees of, and actual imposition of, various sentences reflect degrees of disesteem.¹⁴⁵ The burden of proving that the system fails in accomplishing this goal should lay with the critics.

Second, there is indeed significant empirical evidence—much of which I have reviewed in other fora¹⁴⁶—of the criminal justice system’s effectiveness as a disesteem-generating system. For example, there is experimental support for the idea of “delegated revenge”—that victims actually prefer a third party imposing harsh sanctions on offenders rather than the victims themselves doing so.¹⁴⁷ There is reason to believe that this preference arises from victims’ perception that the criminal conviction is a public expression of *society’s* affirmation of the victim’s worth as a valued member of the community.¹⁴⁸ This explanation is the flip side of the expressive theory of punishment: criminal sanctions affirm the victim’s worth by the communal imposition of disesteem on the offender.¹⁴⁹

Similarly, there is significant empirical data demonstrating that a criminal conviction is an obstacle to offenders getting jobs after completing their sentences.¹⁵⁰ Employers worry that the offenders are neither trustworthy nor desirable enough people to welcome into the workplace.¹⁵¹ For serious offenders, such as sex offenders, public protests against them even residing in certain neighborhoods seem to stem not only from fear but from “moral panics” in which the ex-offender’s mere presence in the community is

¹⁴³ See Ronald J. Allen, *Theorizing About Self-Incrimination*, 30 CARDOZO L. REV. 729, 735-36 (2009).

¹⁴⁴ See *id.* at 10-13.

¹⁴⁵ See *supra* text accompanying notes 93-107.

¹⁴⁶ I discuss this evidence in Andrew E. Taslitz, *Confessing in the Human Voice: A Defense of the Privilege Against Self-Incrimination*, 7 CARDOZO PUB. L., POL’Y, & ETHICS J. 121, 157-62 (2008), and in several forthcoming pieces.

¹⁴⁷ See generally Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059 (2007) (empirically examining and defending this point at length).

¹⁴⁸ See *id.* at 1062, 1086-91.

¹⁴⁹ See *id.* at 1062 (“[V]ictims regard punishment as an important device for restoring losses to their self-worth and social status, suffered as a direct result of their victimization[.] . . . the status-and esteem-restoring function of punishment explains and guides the (usual) preference for delegating revenge.”); *id.* at 1088-89 (arguing that empirical data now support the philosophers’ embrace of an expressive theory of punishment).

¹⁵⁰ See generally DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007).

¹⁵¹ See *id.* at 53-59.

viewed as a disease of the body politic.¹⁵² Ample studies of the extreme severity of American sentences, the harshness of prisons, the resulting disruption of family ties and neighborhood bonds, and the many “invisible punishments” that plague those who long ago paid their debt to society suggest not only that the system is effective in disesteem-generation but that it is *too* effective, imposing excessive and unduly lasting stigma and even crossing the line to demean those caught in its embrace, treating them as inhuman, monsters more than men.¹⁵³ Criminal law theorist George Fletcher put it this way:

Despite our efforts to overcome discrimination in the areas of race, gender, illegitimacy, and alienage (at least by state governments), we still yield to the need to stigmatize felons and to treat them as “untouchables.” They are the undercaste of American society. And among the untouchables, the worst are clearly the sex offenders, who are treated as inherently suspect for the rest of their lives.¹⁵⁴

The stigmatizing power of criminal conviction and punishment is so powerful,¹⁵⁵ as I explain further below, that even its mere *potential* corrodes an accused's social status. Bald accusations, arrests, and even trials resulting in acquittals rob the accused of whatever positive social status they have.¹⁵⁶ Mere proximity to the system is seen as a fall from grace, despite paeans to the presumption of innocence.

¹⁵² See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Punishment*, 51 HASTINGS L.J. 829, 868-70, 874-76, 882-87 (2000) (explaining moral panics and illustrating them with our treatment of juvenile sexual predators); see also ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 13-24 (2006) (summarizing the details of the new “sexual predator” laws).

¹⁵³ See *supra* note 96 (recounting the harshness of prison conditions). See generally MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE (2004) (summarizing and critiquing the severity of modern American criminal punishment policies); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc. M. Mauer & Meda Chesney-Lind eds., 2002) (collecting essays analyzing the “invisible punishments” stemming from criminal sentences, including social exclusion, denial of government benefits, loss of political voice, distortion of family ties, mutilation of children's psyches, immigration penalties, and debilitating or even fatal illness).

¹⁵⁴ Fletcher, *supra* note 140, at 1898.

¹⁵⁵ It is indeed likely that the “criminal moniker” is even more stigmatizing, for example, than the insanity label. *But see* CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 59 (2006) (noting that research indicates that “the criminal moniker” is likely less stigmatizing than the “double whammy” of the insanity label).

¹⁵⁶ See Andrew E. Taslitz, *The Duke Lacrosse Players and the Media: Why the Fair Trial-Free Press Paradigm Doesn't Cut It Anymore*, in RACE TO INJUSTICE: LESSONS LEARNED FROM THE DUKE LACROSSE RAPE CASE 175, 186-97 (Michael L. Siegel ed., 2009) [hereinafter Taslitz, *Fair Trial-Free Press Paradigm*] (summarizing media-coverage literature showing that publicizing mere arrests is highly stigmatizing).

iii. *Race, Disesteem, and Criminal Justice*

That race still serves as a stigmatic badge is a point supported by a vast literature. In a recent Washington Post-ABC News poll, three in ten Americans acknowledged harboring racial prejudice.¹⁵⁷ This is a staggering percentage given the conventional wisdom that many whites will not admit to such prejudice, even to pollsters, because doing so is generally no longer socially acceptable.¹⁵⁸ Other studies suggest that a common strategy employed by individuals is simple self-deception about their own racial prejudice.¹⁵⁹ Truly unconscious racial prejudice, even by whites thoroughly and consciously committed to racial equality, is likely even more widespread.¹⁶⁰

Professor Lu-in Wang describes unconscious racial prejudice as “discrimination by default.”¹⁶¹ This form of discrimination operates via three broad processes: situational racism, self-fulfilling stereotypes, and failures of imagination. “Situational racism” involves the increase in racially-biased behavior in “normatively ambiguous” situations, those in which the actor can readily and consciously justify his choices based on reasons other than racial bias.¹⁶² “Self-fulfilling stereotypes” are habits of thought based on preconceptions, habits that can channel our thoughts and behavior, filter what evidence we perceive, and color how we interpret that evidence—all without our ever being aware that such stereotypes are at work.¹⁶³ “Failures of imagination” describe our limited empathy for those who, through our stereotypes, we expect to suffer.¹⁶⁴ Such failures of imagination lead us to see stereotype-consistent explanations for the behavior of the oppressed, ignoring or minimizing stereotype-contradicting situational, institutional, or character-based explanations.¹⁶⁵ These mechanisms work so powerfully that

¹⁵⁷ See Jon Cohen & Jennifer Agiesta, *3 in 10 Americans Admit to Race Bias*, WASH. POST, June 22, 2008, at A1.

¹⁵⁸ Cf. CAROL TAVRIS & ELLIOTT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME)* 62-63 (Harcourt Books 2007) (2000) (“These days, most Americans who are unashamedly prejudiced 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’.”).

¹⁵⁹ See *id.* at 63-65 (noting that racial prejudice is often suppressed because of the cognitive dissonance it creates between harboring such prejudice and the harboring’s self-image as a moral, egalitarian, non-prejudiced person, but any stress or assault on that person’s self-esteem readily brings prejudice to the fore); Taslitz, *Racial Blindsight*, *supra* note 64, at 4 (discussing self-deception about racial prejudice).

¹⁶⁰ See LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* 4 (2006) (noting that whites often engage in racial discrimination unconsciously).

¹⁶¹ See *id.* at 4.

¹⁶² See *id.* at 17.

¹⁶³ See *id.* Cf. Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 410-33 (1996) [hereinafter Taslitz, *Patriarchal Stories*] (discussing “epistemological filters” and other unconscious processes affecting our preconceptions and behavior).

¹⁶⁴ See WANG, *supra* note 160, at 18.

¹⁶⁵ See *id.* at 18, 83-84.

even educating the most consciously anti-racist liberal about their existence and operation does little, if anything, to limit their effect or to encourage their bearers to recognize them at work.¹⁶⁶ These forces are likely to be particularly effective when individuals are asked to make judgments in specific cases—for example, whether *this* individual deserves a job—rather than on broad policy questions, such as those concerning the wisdom of affirmative action.¹⁶⁷ This combination means that, all else being equal, racial minorities, particularly African Americans, are likely as a group to hold a disproportionate share of society's stock of disesteem.¹⁶⁸

Critics of the psychological bias literature argue, however, that even racially prejudiced attitudes do not necessarily translate into discriminatory action.¹⁶⁹ But here again, ample evidence rebuts this argument,¹⁷⁰ especially in the criminal justice system. For example, the available studies show that a disproportionate number of those wrongly convicted are racial minorities.¹⁷¹ This is not a random outcome. Abundant evidence exists of an “other race effect”—the increased rate of eyewitness error in making cross-racial identifications, a rate particularly high where whites are asked to identify blacks.¹⁷² Likewise, evidence also suggests the existence of both conscious and unconscious racial profiling by the police; that is, that police are more likely to watch, investigate, and arrest racial minority group members than whites.¹⁷³ Police are also more likely to presume guilt when questioning

¹⁶⁶ See, e.g., CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 248 (2003) (discussing why helping jurors to recognize their unconscious assumptions and giving them counter-stereotypical ways to view a situation are important first steps in overcoming racial bias); TASLITZ, *RAPE AND CULTURE*, *supra* note 30, at 133 (explaining why such first steps are insufficient, and “subjects who view a prejudiced belief as wrong” must also be told by qualified experts how “it may nevertheless affect their judgments,” for only then can bias be reduced).

¹⁶⁷ Cf. Taslitz, *Patriarchal Stories*, *supra* note 163, at 399 (defending a similar point).

¹⁶⁸ Cf. McAdams, *supra* note 24, at 1044 (articulating a “status production” theory of race discrimination, using the construct of “status” to mean the aggregation of esteem judgments).

¹⁶⁹ See Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007) (summarizing the literature that criticizes psychological bias arguments and effectively refuting it).

¹⁷⁰ See *id.*

¹⁷¹ See Taslitz, *Wrongly Accused*, *supra* note 63, at 121-23 (summarizing the most important of these studies); Samuel Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545-51 (2005) (concluding that, in exonerations made between 1989 and 2003, race played an important role in eyewitness misidentifications in rape cases and that, for juveniles exonerated, over 90% were blacks or Hispanics—a disparity that could be due to chance, that might partly involve eyewitness misidentification in juvenile rape cases, but that also might stem from more coercive police interrogations, as 85% of juvenile exonerees in all cases who falsely confessed were African American); Karen F. Parker, Mari A. Dewees & Michael L. Radelet, *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 114, 114-28 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (concluding that each of four major empirical studies revealed that a disproportionate percentage of wrongful convictions involved racial minorities and noting that one study found that 57% of exonerees were black).

¹⁷² See Taslitz, *Wrongly Accused*, *supra* note 63, at 124-25.

¹⁷³ See Taslitz, *Redux*, *supra* note 64, at 109-18 (summarizing the empirical data on unconscious profiling, specifically the sociological and psychological research demonstrating

minorities, thereby eliciting defensive responses, which police interpret as deceptive; this in turn leads to harsher interrogation techniques, raising the risk of false confessions.¹⁷⁴ There is also some archival evidence that police are more likely to believe false tips when the tipster fingers blacks rather than whites, leading to more wrongful arrests.¹⁷⁵ Yet, once arrests are made, police are likely to blind themselves to alternative perpetrators, instead collecting evidence confirming their racially-biased suspicions.¹⁷⁶ Indeed, police officers' repeatedly believing that they have found such confirming evidence leads them to devote ever more resources to policing minority communities, continually raising the percentage of racial minorities ensnared in the criminal justice system.¹⁷⁷

Other criminal justice system actors—not only the police—seem to be subject to similar unconscious racial bias. Thus, white jurors in death penalty cases more readily believe that blacks will continue to be dangerous in the future, and white jurors are more likely to ignore mitigating evidence in such cases.¹⁷⁸ The jurors treat evidence of the defendant's bad character as more representative of the "true character" of her "kind" than are instances of good behavior.¹⁷⁹ White jurors also engage in what has been called the "ultimate [fundamental] attribution error."¹⁸⁰ The fundamental attribution error is the human tendency to attribute behavior more to individual character than to good or bad circumstances.¹⁸¹ Whites make this error with a vengeance when evaluating blacks, seeing all bad behavior by blacks as stemming from some fundamental flaw in their nature, from an irredeemably unworthy core rather than from an unfortunate situation.¹⁸² Furthermore, as at least one commentator argues, some whites are "regressive" racists able to accept egalitarian norms, *except* when their anger is aroused by racial

that, and how, white observers pay heightened attention to black faces, perceive them as sources of threat, and react with fear and distrust). See generally DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 16-30 (The New Press 2003) (2002) (documenting and explaining the extent of racial profiling by the police, which can be seen as one important consequence of the unconscious profiling common among people, whether they are laypersons or law enforcement).

¹⁷⁴ See Taslitz, *Wrongly Accused*, *supra* note 63, at 130-33.

¹⁷⁵ See Taslitz, *Redux*, *supra* note 64, at 133-35.

¹⁷⁶ See *id.* at 118-22.

¹⁷⁷ See *id.* at 122-24 (describing this "ratchet effect").

¹⁷⁸ See Sheri Lynn Johnson, *Race and Capital Punishment*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 121, 135-39 (Stephen P. Garvey ed., 2003).

¹⁷⁹ See *id.* at 135-39.

¹⁸⁰ See CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL-PSYCHOLOGICAL SYSTEM 203-09 (2005); Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, in INTERGROUP RELATIONS: ESSENTIAL READINGS 162, 162-73 (Michael Hogg & Dominic Abrams eds., 2001) (coining the term "ultimate attribution error").

¹⁸¹ See generally LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991) (constituting the seminal work on the fundamental attribution error).

¹⁸² Cf. Pettigrew, *supra* note 180 (describing generally this effect between "ingroups" and "outgroups").

insult.¹⁸³ Such insult occurs, for example, in a black assault upon a white victim, which strengthens racial stereotypes. This phenomenon helps explain the greater likelihood of a death sentence in such black offender/white victim situations.¹⁸⁴

Juvenile probation officers are likewise more likely to view black families as uncooperative, their misbehavior indicative of future dangerousness, and their problems due to deeply rooted character flaws.¹⁸⁵ Juvenile court judges seem to buy into these judgments, for young black males are again more likely than their white counterparts to be institutionalized.¹⁸⁶ There is disturbing new evidence of adult criminal court judges suffering similar bias. An archival study found that judges were more likely to mete out heavier sentences to those with stereotypically African American features than those without them.¹⁸⁷

Indeed, evidence of racial bias in decision making arises at every stage of the criminal process—from arrest, to the setting of bail, to the effectiveness of defense counsel, to guilty-plea outcomes, to sentencing.¹⁸⁸ Often

¹⁸³ See Johnson, *supra* note 178, at 138.

¹⁸⁴ See *id.*

¹⁸⁵ See MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 140-47 (2003) (summarizing studies showing: (1) that probation officers are more likely to write reports describing young black males' problems as due to deep-seated character traits than to write similar reports about whites, leading to recommendations of harsher black punishment; (2) that black *re-offenders* are later treated still more harshly because they were already institutionalized, yet that most extreme form of treatment seemingly failed to achieve rehabilitation; and (3) that these report-writing and sentencing observations remained true *even when controlling for the relative severity of black-white juvenile crime*); Taslitz, *Wrongly Accused*, *supra* note 63, at 127-28 (summarizing empirical data).

¹⁸⁶ See BROWN ET AL., *supra* note 185, at 140-47 (summarizing data and noting that one reason young black males are more likely to be institutionalized than are young white ones is that authorities *assume* that black juveniles cannot get adequate parental support). More generally, as Brown and his colleagues note, juvenile justice authorities are more likely to define black families as uncooperative than they are white families, and to favor black detention because they are more likely to attribute black youths' behavior to dangerousness, and white youths' law-breaking to situational pressures. See *id.*

¹⁸⁷ See William T. Pizzi, Irene V. Blair & Charles M. Judd, *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327 (2005). Some researchers have found no racial bias in sentencing considered in isolation. See, e.g., MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 79 (1995) ("From every available data source . . . the evidence seems clear that the main reason that black incarceration rates are substantially higher than those for whites is that black crime rates for imprisonable crimes are substantially higher than those for whites."). A better reading of the modern data is that pure race-based bias is geographically dispersed and modest, but that effects are much more substantial when the interaction of race with other factors like age, gender, and class is examined. See JUSTICE KENNEDY COMMISSION, *REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES* 54 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>; SHAUN L. GABBIDON & HELEN TAYLOR GREENE, *RACE AND CRIME* 182-90 (2005) (concisely summarizing the literature supporting a similar conclusion); THE SENTENCING PROJECT, *RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE* 1 (2003), available at http://www.sentencingproject.org/Admin/Documents/publications/rd_sentencing_review.pdf.

¹⁸⁸ See generally GABBIDON & GREENE, *supra* note 187 (documenting these effects at every stage of the system).

race and class interact to produce these results, but race plays a critical role, and disparities in offending rates do not adequately explain these differences.¹⁸⁹ Although little, if any, empirical work has been done specifically on unconscious prosecutorial racial biases (a topic to which I will return to later), it is hard to believe that such biases are not afoot. First, some of the racially-skewed outcomes—such as guilty-plea-bargaining-outcome differentials—cannot occur without prosecutorial support.¹⁹⁰ Second, other outcomes, such as biased sentences, are unlikely to occur absent the prosecutor's active support, or at least the prosecutor's non-resistance.¹⁹¹ Third, overburdened prosecutors often rely on the police or other justice system actors, rather than second-guessing them, reducing their role to the ratification of others' decisions.¹⁹² Fourth, prosecutors are human beings, subject to the same cognitive biases as the rest of us.¹⁹³

The reality or appearance of bias is, however, well-understood by minority communities. As the vast psychological literature on procedural justice effects shows, when a community perceives procedures as unfair, law-abidingness and willingness to cooperate with the police decrease.¹⁹⁴ These effects raise crime rates in minority communities, further strengthening the unconscious link between race and crime.¹⁹⁵ Moreover, "bystander effects" occur when the innocent suffer from the resulting deterioration of neighborhood services and safety, contributing to weakened job opportunities and furthering the impression of racial minorities as poor, uneducated, or dangerous *because of their own character failures*.¹⁹⁶

The stigmatizing effect of race alone in many facets of American life, and its contributing role in other facets, cannot fairly be denied. In the criminal justice arena, that stigmatization is magnified by a perceived race-dangerousness link.¹⁹⁷ Experimental data suggests, for example, that whites are

¹⁸⁹ See *supra* note 187 and accompanying text (supporting this point in the illustrative area of sentencing).

¹⁹⁰ See GABBIDON & GREENE, *supra* note 187, at 154-55, 213 (summarizing the plea-bargaining disparities literature).

¹⁹¹ In my practice as a prosecutor, I never once saw or heard of a judge giving a higher sentence than that requested by the prosecutor, though I am sure this happens in rare cases. See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 103-13 (2007) (explaining the enormous power that prosecutors hold to affect sentencing outcomes in the federal system).

¹⁹² In the run-of-the-mill case, prosecutors have neither the time nor the resources to conduct their own investigation, even through their small staff of office detectives, given the burden of increasingly crushing caseloads. See *id.* at 35 (noting that prosecutors with heavy caseloads devote "the most attention to the most serious cases"); *id.* at 39-40 (arguing prosecutors are often "willfully blind" to police misjudgments, errors, and abuses).

¹⁹³ See TAVRIS & ARONSON, *supra* note 158, at 128-29, 131-32, 147-52, 224, 264 n.8 (arguing that many prosecutor actions can be explained by just such common human biases).

¹⁹⁴ See Taslitz, *Redux*, *supra* note 64, at 124-28.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* at 128-30.

¹⁹⁷ See LEE, *supra* note 166, at 175-89 (describing unconscious police stereotyping of young black males as dangerous and explaining its connection to police use of excessive force).

more likely to notice race first, processing generalized racial features rather than the unique physical features identifying a person as an individual and not merely a group member.¹⁹⁸ Other research shows the increased involvement of the amygdala—which plays a role in identifying threat—when whites perceive black faces.¹⁹⁹ Two researchers explained the underlying cognitive process connecting these observations:

[T]he brain has a propensity to detect very early in the time course of perception, the presence of threat. Threatening objects (or faces) . . . are important information in the environment, and the . . . studies demonstrate that out-group members are perceived by the brain as threatening, and thus that threat alters the information extracted from the situation.²⁰⁰

Thus, much damage is done by the unconscious racial disesteem inflicted by the criminal justice system on racial minorities. All justice system actors have an obligation to work to right this wrong. That obligation should therefore fall as heavily—perhaps more heavily, given their duty to do justice—on prosecutors as on anyone else.²⁰¹ Before prosecutors can act, however, they must first have some sense of how they contribute to the problem.

B. *How Prosecutors Promote the Over-Supply of Racial Disesteem*

Rather than trying to survey in a single article all of a prosecutor's actions that may contribute to racial-stigmatization, I offer three examples here: (1) the charging decision; (2) guilty plea bargaining (which I call the "pricing decision"); and (3) publicity.

i. *The Charging Decision*

The charging decision is a complex one. Prosecutors must decide, in the first instance, whether to charge someone with any crime at all. Prosecutors may drop some cases not worth pursuing given limited resources.²⁰² Al-

¹⁹⁸ See Taslitz, *Redux*, *supra* note 64, at 110-11.

¹⁹⁹ See *id.* at 112.

²⁰⁰ See Otto H. Maclin & M. Kimberly Maclin, *The Role of Racial Markers in Race Perception and Racial Categorization*, in *PEOPLE-WATCHING: THE SOCIAL PSYCHOLOGY OF VISUAL PERCEPTION* (R. Adams, N. Ambady, K. Nakayama & S. Shimojo eds., forthcoming) (manuscript at 13, on file with author).

²⁰¹ See MODEL RULES PROF'L CONDUCT R. 3.8 cmt. (2007) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); DAVIS, *supra* note 191, at 8 ("[S]ince prosecutors are widely recognized as the most powerful officials in the criminal justice system, arguably they should be held more accountable than other officials . . .").

²⁰² See CENTER FOR PUBLIC INTEGRITY, *HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS* 14-15 (2003) [hereinafter *HARMFUL ERROR*] (noting numerous instances of harm from charges being filed despite inadequate proof); DAVIS, *supra* note 191, at 23, 31 (noting prosecutors' charging decisions are affected by caseload pressures); JOHN W. SUTHERS, *NO HIGHER CALLING, NO GREATER RESPONSIBILITIES: A PROSECUTOR MAKES HIS CASE* 67-

ternatively, they might reach a “pretrial probation,” sometimes called a “diversion,” program agreement with an offender.²⁰³ Such an agreement postpones charging to permit an offender the opportunity to prove she can stay out of trouble and to address recidivism risk factors by, for example, getting drug treatment or a high school diploma.²⁰⁴ If she successfully completes pretrial probation, the case against her is dropped, almost as if it had never been.²⁰⁵ The prosecutor’s power to set conditions for successfully completing pretrial probation gives her enormous clout in shaping a suspect’s life, at least in the short term.

If a prosecutor decides to proceed with a case, she must determine whether there is sufficient evidence to support a particular charge or charges. Having incomplete information at this stage of the prosecution may lead many prosecutors, in an abundance of caution, to charge as many offenses as their conscience will bear, a phenomenon dubbed by its critics “overcharging.”²⁰⁶ Prosecutors may also use the charging function to lay the groundwork for “wired pleas.”²⁰⁷ These pleas arise when prosecutors “charge third parties, such as family members, in order to pressure a defendant to cooperate.”²⁰⁸ In one well-known case, *United States v. Pollard*,²⁰⁹ the United States Court of Appeals for the District of Columbia Circuit upheld the validity of a plea entered into by the defendant primarily because the prosecutor had threatened to charge the defendant’s wife with a crime if he did not comply. As the court stated, “almost anything lawfully within the power of a prosecutor acting in good faith can be offered in exchange for a guilty plea.”²¹⁰

Prosecutors may also choose not to pursue a potential prosecution, to drop or reduce pending charges, or to recommend lenient sentences for informants who cooperate with the police in pursuing other offenders.²¹¹ Such cooperators may reveal information, or even testify about, past crimes.²¹² They also may agree to work undercover, wearing wires, doing drug deals, or otherwise participating in new criminal activity in an effort to ensnare

68 (2008) (discussing and illustrating factors affecting charging decisions, including the willingness to forgo charging a case lacking adequate proof).

²⁰³ See DAVIS, *supra* note 191, at 24.

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ See *id.* at 31; ABBE SMITH, CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER’S STORY 228 (2008) (“I have represented a handful of . . . clients I believed to be innocent. I have represented many clients *who were not guilty of the crime charged* . . .”) (emphasis added); HARMFUL ERROR, *supra* note 202, at 15 (“Charges should not be filed to use as leverage in plea bargaining, or to enhance a prosecutor’s political standing . . .”) (quoting New York City prosecutor Mark Cohen).

²⁰⁷ See ALEXANDRA NATAPOFF, “SNITCHING”: USING CRIMINALS TO MANAGE CRIME (forthcoming 2009) (manuscript at 40, on file with author).

²⁰⁸ *Id.*

²⁰⁹ 959 F.2d 1011 (D.C. Cir. 1992).

²¹⁰ *Id.* at 1021.

²¹¹ See DAVIS, *supra* note 191, at 52.

²¹² See *id.*

other lawbreakers.²¹³ In federal cases, in particular, there are tremendous incentives for suspects to cooperate. By doing so, they gain release from otherwise applicable statutory mandatory minimum sentences through a “5K1.1 letter” from the prosecutor recommending a downward departure from the Federal Sentencing Guidelines.²¹⁴ Prosecutors may also have some discretion concerning whether to charge crimes seeking mandatory minimums in the first place.²¹⁵ Likewise, as in the Jena Six case, prosecutors may often have some discretion as to proceeding against a youthful offender in juvenile or adult court.²¹⁶ Thus, the prosecutor’s charging decision may affect the entire course of the case—whether it is resolved by plea or a trial, by a harsh or lenient punishment, with increased risk of physical harm to the offender—no one likes a “snitch” —or not. But the charging decision independently has implications for the nature and degree of disesteem visited upon an offender.²¹⁷

The United States Supreme Court recognized this last point in *Rothgery v. Gillespie County, Texas*.²¹⁸ Rothgery was arrested for being a felon in possession of a firearm. He was promptly brought before a magistrate judge who apprised Rothgery of the charges against him, found probable cause to proceed based upon an affidavit submitted by an arresting officer, and set a low bail that Rothgery paid. The police based their arrest decision, however, on an erroneous record. Rothgery had indeed been *arrested* for a previous felony, but the felony charges against him had been dismissed after he successfully completed a diversionary (pretrial probation) program. Because Rothgery was not a convicted felon, he had committed no crime by possessing a firearm. The current charges against him should, therefore, have been dismissed. They were not dropped, due to a complex series of events that boiled down to a long delay in counsel being appointed to represent him—a delay that resulted in his indictment, re-arrest, and jailing on heightened bail that he could not pay. The issue before the Court was whether Rothgery’s Sixth Amendment right to counsel attached at his initial appearance before a magistrate judge, even though no indictment or information had yet been filed, and no prosecutor was yet involved in the case. The Court held that it did. In reaching its conclusion, the Court emphasized the stigmatic impact

²¹³ See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 647 (2004) (addressing drug deals, other criminal activity, and undercover work); NATAPOFF, *supra* note 207 (manuscript at 57-61, on file with author) (focusing on wiretaps, other electronic surveillance, and undercover work).

²¹⁴ See HARRY I. SUBIN, BARRY BERKE & ERIC TIRSCHWELL, *THE PRACTICE OF FEDERAL CRIMINAL LAW: PROSECUTION AND DEFENSE* 145-48 (2006). Even though the Guidelines are now technically “advisory,” in practice they still control in most cases. See *id.* at 146.

²¹⁵ See DAVIS, *supra* note 191, at 56-57.

²¹⁶ See FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 139-58 (2005) (analyzing the various approaches to when a juvenile may be tried as an adult).

²¹⁷ See, e.g., DAVIS, *supra* note 191, at 56 (noting that, after mandatory minimum legislation, prosecutors now retain “the lion’s share of the responsibility for the[] inequities” of “race, class, and other disparities” in charging).

²¹⁸ 128 S. Ct. 2578 (2008).

of charges being laid, regardless of whether “the machinery of prosecution was turned on by the local police or the state attorney general.”²¹⁹ The Court explained:

In this case, for example, Rothgery alleges that after the initial appearance, he was “unable to find any employment for wages” because “all of the potential employers he contacted knew or learned of the criminal charge pending against him.” . . . One may assume that those potential employers would still have declined to make job offers if advised that the county prosecutor had not filed the complaint.²²⁰

Corporations in the post-*Arthur Andersen* world likewise recognize the stigmatizing power of criminal charges.²²¹ The mere filing of such charges can send stock prices plummeting, destroying a business before it has any chance to defend itself.²²² To avoid such a calamity, corporations readily accept even the most onerous of “deferred prosecution agreements”—a form of corporate pretrial probation.²²³ Individual white-collar offenders and other middle-class suspects also fear the humiliation in their local communities caused by the filing of criminal charges.²²⁴ Even if individuals in some poor neighborhoods do not fear ostracism in the local communities in which they participate, they too will face such ostracism in the broader world.²²⁵ Indeed, as research in the area of pretrial publicity reveals, formal charges are not even needed.²²⁶ Ostracism flows from the mere fact of arrest—or even of *potential* arrest.²²⁷ Although charges may later be dropped or the offender acquitted, the stigma of association with the criminal process lingers.²²⁸

Does this stigma often extend beyond individuals to their racial groups? While little, if any, hard data exists, there is good reason to think that it

²¹⁹ *Id.* at 2589.

²²⁰ *Id.* (citation omitted).

²²¹ See Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions: Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 2 (2007).

²²² See *id.* at 2-4.

²²³ See *id.* at 2-24.

²²⁴ See Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 506 (1996) (“Corporate officials . . . belong to a social group that is exquisitely sensitive to status deprivation and censure.”) (internal quotation omitted); Eric Masaff, *Tightening the Reins on Pollution of Maryland Waters: Enforcing Maryland’s Criminal Environmental Statutes Against Out-of-State Polluters*, 37 U. BALT. L. REV. 457, 462 (2008) (arguing that the mere threat of criminal prosecution of at least certain white collar offenders is a powerful deterrent because of the resulting social and economic stigma).

²²⁵ See *supra* notes 93-102, 176-96 and accompanying text.

²²⁶ See Taslitz, *Fair Trial—Free Press Paradigm*, *supra* note 156, at 186-97.

²²⁷ See *id.*

²²⁸ See *id.* at 193-97 (discussing the stigma lingering over the Duke lacrosse players, who were proven to have been falsely charged with rape).

does.²²⁹ Notably, the same prosecutorial cognitive biases and institutional forces discussed earlier will still be at work. Those forces suggest a greater likelihood of whites getting more access to diversionary programs, lighter charges, fewer referrals of juveniles to adult courts, fewer mandatory minimums, and “sweeter” cooperation agreements than blacks get.²³⁰ These likely disparities may be the natural consequences of biases elsewhere in the system so that a vastly disproportionate percentage of all offenders will be racial minorities in the first place.²³¹ But the other effects mentioned, from an enhanced sense of black threat, to police and prosecutors’ tunnel vision, suggest that even otherwise identically situated whites and blacks face different probabilities of severe stigma from the charging process.²³² This is partly so because prosecutors have enormous discretion in charging decisions. Absent proof of consciously intentional racial or similar discrimination, the prosecutor can largely do as she pleases.²³³ Such a wide berth for discretion allows for the free play of *unconscious* biases for which there is currently little legal redress and which consciously well-meaning prosecutors will sincerely deny anyway.²³⁴

There is also ample anecdotal support for these conclusions, some of it particularly well summarized by professor and former DC Public Defender Service Chief Angela Davis. Davis writes about a grand jury’s decision not to indict her colleagues’ white client, twenty-five-year-old Georgetown University student David McKnight, on a murder charge.²³⁵ The much taller, heavier McKnight had hacked his fifty-five-year-old, five-foot tall, Vietnamese immigrant roommate, John Nguyen, with a machete, almost slicing him in half.²³⁶ The white prosecutor promptly invited defense counsel to

²²⁹ See DAVIS, *supra* note 191, at 39-40, n.31 (arguing that prosecutors’ frequent deference to the police in making charging decisions ratifies police racial profiling and that there is significant evidence of disparate racial impact in prosecution charging decisions concerning powder versus crack cocaine).

²³⁰ See *id.* at 35-39 (using hypotheticals to illustrate how well-meaning prosecutors can unconsciously make more lenient charging decisions when dealing with white rather than black offenders).

²³¹ See GABBIDON & GREENE, *supra* note 187, at 52, 216 (noting racially disproportionate representation of minorities in arrests for violent crimes as well as race/class and other race interactive factors contributing to sentencing disparities); MICHAEL TONRY, *supra* note 187, at 49-68, 97-104 (collecting data showing racially disproportionate arrests and convictions for drug offenses).

²³² Cf. Taslitz, *Redux*, *supra* note 64 (explaining the cumulative impact of the interaction of these effects on racial disparities in convicting the innocent).

²³³ See *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987) (declaring that a finding of an abuse of prosecutorial discretion based upon racial discrimination requires “exceptionally clear proof”); *Ashe v. Swenson*, 397 U.S. 436, 452 (1970) (describing prosecutorial discretion concerning the scope or initiation of criminal proceedings as “virtually unreviewable”); see also *United States v. Armstrong*, 517 U.S. 456, 458-61 (1996) (refusing to permit discovery in a civil case alleging discriminatory charging and sentencing decisions absent proof that similarly situated whites had *not* been prosecuted).

²³⁴ See DAVIS, *supra* note 191, at 35-37, 204 nn.28-29.

²³⁵ See *id.* at 19-20.

²³⁶ See *id.*

identify witnesses to testify before the grand jury on their client's behalf.²³⁷ Indeed, the prosecutor told McKnight's counsel that a good case could be made that McKnight had acted in self-defense.²³⁸ Moreover, as the prosecutor suggested, there should be witnesses willing to testify that Nguyen had a violent reputation, while McKnight had a peaceful one.²³⁹ The two experienced defense attorneys promptly provided the names of such witnesses willing to testify. The witnesses did just that, and the grand jury voted not to indict.²⁴⁰

Davis contrasts the McKnight case with that of Daniel Ware, a thirty-five-year-old African American high school graduate living in an impoverished neighborhood and periodically working as a manual laborer.²⁴¹ Ware got in an argument with a local gangster, Darryl Brown, well-known as a gun-toting, violent character who had done time for armed robbery and weapons offenses.²⁴² The argument arose because Brown allegedly threatened Ware's younger brother. The argument ended with Brown threatening retaliation against Ware, so Ware began carrying a knife. One day Brown reached inside his jacket and threatened Ware, who promptly stabbed Brown once in the chest, killing him. Davis, as Ware's defender, found eye-witnesses confirming her client's version of the events, as well as witnesses familiar with Brown's violent reputation.²⁴³ But, unlike in David McKnight's case, Ware's prosecutor never offered to present exculpatory evidence to the grand jury, which indicted Ware for first-degree murder.²⁴⁴ Yet Ware had at least as strong a self-defense claim as did McKnight.²⁴⁵ Davis recognized that many factors may have contributed to the disparity between the two cases and that neither prosecutor harbored racial ill will. Nevertheless, Davis suggested, the white prosecutor "may very well have unconsciously empathized with McKnight as a [white] young college student with a future, while simultaneously feeling no such empathy for Nguyen, a poor Vietnamese immigrant" whose future lay working in a restaurant kitchen.²⁴⁶ This unconscious influence, Davis argued, did its work unchallenged by savvy family members capable of agitating for the white McKnight's punishment. Davis's reading of the case is consistent with the sort of failures of racial empathy described in the cognitive science literature.²⁴⁷

Another tale makes the impact of the charging decision on racial stigma even sharper. Marcus Dixon, a football player at Pepperel High School in

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *See id.* at 19-20.

²⁴¹ *See id.* at 20-22.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *See id.* at 21-22.

²⁴⁷ *See* WANG, *supra* note 160, at 51-60.

Rome, Georgia, was an honor student with a 3.96 GPA, a score of over 1200 on his SATs, and a full scholarship to attend Vanderbilt University.²⁴⁸ Marcus, eighteen-years-old at the time, was charged with rape, sexual battery, aggravated assault, false imprisonment, statutory rape, and aggravated child molestation for a single incident involving a fifteen-year-old white girl.²⁴⁹ He claimed, however, that the sex was consensual, and a jury quickly agreed, acquitting him of most of the charges within twenty minutes.²⁵⁰ Nevertheless, the jurors convicted him of the two charges for which consent was irrelevant: statutory rape (sexual intercourse with a minor) and aggravated child molestation (sex with a minor that causes injury).²⁵¹ Georgia's penalty for the latter charge was a mandatory term of ten years imprisonment, a sentence that a prosecutor sought and the trial judge imposed.²⁵² At least one of the jurors was stunned, declaring that she never would have convicted Dixon of the charge had she known of the consequences.²⁵³ One of the legislators who had spearheaded the statute creating the penalty publicly declared that it was intended "to protect children from predators. Marcus Dixon was not a predator."²⁵⁴ The African American community clearly perceived the conviction and sentence as a group insult, and members of that community held "rallies and otherwise advocated for Marcus's release, alleging that the prosecution was racially motivated."²⁵⁵ The Supreme Court of Georgia ultimately reversed the conviction for aggravated child molestation, finding "a clear legislative intent to prosecute the conduct that the jury determined to have occurred in this case as misdemeanor statutory rape."²⁵⁶ The case prosecutor, John McClellan, admitted that he added the aggravated child molestation charge as a "backstop" in case Dixon was acquitted of rape.²⁵⁷ The prosecutor, who was most concerned with *forcible*, non-consensual rape, apparently did not ask himself whether the mandatory ten-year sentence for a "backstop" charge was appropriate.²⁵⁸ Nor did he consider whether the charge was truly consistent with legislative intent. He did not weigh the heightened public perception of group-based stigma likely to result from a conviction, playing into hoary stereotypes about oversexed black men who prey on white women.²⁵⁹ Nor did he pause to reflect upon whether

²⁴⁸ See DAVIS, *supra* note 191, at 32-33.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See *id.* at 32 (citing *Nightline* (ABC News television broadcast Jan. 21, 2004)).

²⁵⁵ *Id.* at 33.

²⁵⁶ *Dixon v. State*, 596 S.E.2d 147, 148 (Ga. 2004).

²⁵⁷ See *Nightline*, *supra* note 254.

²⁵⁸ See DAVIS, *supra* note 191, at 32 (quoting a state legislator who made a similar point about the legislature's intent).

²⁵⁹ See *id.* at 32-33 (making no mention of the prosecutor considering these matters); TALLITZ, RAPE AND CULTURE, *supra* note 30, at 8-11 (summarizing racial rape myths).

his own unconscious biases may have entered into the (over)charging decision.²⁶⁰

ii. Guilty Pleas: The Pricing Decision

a. Criminal Justice Markets

There is a branch of behavioral economics known as “fair pricing theory.”²⁶¹ This discipline addresses the emotional reaction of buyers to prices that they perceive to be unfair.²⁶² Its relevance here is that the United States Supreme Court and numerous commentators have come to think of the plea bargaining process in contract terms: an exchange of benefits and burdens in a market economy.²⁶³ The plea itself and any conditions imposed on it (for example, the offender agreeing to testify at trial against a more serious offender) can be thought of as the “price” the state charges the accused in exchange for a recommendation of more lenient treatment.²⁶⁴

I do not plan to address fair pricing theory here in detail, though I have done so in a forthcoming work.²⁶⁵ Instead, I want to summarize those of its teachings that are relevant to the guilty plea process to use as a framework for understanding how that process affects the disesteem economy.

The major relevant fair price theory teachings are as follows. First, prices that violate social norms of equity, equality, and need will be perceived as distributively unfair.²⁶⁶ “Equity” means getting what you pay for, “equality” means being treated the same as others similarly situated, and “need” means making special allowance for the disadvantaged.²⁶⁷ Second, pricing processes that deny the buyer voice and choice, transparency, and impartiality will be perceived as procedurally unfair.²⁶⁸ “Voice and choice” means having some real say in the pricing decision—a sense of control and of not being subjected to unfair advantage-taking.²⁶⁹ A buyer having a real choice among a range of viable alternatives and the freedom to exit one

²⁶⁰ See DAVIS, *supra* note 191, at 32-33.

²⁶¹ See Jon Luther, *Foreword to SARAH MAXWELL, THE PRICE IS WRONG: UNDERSTANDING WHAT MAKES A PRICE SEEM FAIR AND THE TRUE COST OF UNFAIR PRICING* x-xi (2008) (summarizing many of the teachings of fair price theory).

²⁶² See *id.*

²⁶³ See, e.g., *United States v. Mezzanato*, 513 U.S. 196, 208 (1994) (treating plea-bargaining as a market transaction in which each side buys and sells concessions akin to those negotiated in a flea market or bazaar, and approving prosecutor insistence on defense waiver of certain evidentiary protections as a prerequisite to attempting plea-negotiations); Richard Birke, *The Role of Trial in Promoting Cooperative Negotiation in Criminal Practice*, 91 MARQ. L. REV. 39, 70-79 (2007) (arguing that a steady supply of trial verdicts helps to set plea-bargaining market prices, including the “going rate” offered by the prosecutor).

²⁶⁴ See Birke, *supra* note 257, at 70-73.

²⁶⁵ See generally Andrew E. Taslitz, *Plea Bargaining and Fair Price Theory* (unpublished manuscript, on file with author).

²⁶⁶ See MAXWELL, *supra* note 261, at 26, 34-46.

²⁶⁷ See *id.* at 57, 59, 64.

²⁶⁸ See *id.* at 74 tbl.9.1.

²⁶⁹ See *id.* at 76.

potential deal for a better one gives the buyer some measure of voice.²⁷⁰ “Transparency” means that the negotiating process and outcome seem rational and understandable.²⁷¹ “Impartiality” means that favoritism does not affect the negotiating process.²⁷² Third, violations of these fairness principles trigger reciprocity norms—norms of retaliation sparked by anger at unfair treatment.²⁷³ The degree of anger and severity of the retaliatory response will depend on the permanence of the violations, the buyer's perceived ability to control them and to pin the violations on a particular individual seller, and the nature of the seller's motives.²⁷⁴ But the primary cause of retributive anger, as we have already seen, is the perception of being treated as less worthy than you are, partly meaning being disesteemed.²⁷⁵ The seller's unfair treatment of a buyer in bargaining both reflects the buyer's lower status and marks her with it. So understood, a contract involves not only an exchange of goods and services but also of esteem and disesteem.

If the guilty plea process seems to give offenders less of a benefit than they pay for obtaining it, treats racial minority offenders worse than white ones, and ignores disadvantages that account for the offender's plight and limited bargaining power, then offenders will see themselves as being denied distributive fairness. If, correspondingly, offenders perceive limited options and minimal voice in plea outcomes, view the process as neither rational nor understandable, and believe that they have not been treated impartially, they will view themselves as having been denied procedural justice. Furthermore, if they see the wrongs done to them as relatively permanent, their own control over and responsibility for the wrongs as minimal, and the prosecutor's motives as ill, offenders will react with retributive anger. Such anger will impede rehabilitation and encourage recidivism.²⁷⁶ Equally as important, the offenders' perceptions likely reflect, at least at the unconscious

²⁷⁰ See *id.* at 76. Cf. ALBERT HIRSCHMANN, EXIT, VOICE, AND LOYALTY (1970) (articulating the first economic analysis of the voice/exit choice but viewing the two as alternatives rather than variants of the same phenomenon).

²⁷¹ See MAXWELL, *supra* note 261, at 77-78.

²⁷² See *id.* at 80.

²⁷³ See *id.* at 42-44, 85-90, 96-97, 105; Dale T. Miller & Neil Vidmar, *The Social Psychology of Punishment Reactions*, in THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE 145, 145-72 (Melvin J. Lerner & Sally C. Lerner eds., 1981). See generally Jeffrey P. Carpenter, Peter Hans Matthews & Okombdi Ong'ong'a, *Why Punish? Social Reciprocity and the Enforcement of Prosocial Norms*, 14 J. EVOL. ECON. 407 (2004).

²⁷⁴ See MAXWELL, *supra* note 261, at 56-71; Margaret Campbell, *Why Do You Do That? The Important Role of Inferred Motive in Perceptions of Price Fairness*, 8 J. PRODUCT & BRAND MANAGEMENT 145, 145-53 (1999).

²⁷⁵ See *supra* text accompanying notes 118-142. Cf. SHADD MURUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 9, 74, 83, 144 (2001) (arguing that offenders who perceive themselves as lacking control over their lives, as victims of circumstance and unable to change their future, are least likely to be rehabilitated).

²⁷⁶ See *supra* text accompanying notes 189-91. See generally JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, URBAN INST., FROM PRISON TO HOME 10-13 (2001), available at <http://www.urban.org/url.cfm?ID=410098>.

level, those of the prosecutor and of broader society, making treatment of the offender during the bargaining process a mark of disesteem.²⁷⁷

These flaws in the plea-bargaining process may affect whites as well as blacks, though white ills are likely to be of a lesser degree and are less likely to be caused by, or to be perceived as caused by, their race. The ills suffered by blacks will likely be of greater severity, and are more likely to be, and *to be perceived as being*, the result of at least unconscious prosecutorial bias during the bargaining process. If this state of affairs indeed occurs, then it is racial disesteem, rather than simply individual disesteem, that the plea bargaining process will reflect and promote.²⁷⁸

Is this imagined state of affairs an accurate description of the real-world plea-bargaining process? My short answer, which I will now explain, is “yes.”

b. Fair Pricing of Guilty Pleas?

1. Why Guilty Pleas Are Often Unfairly Priced

The most obvious breach of fair pricing principles in the plea negotiation process arises from the often vast disparity in bargaining power between the muscular state and the typically weak defendant.²⁷⁹ This point has been made repeatedly in the literature, so I offer but a brief summary here. Notably, the defense has limited access to information, especially early in a case. For example, there is no general constitutional right to discovery.²⁸⁰ It is true that *Brady v. Maryland*²⁸¹ and *Giglio v. United States*²⁸² require prosecutors to produce direct and impeaching exculpatory evidence at trial. A broad reading of the more recent *United States v. Ruiz*²⁸³ case, however, suggests that no such evidence need be produced *before a guilty plea*.²⁸⁴ Statutory and related discovery rules in even the more generous jurisdictions are also timid next to civil discovery rules. For example, depositions are rare, and

²⁷⁷ See *supra* text accompanying notes 93-156 (analyzing communicative aspects of insulting behaviors and their role in the disesteem economy). See generally DJ Siltan, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 *LAW & INEQ.* 53 (2002) (discussing how unconscious racism in the criminal justice system leads to higher rates of arrest and recidivism amongst minorities).

²⁷⁸ See *supra* text accompanying notes 157-68 (defining “racial disesteem”).

²⁷⁹ See DAVIS, *supra* note 191, at 44 (“[I]n reality, the prosecutor always has the upper hand because of her control over the process.”); Timothy Lynch, *The Case Against Plea-Bargaining*, REGULATION, Fall 2003, at 24.

²⁸⁰ See *United States v. Ruiz*, 536 U.S. 626, 629 (2002).

²⁸¹ 373 U.S. 83, 87 (1963) (holding that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment).

²⁸² 405 U.S. 150, 154-55 (1972) (holding that due process required a new trial where a United States attorney failed to disclose evidence affecting the credibility of a witness).

²⁸³ 536 U.S. 626.

²⁸⁴ *Id.* at 629 (holding that prosecutor’s failure to disclose material exculpatory impeachment evidence to the defense prior to guilty plea did not thereby render the guilty plea involuntary, but leaving the right to disclosure of *direct* exculpatory evidence uncertain).

defense counsel cannot compel prosecution witnesses to give even informal pretrial interviews.²⁸⁵ Nor, in many jurisdictions, can defense counsel simply get the name of prosecution witnesses.²⁸⁶ Even jurisdictions with “open file” policies in practice provide the defense with little information relative to the civil system.²⁸⁷ “Altogether, the discovery rules pose massive barriers to determining the facts, assessing witness credibility, and developing prior to trial a well-informed estimate of the probability of conviction.”²⁸⁸ The result, concludes NYU law professor Stephen Schulhofer, is that “plea bargains are often struck on the basis of incomplete, highly imperfect information and little more than the attorney’s guess about what a trial might reveal if one were held.”²⁸⁹

Heavy caseloads result in assembly-line justice in which relatively little time is devoted to the run-of-the-mill case.²⁹⁰ Contrary to the position of the United States Supreme Court, the presence of defense counsel in such cases does not erase the disparity between the many poor, meagerly educated inner-city defendants and the far wealthier state.²⁹¹ Defense counsel are overworked and underpaid.²⁹² This under-resourcing creates incentives to settle cases in brief negotiations and with equally brief consultation with clients.²⁹³ The result is a system in which most cases end in pleas, promoting a case-processing “teamwork” approach, rather than true adversarialness, at least for the vast numbers of cases that never get to trial.²⁹⁴ Lawyers under time pressure and with inadequate information engage in stereotyping, starting to fit cases into categories, each of which has a “going rate.” Clients are not considered unique.²⁹⁵ They can often be too young, drug-addicted, or men-

²⁸⁵ *Brady*, 373 U.S. at 87-88; Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations: “Voluntary” Waivers of Constitutional Rights*, 23 CRIM. J. 14, 18-26 (2008) [hereinafter Taslitz, *Prosecutorial Preconditions*] (arguing that such a reading of *Ruiz* is the fairest reading of it).

²⁸⁶ See Stephen J. Schulhofer, *A Wake-up Call from the Plea-Bargaining Trenches*, 19 L. & SOCIAL INQUIRY 135, 137 (1994).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ See Taslitz, *Myself Alone*, *supra* note 25, at 18.

²⁹¹ See *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion and unlikely to be driven to false self-condemnation.”); Taslitz, *Prosecutorial Preconditions*, *supra* note 285, at 20-23 (summarizing social science literature demonstrating why *Bordenkircher* is wrong on this point).

²⁹² See AMERICAN BAR ASSOCIATION, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* 87-89 (2006) [hereinafter ABA, *ACHIEVING JUSTICE*].

²⁹³ See Schulhofer, *supra* note 286, at 137.

²⁹⁴ See *id.* (noting that this working environment “generates intense pressure to bypass whatever avenues for factual investigation remain open”).

²⁹⁵ See Taslitz, *Prosecutorial Preconditions*, *supra* note 285, at 21-23 (defending this point); see also Taslitz, *Myself Alone*, *supra* note 25, at 18 (explaining how the criminal justice system in practice reduces defendants to categories rather than unique persons).

tally-impaired to understand the consequences of their choices, and rarely get adequate time to consider them.²⁹⁶

It is true that prosecutors are also often fatigued and time-pressed.²⁹⁷ But they have the police's investigation efforts and forensic units, and ready access to a significant number of their own investigating detectives. In large cities, prosecutors have huge reservoirs of additional resources that they can draw on where needed.²⁹⁸ Furthermore, the law empowers prosecutors. In the federal system, as mentioned earlier, only prosecutors effectively have the power to free defendants from the spectre of mandatory minimum sentences, and cooperation with the prosecutor is the surest route for getting a sentence below the usual guidelines range.²⁹⁹ The risk of suffering grave punishment upon going to trial gives most defendants little leverage to insist upon a trial if they dislike a prosecutor's offer.³⁰⁰

Many prosecutors are eager to press their advantage. The law often permits prosecutors to refuse to attempt mere bargaining unless defendants first waive their rights to discovery of certain evidence, to challenge the admissibility of some evidence, to claim prosecutorial misconduct, to waive rights to receive later-discovered evidence of innocence, to waive rights to appeal, and even to object on grounds of ineffective assistance of counsel.³⁰¹ Defendants face grave trial risks if they refuse waiver; such a choice leaves trial as the only option.³⁰² Yet if defendants do waive these rights and no deal is reached, they have an even greater chance of conviction at trial. They have assisted in their own destruction.

This power disparity contributes to a client's distrust of both her counsel and the state.³⁰³ Negotiations are more likely to feel like coerced self-immolation than an opportunity for an effective voice in the plea-bargaining "pric-

²⁹⁶ See generally Abbe Smith, *I Ain't Takin' No Plea: The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11 (2007).

²⁹⁷ Former United States Attorney, former Colorado Springs elected District Attorney, and current Colorado Attorney General John W. Suthers explains: "For new prosecutors who operate in the high-volume traffic and misdemeanor courts, plea bargaining is an art form requiring patience, persuasion, creativity, and quick thinking. Disposing of up to a hundred cases per day leaves little time for extended negotiation." SUTHERS, *supra* note 202, at 84 (2008); see also *id.* at 85-86 (noting that docket congestion creates similar pressures even in felony cases).

²⁹⁸ See DAVIS, *supra* note 191, at 93-122 (summarizing and illustrating in particular the expansive power of the federal prosecutor). For this point, I am also drawing on my own experience as a state-level prosecutor in Philadelphia.

²⁹⁹ See *id.* at 103-13.

³⁰⁰ See Lynch, *supra* note 279, at 26 ("Plea bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their right to trial by jury."). Lynch quotes Chief Judge Young of D. Mass. as saying: "[T]oday we punish people—punish them severely—simply for going to trial. It is sheer sophistry to pretend otherwise." *Id.* at 27.

³⁰¹ See Taslitz, *Prosecutorial Preconditions*, *supra* note 285, at 14-19.

³⁰² See *id.* at 14-16.

³⁰³ J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 105-15 (1972) (discussing defendants' distrust of their public defenders).

ing” decision.³⁰⁴ Limited options, all harsh, mean no real choice, no chance to exit as a means of conveying dissent.³⁰⁵ When prosecutors press their power to the fullest, defendants (and even defense counsel) fear their weakness has led to advantage-taking.³⁰⁶ The sense of equity—of getting equal value for what you paid—is missing.³⁰⁷ Poverty, danger, and poor neighborhood educational opportunities may lead some defendants to see themselves as in need. Society is, perhaps, partly at fault for these defendants’ plight, yet the state offers them no “discount” for their suffering.³⁰⁸

Nor will the plea-bargaining process seem “transparent” (rational and understandable) to them.³⁰⁹ Sentencing guidelines, for example, are notoriously complex, especially at the federal level, as are many aspects of criminal procedure.³¹⁰ In routine cases, defense lawyers negotiate outside their client’s involvement or even presence.³¹¹ Consultation time about a plea with counsel can be so hurried as to leave the client with little real understanding of how or why a sentence was reached.³¹² At best, the client understands only that she will receive the “bargained-for” sentence.³¹³ The rote, mantra-like guilty plea colloquy reinforces the mystery of the process rather than diminishing it.³¹⁴

³⁰⁴ See Taslitz, *Prosecutorial Preconditions*, *supra* note 285, at 19-20 (discussing duress in plea bargaining).

³⁰⁵ See *id.* at 21-22 (summarizing the cognitive biases that make voluntary choice by a defendant offered a plea deal harsh); Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 163-82 (2007) (making a more elaborate defense of this point).

³⁰⁶ For a powerful description of such advantage-taking by prosecutors in a case where there was much evidence of the defendant’s innocence, see SMITH, *supra* note 206.

³⁰⁷ Cf. Hollander-Blumoff, *supra* note 305, at 168-69 (explaining why “time-discontinuing”—the tendency to undervalue *future* consequences—means that at the time a plea bargain is struck, the defendant may not fully appreciate how much she has lost and how little she has gained).

³⁰⁸ See DAVIS, *supra* note 191, at 50-52 (recounting the example of Erma Faye Stewart, “a poor African American woman with very limited education and even less understanding of the criminal justice system,” whom a prosecutor bullied into an extremely harsh plea based upon an informant later proven to have lied, after which the prosecutor “offered no assistance and expressed no regrets”).

³⁰⁹ See Taslitz, *Prosecutorial Preconditions*, *supra* note 285, at 21-23 (summarizing the cognitive biases and systemic flaws that make it hard for typical criminal defendants to understand plea deals fully, even when represented by counsel).

³¹⁰ See SUBIN ET AL., *supra* note 214, at 122-43 (summarizing sentencing guidelines’ complexity); *id.* at 316-481 (detailing the complexity of many other aspects of criminal procedure).

³¹¹ This has been my experience and that of the many prosecutors and defense counsel whom I have known in over twenty-five years of practicing and teaching criminal law.

³¹² See Daniel D. Barnhizer, *Bargaining Power in the Shadow of the Law: Commentary to Professors Wright and Engen, Professor Birke, and Josh Bowers*, 91 MARQ. L. REV. 123, 157-60 (2007) (noting that non-white collar criminal defendants are not as involved with their lawyers as are many civil law clients and that caseloads for run-of-the-mill cases are so heavy that defense counsel must negotiate as many pleas as she can as quickly as possible).

³¹³ See generally Hollander-Blumoff, *supra* note 305 (detailing criminal defendants’ limited understanding of plea deals).

³¹⁴ See SUBIN ET AL., *supra* note 214, at 185-92 (reproducing an illustrative guilty plea colloquy in federal court).

Moreover, defendants see their lawyers negotiate with a particular person—a specific prosecutor. Whatever willingness offenders might have to take responsibility for their actions is likely to be dampened by perceived abuses by their very human adversary, who is backed up by (and linked to) the power of the state, including the police, whom the client might already hold in contempt.³¹⁵ The price imposed on the client is not temporary, either. It may last five, ten, twenty years, even a lifetime.³¹⁶ The client will likely attribute ill motives to the state and be angry.

2. *The Raced Impact of Unfairly-Priced Guilty Pleas*

Perceived disparate racial treatment from profiling, racially biased sentences and verdicts, and other sources detailed above likewise violates equality norms.³¹⁷ Merely being in courtrooms and prisons where a black offender sees a sea of nearly all black faces must raise suspicions that something is amiss. Offenders' or suspects' retributive anger will be one factor raising the risk of recidivism.³¹⁸ But their local communities are fully aware of the biases and abuses suffered by individuals.³¹⁹ The communities desperately want safety, but not at the price of biased, otherwise flawed procedures; the frequent hassling of the innocent; the undue harshness of penalties; and the ill community impacts of neighborhoods denuded of many young men, and filled with others whose criminal records leave them with little hope for useful employment.³²⁰ Neighborhoods deteriorate further when these factors are present, as does respect for and cooperation with the law, and crime rises as procedural justice theories suggest.³²¹

All this in turn reinforces a popular linkage between skin color and crime. Disesteem reigns, not just for the individual offenders but for others of her race and class.³²² Political scientist Murray Edelman explains: “[i]t is common and easy to define various kinds of disadvantaged groups as inferior, dangerous, unworthy, or even nonhuman.”³²³ Such labels, argues Edelman, seem necessary to justify continuing their unequal treatment and

³¹⁵ For a summary of evidence of racial minority communities' general distrust of the police, see Taslitz, *Respect and the Fourth Amendment*, *supra* note 39.

³¹⁶ See The Sentencing Project, *Comments and Recommendations Submitted to the Justice Kennedy Commission of the American Bar Association* (Nov. 5, 2003), http://www.sentencingproject.org/Admin/Documents/publications/sl_comments_kennedycommission.pdf (summarizing the ways in which federal sentencing practices are unduly harsh).

³¹⁷ See generally GABBIDON & GREENE, *supra* note 187 (cataloguing the various racial biases at each step in the criminal justice process).

³¹⁸ Taslitz, *Prosecutorial Preconditions*, *supra* note 285, at 24-25.

³¹⁹ See Taslitz, *Respect and the Fourth Amendment*, *supra* note 39, at 25-26.

³²⁰ See Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From “Elia to the Internment,”* 70 *FORDHAM L. REV.* 2257, 2259-62 (2002).

³²¹ See Taslitz, *Redux*, *supra* note 64, at 126-33 (discussing procedural justice research and its relevance to racial bias in the criminal justice system and the resulting ill bystander effects).

³²² See *id.* at 126-30 (discussing race-crime link); *supra* text accompanying notes 127-45 (discussing forces contributing to racial disesteem).

³²³ MURRAY EDELMAN, *THE POLITICS OF MISINFORMATION* 60 (2001).

intensifying their disadvantage.³²⁴ Crime plays a special role in this labeling process, says Edelman, a “cover” for the often subconscious playing out of racial and class prejudice in the actions of police, prosecutors, judges, and juries.³²⁵ “Consciously and probably more often subconsciously, criminals are merged with others who are feared or resented: color minorities, religious minorities, ideological minorities, ethnic minorities, and especially the poor.”³²⁶ For some people, criminal justice institutions represent fairness and safety, but for the oppressed minorities, these institutions are symbols of unequal status and power.³²⁷ The result of this labeling process and division of worldviews is to divide society into those presumed respectable and those presumed the contrary.³²⁸ Indeed, minority groups may compete among themselves over who gets to be in the highest rungs of the lowest part of the ladder of social esteem, while majorities may avoid minorities, to the extent they can.³²⁹ Even middle-class whites working with blacks of the same class usually live in different neighborhoods and rarely socialize or form close friendships outside the workplace.³³⁰ This polarization of the population makes common cause with, and on behalf of, racial minorities hard. That absence of joint political action further promotes differing worldviews and group polarization—“us/them” thinking.³³¹

Most racial minority group members do not, however, engage in crime.³³² Many such individuals struggle to work and get by, but often see obstacles to their own success while watching the wicked prosper. Edelman concludes:

Opinions about social status and about claims that particular groups are especially worthy of esteem or of suspicion or contempt tend to persist and be exaggerated even if there is clear evidence that the claims should be discounted. Working-class people or the poor typically have abilities and virtues that win them little advantage or esteem, for example. They may be far more generous to other disadvantaged people than elites are, may be taxed more onerously, or may do work that is of greater benefit. Elites

³²⁴ *See id.*

³²⁵ *See id.* at 60, 117.

³²⁶ *Id.* at 117.

³²⁷ *See id.* at 121.

³²⁸ *See id.* at 117; CHARLES TILLY, CREDIT AND BLAME 53-60 (2008).

³²⁹ *See* ABEL, *supra* note 79, at 7-23; EDELMAN, *supra* note 323, at 117-22; TILLY, *supra* note 328, at 102-06.

³³⁰ *See* EDELMAN, *supra* note 323, at 118-19; Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47, 68-70 (2007).

³³¹ *See* EDELMAN, *supra* note 323, at 117; SUNSTEIN, *supra* note 50, at 69-76 (explaining group polarization); TILLY, *supra* note 328, at 53-60. *See generally* DAVID BERREBY, US AND THEM: UNDERSTANDING YOUR TRIBAL MIND (2005).

³³² U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008, at 202 tbl.318, 212 tbl.339 (2008), available at <http://www.census.gov/prod/2007pubs/08abstract/law.pdf>. *See also* William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1802 (1998).

may [sometimes] be corrupt, self-seeking, or inept at what they claim to do, but they nevertheless experience little or no blame as a result.³³³

The reaction of elites and subordinate groups alike to the criminal justice system's role in perpetuating racially skewed distributions of esteem and disesteem can be complex. A study of order-maintenance policing in New York City—a police approach requiring enforcement, including arrest, of even the most minor offenses—makes the point.³³⁴ The data show that *within* every jurisdiction type—urban, suburban, rural, poor—white defendants do better than minority defendants.³³⁵ As law professor Josh Bower explains: “[M]inorities were convicted and sent to jail more frequently, they received longer jail sentences than whites, and they were offered fewer ACDs [pretrial probations].”³³⁶ But across jurisdictions a different pattern emerged. For “quality of life offenses”—annoying, minor crimes—parents are likely to be particularly incensed at their children suffering serious punishments.³³⁷ In poor, urban, minority areas, residents usually do “not . . . wield terrific electoral clout.”³³⁸ Nevertheless, they have the power of resistance—of non-cooperation with the police, anger, looking away from offenses they do observe—powers that procedural justice research suggests they will use.³³⁹ On the other hand, they are less likely to resist so openly and vigorously when serious, violent offenders are punished because, whatever costs this may impose on the community, it leads to some apparent gains as well in neighborhood safety.³⁴⁰

Police cannot ignore growing community pushback. They need some base level of community trust, however small, to act effectively.³⁴¹ The data show how the system accommodated this tension: police still arrested minor offenders with previously relatively clean criminal records at high rates, but prosecutors decreased sentences dramatically upon conviction in poor urban areas.³⁴² Such sentencing decreases did not occur in majority white neighborhoods.³⁴³ The odd result was that most whites living in white areas suffered harsher sentences than blacks living in black areas, albeit for *minor crimes only*, regardless of other circumstances.³⁴⁴ Bowers calls this “grass-

³³³ EDELMAN, *supra* note 323, at 55.

³³⁴ For a scathing critique of order-maintenance policing, see generally BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001).

³³⁵ Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 118 (2008).

³³⁶ *Id.*

³³⁷ *See id.* at 110-12.

³³⁸ *Id.*

³³⁹ *See id.*; Taslitz, *Redux*, *supra* note 64, at 108-09 (discussing effects of denial of procedural justice).

³⁴⁰ *See* Bowers, *supra* note 335, at 111-12.

³⁴¹ *See id.*; Taslitz, *Respect and the Fourth Amendment*, *supra* note 39, at 25-26.

³⁴² Bowers, *supra* note 335, at 111-19.

³⁴³ *See id.* at 116-17.

³⁴⁴ *See id.* at 118.

roots plea bargaining”—community resistance alters going rates in individual cases.³⁴⁵

Absent such pushback, of course, punishment of racial minorities is likely to stay significantly harsher for minorities than whites. In Bowers' words: “[I]t seems that when prosecutors offer lenient prices of their own volition, they typically exercise that kind of discretion to the benefit of white defendants.”³⁴⁶ Moreover, disparate treatment of racial minorities in minority neighborhoods relative to whites seems to continue apace.³⁴⁷ Given these minority-biased disparities, the lack of publicity for minority neighborhoods getting a break for minor cases, the minor nature of those cases, and the continued impact of the various cognitive biases and institutional forces discussed throughout this Article, it is unlikely that this modest “grassroots plea bargaining” will do much to moderate the ill effects of most prosecutorial bargaining practices on racial disesteem.³⁴⁸ However, the grassroots model may contribute to early thinking about esteem-informed systemic reform that I hope to spark in a brief discussion of the subject in this Article's conclusion.

iii. *Publicity Strategies*

Prosecutors' use of publicity as a way to promote disesteem is important, yet it can be addressed briefly because the central points are not in dispute. Most criminal cases escape media coverage.³⁴⁹ Pre-trial publicity is, therefore, usually local, limited to the friends, family, and neighborhood of the accused and the victims, passed along largely by word-of-mouth. In the subset of cases that do receive media coverage, however, the coverage is usually heavily biased against the defendant.³⁵⁰ This occurs for a variety of reasons, not the least important of which is that police and prosecutors have far more access to information early in a case than does the defense, so that law enforcement's version of events is what makes the evening news.³⁵¹ Moreover, the press is dependent upon law enforcement for rapid access to information needed to make deadlines, especially early in the case.³⁵² Accordingly, the press pays a high cost in reduced access if it slants coverage in ways disliked by law enforcement, including prosecutors. Although a variety of complex factors affect the extent to which the public attends to and is

³⁴⁵ See *id.* at 87.

³⁴⁶ *Id.* at 119.

³⁴⁷ See *id.* at 118-20.

³⁴⁸ See generally David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97 (2007).

³⁴⁹ JON BRUSCHKE & WILLIAM E. LOGES, *FREE PRESS VS. FAIR TRIALS: EXAMINING PUBLICITY'S ROLE IN TRIAL OUTCOMES* 81, 105 (2004).

³⁵⁰ See Taslitz, *Fair Trial-Free Press Paradigm*, *supra* note 156, at 182-86 (summarizing empirical data on this point).

³⁵¹ See *id.* at 183-84.

³⁵² See *id.* at 184.

affected by media crime coverage, strong evidence suggests that there are often significant effects detrimental to the accused.³⁵³ In high-profile cases with long time spans, the defense may over time be able to offer a counter-story, but early media coverage may have done much damage to an accused's reputation along the way—damage that may not be entirely undone even by an acquittal.³⁵⁴ Where researchers disagree is over the impact of press coverage on trial outcomes. Pessimists believe that mechanisms that include aggressive *voir dire*, sequestration, cautionary jury instructions, and perhaps even venue change will do little to improve trial fairness, while optimists believe the opposite.³⁵⁵ But even a fair trial followed by an acquittal does not necessarily erase the damage done to the accused's esteem.³⁵⁶

A conviction, of course, magnifies disesteem, but where the trial was a fair one, that is how it should be.³⁵⁷ In any case, disesteem imposed upon the individual for her wrongful actions never justifies imposing resulting disesteem upon her racial group.³⁵⁸ Yet ample empirical evidence suggests that, at least in racially charged cases, that may be just what happens.³⁵⁹ Moreover, even subconsciously racially tinged cumulative media coverage—such as showing more blacks in “perp” walks; broadcasting black faces in connection with violent crimes, white faces for non-violent ones; covering the causes of “ghetto” and racial gang violence—can help to associate racial group membership with the worst of crimes.³⁶⁰

Ethics rules do govern the proper scope of prosecutors' statements to the media in individual cases.³⁶¹ The rules may too often be honored in the

³⁵³ See *id.* at 186-87. Cf. BRENNAN & PETTIT, *supra* note 19, at 311 (discussing “unbalanced” publicity in criminal cases distorting disesteem market regulation efforts).

³⁵⁴ See Taslitz, *Fair Trial-Free Press Paradigm*, *supra* note 156, at 186.

³⁵⁵ See *id.* at 186-90.

³⁵⁶ See *id.* at 182-83, 191-97 (illustrating this point in the context of the Duke lacrosse players' rape case).

³⁵⁷ See *supra* text accompanying notes 109-24 (addressing the sometimes positive role of disesteem-imposition by the criminal justice system and the disesteem-magnifying effect of a guilty verdict).

³⁵⁸ See *supra* Part II (defending this point).

³⁵⁹ See ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 78-93 (2000). Entman and Rojecki conclude:

The racial stereotyping of Blacks encouraged by the images and implicit comparisons to Whites on local news reduces the latter's empathy and heightens animosity, as demonstrated empirically by several experimental studies. To the extent local television news thereby undermines the fragile foundations of racial comity, it could reduce apparent and real responsiveness of White-dominated society to the needs of poor minorities, especially Blacks. The result, in turn, is continued employment discrimination and government unresponsiveness to the urban job loss and economic dislocation that has so traumatized the inner city—and consequent breeding of crime.

Id. at 91 (citation omitted).

³⁶⁰ *Id.* at 81-86. See generally Tarso Luís Ramos, *L.A. Story: Who Gains from Framing Gang Attacks as “Ethnic Cleansing”?*, *COLORLINES*, July-Aug. 2007, at 33, 33-36; David Shaw, *Negative News and Little Else*, *L.A. TIMES*, Dec. 11, 1990, at A1.

³⁶¹ See MODEL RULES OF PROF'L CONDUCT R. 3.6, 3.8 (2007).

breach, and do not address cumulative racial group biases, conscious or otherwise, fostered by prosecutors' comments.³⁶² Few prosecutors would consciously seek to fan racial bias, though there are a small number of glaring exceptions.³⁶³ But neither the ethics rules nor hurried legal practice require, or even encourage, prosecutors to give thought to the broader racial impact of their words to the press—though many careful prosecutors likely try to do so.³⁶⁴ Furthermore, prosecutors simply cannot control the media statements of many other criminal justice system actors, from victims, to interest-group commentators, to potential jurors. First Amendment rights also limit what can be done to restrict either these voices or the prosecutors'.³⁶⁵ Nevertheless, the risks of racial harm seem sufficiently high so as to counsel extreme prosecutorial caution in dealing with the press, not only in individual cases but also in the overall tenor of the comments flowing from various assistants in a prosecutor's office. Even if other societal forces may explain much of the media's racial bias in criminal cases, prosecutors should not contribute to the worsening of the problem.

iv. *Summing Up*

Because one function of the criminal justice system is to impose disesteem on individuals, there will always be a demand for disesteem-generation by the state. Moreover, because the criminal justice system purports to generate a particular type of disesteem—one marking serious moral harms done to the public—it is the broader public that will generate this demand. Furthermore, because of endemic institutional and unconscious society-wide forces, much of this demand—usually “virtual,” subconscious demand—will be to visit disesteem not merely upon the individual but upon her racial group, should that group be one in the minority and have a recent or long-standing history of being racially stigmatized. Finally, because most prosecutors are elected—and even the appointed ones rise at least partly through local politics—the demand for criminal justice system-generated racial dis-

³⁶² See *id.* (containing no references to race-bias); Taslitz, *Fair Trial–Free Press Paradigm*, *supra* note 156, at 191-97 (offering Duke rape case as an infamous example of the rules being honored in the breach). But see MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. (2007) (declaring that certain expressions of racial bias by lawyers, if prejudicial to the administration of justice, may violate a rule that itself never mentions race). This is a relatively toothless aspirational comment that, while admirable in spirit, is likely to address only the most extreme, overt, and conscious racist appeals by prosecutors, rather than the far more subtle issues of racial esteem discussed here.

³⁶³ See Taslitz, *Fair Trial–Free Press Paradigm*, *supra* note 156, at 175-76, 193.

³⁶⁴ Cf. SUTHERS, *supra* note 202, at 102-08 (describing one conscientious prosecutor's struggles to deal with the media in a way that is fair to them, the broader public, and the defense).

³⁶⁵ See Taslitz, *Fair Trial–Free Press Paradigm*, *supra* note 156, at 197-209.

esteem will also be at least partly local, varying in nature and degree from one geographic area to another.³⁶⁶

This demand for racial disesteem will be for disesteem services. Prosecutors are important providers of those services. As we have seen, their decisions on whether and what to charge, how to negotiate plea deals and for what end, what to say to the press, and what sentences to seek can have profound consequences in contributing to racial disesteem. The extreme example of the Jena Six may reflect a broader culture of racial disesteem in Jena as a community. The mere existence of the “white tree,” the use of images of lynching in response to black student dissent, and the inter-racial violence spawned in the wake of these events all support this (informed) speculation. If this is correct, then prosecutor Reed Walters could not have been elected if his actions were not expected to promote some locally desired level of criminal justice system disesteem-generation. I am not suggesting conscious or overt racial bias by either Walters or the white Jena community. But, as the review of the economy of racial disesteem above explains, a strong system of disesteem market exchange can occur via entirely unconscious processes.

Prosecutors are, however, more than mere generators of racial disesteem in geographically and topically local economies of disesteem. They also serve as indirect regulators of broader economies of racial disesteem. Partly because of the special expressive power of the criminal justice system, racial group members start the daily struggle for esteem at a disadvantage. They may be marked with some measure of disesteem simply because of their racial group membership and find it harder to gain esteem by their actions for the same reason. By altering the initial distribution of esteem and disesteem themselves and of esteem and disesteem services, and by making market exchanges of all these things “stickier” for racial group members—that is, by slowing exchange and making it more costly—racial group members find competing for *individual* esteem particularly hard.³⁶⁷ Even if one accepts the ethic of equal opportunity, this hardly seems a model consistent with that ethic. In light of these observations, what, if anything, should a well-meaning prosecutor do? Space constraints limit the answer I can give here, but I offer some brief observations concerning both parts of this question: (1) Are prosecutors obligated to do anything at all?; (2) If yes, what, at a minimum, should that be?

³⁶⁶ See SUTHERS, *supra* note 202, at 109 (noting service both as a locally elected prosecutor and a federally appointed one); *id.* at 116 (“When you accept the president’s nomination to be U.S. attorney, you know your tenure is tied to his and that your wonderful job will come to a relatively quick conclusion.”). See generally Sheila Vera Flynn, *A Complex Portrayal of Social Norms and the Expressive Function of Law*, 36 UWLA L. REV. 145 (2005).

³⁶⁷ Cf. CHIP HEATH & DAN HEATH, *MADE TO STICK* (2007) (summarizing the psychological and social forces explaining why some ideas “stick” in our culture, surviving challenges from competitors and thereafter resisting change).

IV. PROSECUTORS' OBLIGATIONS

A. *Modified Do-Justice Adversarialism*i. *Adversarialism Defined*

The current ethical model for prosecutors is what I call Do-Justice Adversarialism. Adversarialism is a familiar model. Lawyers for each side serve as advocates for their respective client's positions. Each lawyer's goal is to maximize the gain for her side.³⁶⁸ "Gain" is often, though not always, measured in significant part by things that can be quantified: money; years in prison; length of time subject to an injunction.³⁶⁹ Within broad ethical limits prohibiting, for example, outright lies, conflicts of interest, criminal activities, or overt appeals purely to high-wrought emotions or to racial or similar biases, each side in the adversarial war should do all that she can to win.³⁷⁰ Moreover, combat focuses primarily on the individual case and the individual client, rather than on the overall gain for some "cause" or another on each side, or on net social gain, though there are variants on this model (such as class actions and "cause lawyering") not relevant here that may vary somewhat this portion of the central model.³⁷¹ The combat of adversaries over individual disputes is, however, thought to maximize *societal welfare* in the aggregate and in the long run.³⁷² Adversarialism is thus consistent with free market principles of an "invisible hand" moving self-interested parties toward serving an overall social good that they never intended.³⁷³

³⁶⁸ See TASLITZ, RAPE AND CULTURE, *supra* note 30, at 103-04 (describing the nature of the adversary system); Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1594-1601 (2006) [hereinafter Taslitz, *Temporal Adversarialism*] (describing the ideologies, benefits, and costs underlying legal adversarialism and the broader political adversarialism that supports it).

³⁶⁹ Cf. TASLITZ, RAPE AND CULTURE, *supra* note 30, at 103 (describing the adversary system as a zero-sum game).

³⁷⁰ Cf. *id.* at 103-04; see, e.g., N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY Canon 7 (2007), available at <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf> ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").

³⁷¹ Cf. TASLITZ, RAPE AND CULTURE, *supra* note 30, at 103 ("[W]inning is all, and devotion to the client is alone what matters."). See generally RACHEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 23-46 (2004) (describing the identifying features of class actions); AUSTIN SARAT & STUART A. SCHEINGOLD, *CAUSE LAWYERS AND SOCIAL MOVEMENTS* (2006) (discussing special nature of various types of cause lawyering).

³⁷² See Taslitz, *Temporal Adversarialism*, *supra* note 368, at 1594-1601 (describing adversarialism's purported social benefits).

³⁷³ See TASLITZ, RAPE AND CULTURE, *supra* note 30, at 103-05 (describing the "market metaphor" of the adversary system); ADAM SMITH, *THE THEORY OF THE MORAL SENTIMENTS* 184-85 (Liberty Classics 1982) (1759) (coining the term "invisible hand" to capture how markets move society toward a greater overall good likely never intended by the individual market participants).

Simply stated, if each side in each case fights hard, within broad rules of “fair play,” the market for justice will ferret out truth, however it is defined.

ii. Doing Justice

Prosecutors, especially at trial, are indeed expected to embrace the adversarial model.³⁷⁴ But they have another, competing obligation—to “do justice”—that may require tempering adversarial zeal.³⁷⁵ The meaning of the obligation to “do justice” is ambiguous and disputed.³⁷⁶ In theory, the obligation has radical implications, for it suggests that prosecutors owe allegiance not merely to a client’s narrow interests but to a broader systemic ideal.³⁷⁷ Such an allegiance implicitly recognizes that the free market for justice will fail to achieve its goals in the criminal context if it involves the same degree of relatively unregulated, blind competition for victory as in the civil context. That failure, the do-justice obligation further suggests, is not due to criminal defense counsel’s role but rather to the state’s relatively greater access to resources and the power of the prosecutor as representative of the state and its people.³⁷⁸ It is thus *the prosecutor’s* unmitigated combativeness that seems most dangerous and most in need of a modification of the usual rules of adversarial battle.

The duty to do justice could be given a broad reading that requires prosecutors to protect aggressively the innocent by maintaining grave skepticism of police investigations, by readily seeking lower, more creative sentences matching punishment to culpability, by showing compassion for certain offenders as well as their victims, and by emphasizing protection of constitutional rights over conviction. Though some prosecutors do interpret their duty in this way, most give the obligation a far less expansive role.

More specific ethical and constitutional rules codifying the duty to do justice apply in only the narrowest professional situations.³⁷⁹ This establishes support for the principle that doing justice means little more than ensuring access to fair procedures.³⁸⁰ Yet even this minimalist conception is

³⁷⁴ See DAVIS, *supra* note 191, at 12 (“The criminal justice system is adversarial by design[;] [i]deally, a capable and zealous defense attorney represents the accused, and a similarly capable prosecutor represents the state.”).

³⁷⁵ See *id.* at 13.

³⁷⁶ See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 613-18 (1999).

³⁷⁷ Cf. DANIEL MARKOVITZ, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 41, 86-88 (2008) (discussing the unique professional responsibilities of the prosecutor).

³⁷⁸ See *id.* See generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (arguing that criminal defense counsel need to be especially zealous advocates precisely to counterbalance the immense power of the state).

³⁷⁹ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8.

³⁸⁰ See Green, *supra* note 376, at 634-35. Green describes the scope of the prosecutor’s duty to do justice:

Doing justice comprises various objectives which are, for the most part, implicit in our constitutional and statutory schemes. They derive from our understanding of

often narrowly understood. Notably, the obligation focuses on conscious and overt actions that may undermine fair procedures.³⁸¹ For example, consciously seeking to exclude blacks from juries because “those people” do not believe the police, consciously pitching closing arguments solely to juror anger, or knowingly seeking to introduce blatantly inadmissible evidence for the sole purpose of prejudicing the jury would all violate the duty to do justice, though, as so understood, that obligation may be hard to distinguish from the broad limits also imposed on defense counsel.³⁸² Perhaps a clearer example of a “do justice” rationale is the ethical and constitutional rule requiring prosecutors to produce material exculpatory evidence to the defense.³⁸³ The defense does not have a reciprocal obligation to share such evidence with the prosecutor pre-trial, though the defense may choose to do so.³⁸⁴ The do-justice model also seems to extend to some acts of prosecutorial negligence.³⁸⁵ Nevertheless, as a general rule, the minimalist conception of Do-Justice Adversarialism focuses on what the prosecutor consciously knows or intends or what she should know given what informa-

what it means for the sovereign to govern fairly. Most obviously, these include enforcing the criminal law by convicting and punishing some (but not all) of those who commit crimes; avoiding punishment of those who are innocent of criminal wrongdoing (a goal which, as reflected in the “presumption of innocence,” is paramount in importance); and affording the accused, and others, a lawful, fair process. Additionally, most would agree, the sovereign has at least two other aims. One is to treat individuals with proportionality; that is, to ensure that individuals are not punished more harshly than deserved. The other is to treat lawbreakers with rough equality; that is, similarly situated individuals should generally be treated in roughly the same way.

Id. at 634. Green characterizes this description as “a reminder of the traditional understanding.” *Id.* at 642.

³⁸¹ See *id.* at 634 (cataloguing “do justice” obligations that involve primarily conscious prosecutorial choices, though also including prosecutorial negligence-avoidance).

³⁸² See HARMFUL ERROR, *supra* note 202 (listing examples of prosecutorial misconduct); R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 95-101 (2005) (surveying ethical limits on prosecutors’ trial and pre-trial behavior).

³⁸³ See HARMFUL ERROR, *supra* note 202, at 31-32 (discussing this form of prosecutorial misconduct); CASSIDY, *supra* note 382, at 66-78 (analyzing the legal bases for this obligation).

³⁸⁴ See CASSIDY, *supra* note 382, at 66-67 (rooting prosecutor’s obligation to produce exculpatory evidence in the prosecutor’s unique duties not shared by defense counsel).

³⁸⁵ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (noting that the prosecutor’s obligation to produce material exculpatory evidence to the defense governs “irrespective of the good faith or bad faith of the prosecution”); see also *supra* text accompanying notes 15-16, 378-83. Professor Cassidy elaborates:

There is no *mens rea* requirement under the Model Rule [3.8(d)]: so long as the evidence was known to the prosecutor, it does not matter whether he understood or appreciated the exculpatory significance of the material. Whether the prosecutor fails to turn over exculpatory evidence due to negligence (e.g., the press of an overwhelming workload), for benevolent purposes (e.g., to protect the privacy of a victim) or for a more malevolent reason (e.g., to gain a tactical advantage) is simply irrelevant under either ABA Model Rule 3.8 or *Brady*.

CASSIDY, *supra* note 382, at 71.

tion is already available to her conscious deliberation.³⁸⁶ Some prosecutors' offices may by office policy, and some individual prosecutors may by preference, substantially expand upon this minimalist vision, but there is no current consensus requiring such expansion.³⁸⁷

iii. *The Free-Market Paradigm*

The United States Supreme Court has suggested that, whatever the duty to do justice means, it does not routinely trump the competitive market model generally governing adversarial combat. In *United States v. Mezzanatto*,³⁸⁸ the Court upheld a prosecutor's refusal to engage in plea negotiations with a defendant absent his waiver of his right, under Federal Rule of Evidence 410, to have any statements that he made during plea negotiations excluded should the negotiations fail and the case go to trial. The negotiations did indeed fail, and Mezzanatto was convicted when his statements during those negotiations were used against him.³⁸⁹ The Court rejected arguments that its decision would allow prosecutors to exploit weak, vulnerable defendants; would violate notions of fair play by forcing the accused to make impossible choices about whether to aid in her own conviction or to forego the prospect of a guilty plea deal; and would undermine candor, truth, and systemic accuracy.³⁹⁰ Instead, the Court approved the transaction as a fair market exchange: "[I]f the prosecutor is interested in 'buying' the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can maximize what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying."³⁹¹

iv. *The Case Processor Strategy*

Do-Justice Adversarialism has its roots in what anthropologist Catherine M. Coles and others have called the "case processor strategy."³⁹² Work by historians and social scientists support the current dominance of the strategy,³⁹³ which evolved from the *Wickersham Report on Prosecution*,³⁹⁴ part of

³⁸⁶ See generally CASSIDY, *supra* note 382 (surveying prosecutors' major ethical obligations without once addressing duties arising from the risks of unconscious or institutional biases).

³⁸⁷ See HARMFUL ERROR, *supra* note 202, at 15 (noting that Brooklyn, N.Y. District Attorney Charles Hynes instituted an office policy requiring his personal approval of any decision to charge a suspect based on a single witness identification).

³⁸⁸ 513 U.S. 196 (1995).

³⁸⁹ *Id.* at 198-200.

³⁹⁰ *Id.* at 203-04.

³⁹¹ *Id.* at 208.

³⁹² See Catherine M. Coles, *Evolving Strategies in 20th-Century American Prosecution*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 177, 182 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008).

³⁹³ See *id.*; John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR, *supra* note 392, at 3, 10-12.

a Progressive Era attempt to professionalize criminal justice while removing it from corrupt political influence.³⁹⁵ That 1931 report identified the prosecutor's four functions as investigating crime, deciding who shall be prosecuted and tried, preparing cases for trial, and trying those cases and arguing their appeals.³⁹⁶ All four functions focus primarily on the efficient and effective processing of each individual case from accusation to conclusion. Moreover, as other reports from the era argued, the ideal for most cases was to obtain convictions and punishments; case attrition—even plea bargaining for reduced sentences—was seen as a sign of systemic failure.³⁹⁷

In 1969, based upon surveys conducted during the 1950s and 1960s by the American Bar Foundation, criminologist Frank Miller published a report, *Prosecution: The Decision to Charge a Suspect with Crime*, that found greater complexity in the actual activities of prosecutors.³⁹⁸ Prosecutors exercised enormous discretion, often sought alternatives to formal criminal sanctions, weighed harm to the victim against that done to the suspect and to the costs prosecution imposed upon the system, and sometimes even used the justice system to address other, albeit related, social problems.³⁹⁹ But the ABF study did not prove to be influential. Instead, the more important reform effort of the time was the Report of the 1967 President's Commission on Law Enforcement and the Administration of Justice.⁴⁰⁰ That report discussed, but played down, the ABF's work, and embraced a variant of the case processing model of investigating, charging, and trying individual cases with the primary goal of being tough on crime.⁴⁰¹

The case processing model, as redefined by the President's Commission Report, its progeny, and later prosecutorial practice, has several central elements. First, the prosecution's mission is the efficient, effective, and just disposition of cases, each valued for its uniqueness, but with recognition that like cases must be treated alike.⁴⁰² This mission's success is measured by

³⁹⁴ See U.S. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931) [hereinafter Wickersham Commission Report].

³⁹⁵ See Coles, *supra* note 392, at 182-83.

³⁹⁶ See Wickersham Commission Report, *supra* note 394, at 12.

³⁹⁷ See Coles, *supra* note 392, at 183.

³⁹⁸ See generally FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH CRIME (Frank J. Remington ed., 1969).

³⁹⁹ See Coles, *supra* note 392, at 183; Samuel Walker, *Origins of the American Criminal Justice Paradigm: The American Bar Foundation Survey, 1953-1969*, 9 JUST. Q. 47, 67 (1992) (noting survey's data demonstrating that the criminal justice system was used to address an array of social problems).

⁴⁰⁰ See Coles, *supra* note 392, at 183 (noting importance of this Commission appointed by President Lyndon Baines Johnson). See generally PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967).

⁴⁰¹ See Coles, *supra* note 392, at 183-84.

⁴⁰² See *id.* at 184.

maximizing the felony conviction rate.⁴⁰³ Second, the prosecutor's sources of authority are rooted in her professional expertise and public mandate to hold lawbreakers accountable.⁴⁰⁴ Third, demand for prosecutorial services is driven by the police, who funnel work in the form of individual cases to the prosecutor.⁴⁰⁵ Fourth, prosecutors' offices are geographically and organizationally centralized and hierarchical.⁴⁰⁶ Fifth, each office's primary tactic is effective case preparation aimed at convictions via trial or plea-bargains. Although resource constraints and equal treatment concerns may prompt office policies modifying these tactics somewhat, "they do not conflict with the goal of seeking to maximize convictions and obtain dispositions reflecting the maximum charge evidence can reasonably sustain."⁴⁰⁷ Sixth, prosecutors operate in an environment in which most of their decision-making is hidden from the public, they face little judicial or legislative review, and they are neither part of nor close working partners with other local government structures; apart from the discipline required by reelection pressure, they operate largely independently from citizen input and control.⁴⁰⁸ The prosecutor's office is thus a "closed system" relatively independent of citizen preferences, focused on internal operations, and obsessed with reducing uncertainty.⁴⁰⁹ Its prestige, power, style, methods, and outcomes are thus also particularly reflective of the idiosyncrasies of the chief prosecutor.⁴¹⁰ Finally, its success is usually judged based upon the numbers of convictions and the length of sentences, particularly for serious crimes.⁴¹¹

v. *Case Processing's Failures and How to Correct Them*

The case processing model best captures the realities of large, urban prosecutors' offices, though it ignores many subtleties within each office that do not strictly fit the model, and ignores significant geographic variation.⁴¹² Nevertheless, the model captures well both the ideology and dominant practice of what Do-Justice Adversarialism means today. The model has faced numerous scholarly assaults,⁴¹³ but its most relevant problems for my purposes can be concisely stated. The free market for justice does not always

⁴⁰³ *See id.*

⁴⁰⁴ *See id.*

⁴⁰⁵ *See id.* at 185.

⁴⁰⁶ *See id.*

⁴⁰⁷ *See id.* at 186.

⁴⁰⁸ *See id.*

⁴⁰⁹ *See* Worrall, *supra* note 393, at 18-19.

⁴¹⁰ *See* Coles, *supra* note 392, at 186.

⁴¹¹ *See id.*

⁴¹² *See id.* at 184.

⁴¹³ *See, e.g.,* Worrall, *supra* note 393, at 14 (summarizing empirical and logical flaws in the model); *see also* Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 51-53 (1998) (challenging the model's case-centric focus without using the "case processing" label).

work, even as modified by the case processing brand of “doing justice.”⁴¹⁴ One important source of failure, as documented throughout this Article, is that subconscious processes can both skew prosecutorial judgment and leave prosecutors blind to the severity of the impacts of some prosecutorial decisions. Race can magnify these flaws. The result can be unwarranted error rates by convicting the innocent and imposing excessively disesteem-generative punishments on the guilty. Moreover, particularly where race is salient, the communities most harmed by crime can suffer from the state's efforts to punish it, and may suffer entirely undeserved group-based disesteem. The combination of these effects can actually increase crime, or at least deter crime less, while undermining the proportionality mandates of retributive justice.

I therefore propose expanding the minimalist ideal in two ways. First, prosecutors should take steps to reduce, with the aim of eliminating, even *subconsciously caused* racial disesteem from their handling of individual cases. My argument is a simple one: the evidence for inadvertent prosecutorial contribution to racial disesteem is sufficiently strong that ignoring it is a form of “willful blindness,” a state of semi-conscious indifference so extreme as to be morally equivalent to knowingly inflicting unnecessary and unwarranted suffering on another.⁴¹⁵ This obligation does *not* mean that prosecutors must be able to “read” their own or others' subconscious minds in individual cases. It *does* mean that the prosecutor must use care to consider the potential racial subtext of each action she takes—from charging, to plea bargaining, to making opening arguments, to guiding sentencing.⁴¹⁶ In effect, this approach is a psychologically realistic variant of the prosecutor's duty to treat like cases alike. For example, a prosecutor should be wary of the possibility of police overzealousness in interrogating black suspects, and should be particularly attentive to whether the quality of a plea deal reached with a black defendant really is equal to that given to “similarly situated” white defendants. Prosecutors should be skeptical of their own intuitions concerning proper bail or sentencing ranges for racial minorities. Such heightened self-awareness is likely not beyond a prosecutor's reach; it is a skill that can be developed with practice and education.

Self-awareness requires attention to the raced “cultural meaning” of prosecutorial actions, so the prosecutor must be familiar with the relevant

⁴¹⁴ Cf. TASLITZ, RAPE AND CULTURE, *supra* note 30, at 105-15 (examining the failures of a free-market philosophy of advocacy to do justice in the context of rape trials).

⁴¹⁵ See DAVIS, *supra* note 191, at 19-22; see also Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 413-23 (2005) (defining the various types of willful blindness and corresponding underlying psychological processes).

⁴¹⁶ See Davis, *supra* note 413, at 16, 18 (arguing that unconscious and systemic prosecutor racial bias occurs at every stage of the criminal justice process); see also Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 400 (2001). Smith acknowledges that prosecutors serve an important social function but nevertheless counsels “those who are committed to social and racial justice: Please don't join a prosecutor's office.” *Id.*

psychological literature.⁴¹⁷ Various law reform entities are indeed working on training courses to help prosecutors with just this task.⁴¹⁸ Of course, better prosecutorial decision-making in this area requires prosecutors to compare what they do in one case to what they do in another and to be aware of cultural and systemic influences; in short, prosecutors must think beyond the individual case. As I have explained in detail elsewhere, for prosecutors to successfully overcome subconscious biases requires new collaborative, deliberative decision-making structures within prosecutors' offices rather than leaving the matter either to individual line-prosecutor judgment or to uninformed and inflexible office policies.⁴¹⁹ Modified Do-Justice Adversarialism links the specific case to more general concerns. But prosecutors will always have to make judgments in individual cases, judgments that most directly affect the alleged offender, so Modified Do-Justice Adversarialism is necessarily still a model focused largely on the individual case, albeit with a heightened sensitivity to its social implications.

Because the harms of racial disesteem affect non-defendants too—innocents temporarily ensnared by the system, neighborhoods devastated by poverty and despair, tarnished raced reputations of individuals neither directly brought into the system nor condemned to life in blighted locations—Modified Do-Justice Adversarialism cannot alone cure the current dominant model's ills.⁴²⁰ To address these broader concerns, my second suggestion is to rely on an entirely different ethical model. Modified Do-Justice Adversarialism is concerned directly with the prosecutor's relationship *with the accused* but only indirectly with its impact on third parties. My alternative model—the Medical Model—governs the prosecutor's direct relationship with these third parties, institutions, and communities, and with the "People" as a whole. I recognize that a different term might be needed to capture

⁴¹⁷ Cf. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) (suggesting a cultural meaning test to identify unconscious racism). See also Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) (examining unconscious racism in criminal justice); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007) (presenting an empirical study suggesting that unconscious racial bias leads judges and jurors to misremember facts in a racially biased way).

⁴¹⁸ For example, the American Bar Association Criminal Justice Section's Committee on Race and Racism began such an effort when I last chaired the Committee. Cf. Marc Mauer, Op-Ed., *Racial Fairness Gaining Ground in the Justice System*, BALT. SUN, July 30, 2008, at 17A (discussing the federal Justice Integrity Act, proposed by Democratic Senator Joseph Biden, Jr. and Republican Senator Arlen Specter, that, if enacted, would establish pilot programs in ten federal districts to create local advisory groups to collect and analyze "racial and ethnic data on charging, plea negotiations, sentencing recommendations, and other factors," as well as state-level legislation requiring preparation of "racial impact statements" for proposed new legislation in both Connecticut and Iowa).

⁴¹⁹ See generally Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 271 (2006) [hereinafter Taslitz, *Democratic Deliberation*].

⁴²⁰ See *supra* text accompanying notes 368-419.

this model's emphasis on the prosecutor's lawyerly role, but the term "Medical Model" for now captures mostly clearly the controlling metaphor.

B. *The Medical Model*

The Medical Model is governed by three principles:

- First, prevention is better than treatment;
- Second, if treatment is necessary, at least do no harm; and
- Third, treat the Body of the People holistically, recognizing that the health of the mind (including the subconscious mind) and the health of the Body interact.⁴²¹

The prosecutor's duty to "do justice" stems from his representing the People—all of the People, rather than any individual.⁴²² The argument has even been made that the prosecutor in part represents the interests of the defendant, who, though suffering temporary limitations on her political and other freedoms, is still part of the American people; the prosecutor thus shows respect for the offender by holding her to account for her wrongs, for she is then treated as an autonomous individual capable of making reasoned choices and of being held responsible for her actions.⁴²³ In any event, the prosecutor's social role is in part to impose proportional disesteem on individual criminal offenders, not to wreak undue disesteem on the guilty or on the innocent. Moreover, because the prosecutor represents the People, she should do what is reasonably within her power as a prosecutor to reduce the harm they suffer, both as victims of crime and as a result of the prosecutor's efforts to "treat" the symptom of disease—crime—raging within the Body Politic. The prosecutor should not leave the patient worse off than she would be without treatment and indeed should try to maximize the return to

⁴²¹ Cf. LEONARD ROY FRANK, QUOTATIONARY 347 (2001) ("As to diseases, make a habit of two things: to help, or at least, do no harm." (quoting Greek physician Hippocrates, stating the fundamental principle known to modern physicians as the "Hippocratic Oath")); *id.* at 601 ("Who is the skilled physician? He who can prevent sickness." (quoting Hasidic saying)); *id.* at 347 ("He who advises a sick man, whose manner of life is prejudicial to health, is clearly bound first of all to change his patient's manner of life." (quoting Plato)); *id.* at 348 ("But what is quackery? It is commonly an attempt to cure the diseases of a man by addressing his body alone." (quoting Henry David Thoreau)).

⁴²² See Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 L. & SOC. INQUIRY 387, 390 (2008) (arguing that prosecutors exercise a "fragment of sovereignty, . . . shift[ing] the conversational register from administration to the domain of politics—from seeing what prosecutors do in terms of a bureaucratic division of labor to seeing it in terms of the allocation of political power").

⁴²³ See CASSIDY, *supra* note 382, at 2-3. Cassidy argues: "A prosecutor must also appreciate that when he acts as a representative of the sovereign . . . the defendant charged with a crime is also a member of that sovereign entity. The *defendant* is therefore one of the persons that the prosecutor technically represents." *Id.* See also Kenneth J. Melilli, *Prosecutorial Discretion in an Adversarial System*, 1992 BYU L. REV. 669, 698 ("Prosecutors represent the interests of society as a whole, including the interests of defendants as members of that society.").

health. Thus the three Medical Model principles of helping to prevent harm, not causing harm, and recognizing that there are holistic implications for all the People (the patient) each come into play when we treat only the symptom, and treat it as an isolated symptom at that. Given this country's sordid racial history, its continuing racial troubles, and the criminal justice system's role in these troubles,⁴²⁴ the argument for application of these Medical Model principles seems particularly strong in the area of race.

A variety of recent trends converge toward the Medical Model. Prosecutors are increasingly involved in crime prevention through such innovations as nuisance suits against owners of drug houses, anti-gang injunctions, forfeiture of organized crime assets, community prosecutors, and promotion of specialty courts.⁴²⁵ Prosecutors are also increasingly involved in minimizing the harm that they and the police do in investigating and prosecuting crime. New ABA Standards regulate prosecutor behavior where prosecutors *investigate*, and not merely prosecute, crime.⁴²⁶ These standards seek to minimize informant abuse, limit undue use of wiretaps, reduce privacy invasions, and avoid a host of other harms. Prosecutors have likewise played pivotal roles in improving procedures, such as eyewitness identifications and interrogations, that have raised undue risks of convicting the innocent.⁴²⁷ In doing so, prosecutors have implicitly recognized that they must take into account the workings of the subconscious mind and of institutional forces and practices in creating these risks, for these reforms rely heavily on social science research on just these sorts of unconscious processes.⁴²⁸ Prosecutors

⁴²⁴ See *supra* Part II (arguing that racial disesteem has especially ill effects in the criminal justice system). See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997) (tracing the history of racial bias in the American criminal justice system).

⁴²⁵ See, e.g., JAMES B. JACOBS, *GOTHAM UNBOUND: HOW NEW YORK CITY WAS LIBERATED FROM THE GRIP OF ORGANIZED CRIME* 223-33 (1999) (explaining novel remedies used by prosecutors to combat organized crime); Darryl K. Brown, *Executive Branch Regulation of Criminal Defense Counsel and the Private Contract Limit on Prosecutor Bargaining*, 57 DEPAUL L. REV. 365, 372 (2008) (discussing prosecutors' use of federal forfeiture statutes to garner defendants' assets pre-trial); Catherine M. Coles & George L. Kelling, *Prevention Through Community Prosecution*, 136 PUB. INT. 69, 72-74 (1999); Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1503-04 (2003); Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1128-29 (2005) (noting that in the past decade some prosecutorial programs have arisen for "drug interdiction and rehabilitation . . . adopt[ing] a modified problem orientation, and some localities have established community prosecution offices to keep local prosecutors in better touch with the needs of their respective communities"); Stephanos Bibos, *The Real World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 810-11 (2003) (noting the evolving nature of criminal prevention tactics available to prosecutors, including anti-gang loitering injunctions, civil nuisance suits, civil and criminal forfeiture, and civil commitment of sex offenders).

⁴²⁶ STANDARDS FOR CRIMINAL JUSTICE: INVESTIGATIVE STANDARDS FOR THE PROSECUTOR, §§ 2-3 (2008).

⁴²⁷ See ABA, *ACHIEVING JUSTICE*, *supra* note 292, at 99-107.

⁴²⁸ See *id.* Professors Bruce Green and Fred Zacharias have suggested that the duty to "do justice" might fairly be understood as already encompassing a duty to ferret out unconscious bias. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 855-56 (noting that it is at least subject to debate whether prosecutors' duty of neutrality,

have played a part in efforts to create or expand Criminal Justice Coordinating Councils and related reforms focused upon reducing racial bias, a mission that is a subset of a broader mission focusing upon the system's contribution to generating racial disesteem.⁴²⁹ These trends converge on an implicit recognition of a broader prosecutorial social role in preventing and healing harm to the Body Politic.

What I am calling the Medical Model has indeed been evolving for some time, to one degree or another, in various prosecutors' offices.⁴³⁰ Much of the impetus for change has come from prosecutors themselves. Some prosecutors concluded that tough-on-crime strategies were not solving the drug problem or its corollary violence.⁴³¹ Other practitioners noticed that broader tactics, such as seeking forfeiture and civil injunctions, had made tremendous headway in fighting organized crime.⁴³² The rise of the victims' rights movement led to calls by victims for attention to a wide range of their needs, at times embracing alternatives to traditional punishments as better serving of those needs.⁴³³ Meanwhile, minority groups "heavily impacted by increases in crime and worsening quality of life—yet alienated from justice institutions and political leadership—increasingly demanded more than arrests, prosecution, and incarceration."⁴³⁴ These local, loosely organized community groups sought solutions to unsafe communities and unfair policing tactics alike, wherever those solutions lay.⁴³⁵

The evolution of prosecutorial thinking prompted by these forces was reflected in meetings of the Executive Session for State and Local Prosecutors that were convened by Harvard University's Program in Criminal Justice Policy and Management at its Kennedy School of Government between 1986 and 1990.⁴³⁶ Those discussions identified five prosecutorial types. The

which unquestionably bars conscious use of impermissible racial criteria in exercising discretion, also requires acting to prevent subliminal racial bias and discriminatory effects).

⁴²⁹ See ABA, *ACHIEVING JUSTICE*, *supra* note 292, at 67-76; *supra* note 426 and accompanying text (discussing new federal and state legislation investigating, in part, prosecutorial racial bias).

⁴³⁰ See Coles, *supra* note 392, at 188-89.

⁴³¹ See *id.*

⁴³² See *id.* See generally JACOBS, *supra* note 425 (analyzing New York prosecutors' use of such innovative tactics to defeat the mob's dominance of certain industries).

⁴³³ See M. Elaine Nugent-Borakove, *Performance Measures and Accountability*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR*, *supra* note 392, at 91, 101 (noting that, as a result of the victims' rights movement begun in the 1980s, victim and witness attitudes about their personal safety, and their satisfaction with the actions prosecutors take on their behalf and with their experience as a whole, are now important measures of prosecutorial success); Andrew E. Taslitz, *Fourth Amendment Federalism and the Political Silencing of the Urban Poor* (unpublished manuscript, on file with author) (explaining why victims sometimes seek less harsh and more creative punishments than do many legislators, judges, and prosecutors).

⁴³⁴ Coles, *supra* note 392, at 189.

⁴³⁵ See *id.*

⁴³⁶ See *id.* at 190 (explaining the *Kennedy School Report* and its historical significance); Nugent-Borakove, *supra* note 433, at 93-94 (summarizing the report); see also ZACHARY TUMIN, *SUMMARY OF PROCEEDINGS: FINDINGS AND DISCOVERIES OF THE HARVARD UNIVERSITY EXECUTIVE SESSION FOR STATE AND LOCAL PROSECUTORS AT THE JOHN F. KENNEDY SCHOOL OF GOVERNMENT, 1986-1990 (1990)* [hereinafter *KENNEDY SCHOOL REPORT*].

first two of these—the “jurist,” seeking efficient case disposition, and the “sanction-setter,” seeking retribution, rehabilitation, and deterrence via punishment—fit the traditional case processing model.⁴³⁷ The other three types—“problem-solvers,” “strategic investors,” and “institution builders”—departed from this tradition.⁴³⁸ Problem-solvers will use any tool, not merely those of the criminal law, to attack crime-related problems.⁴³⁹ They may mobilize varied governmental agencies and seek funding for novel programs.⁴⁴⁰ A particularly well-received recent example of a problem-solving strategy is Brooklyn District Attorney Charles Hynes’s creation of the Drug Treatments Alternative to Prison (DTAP) Program.⁴⁴¹ The program extended drug treatment to high-risk, prison-bound drug sellers, not merely those only using drugs, and added residential and other long-term treatment well after release to extant, but failing, drug treatment programs.⁴⁴² Hynes’s team conceived of the program, obtained funding to create it, and established a permanent in-house research unit to inform and monitor its performance and alter its approach as needed. The team also partnered with external researchers to ensure that the most recent and reliable data informed therapy on the ground.⁴⁴³ Studies of DTAP’s performance are optimistic that it has been and will continue to be more effective than other options in aiding the local community by reducing recidivism and increasing ex-felon employment prospects.⁴⁴⁴

“Institution-builders,” a fourth prosecutorial type, focus more directly on fostering “the vitality of basic neighborhood institutions—families, schools, and civic and religious institutions—against criminal disruption and disorder, so that they could become self-sufficient and capable of regulating their own affairs.”⁴⁴⁵ Institution-builders might, for example, reach out to involve the community in improving school safety and student retention, in fostering crime-prevention efforts like community watches, and in easing the provision of health and social services to needy community members.⁴⁴⁶ Finally, the “strategic investor” does not simply take resources as a given but rather pursues the goal of “bolster[ing] the efficacy of prosecution by adding capacities.”⁴⁴⁷ These ideal types are, of course, not mutually exclusive, and may occur in varying combinations in any one prosecutor’s office.⁴⁴⁸

⁴³⁷ See Coles, *supra* note 392, at 190.

⁴³⁸ See *id.*

⁴³⁹ See *id.*

⁴⁴⁰ See *id.*

⁴⁴¹ See Steven Belenko, Hung-en Sung, Anne J. Swern & Caroline R. Donhauser, *Prosecutors and Treatment Diversion: The Brooklyn (NY) Drug Treatment Alternative to Prison Program*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR*, *supra* note 392, at 111.

⁴⁴² See *id.* at 112, 120, 128-32.

⁴⁴³ See *id.* at 130.

⁴⁴⁴ See *id.* at 111-12.

⁴⁴⁵ See Coles, *supra* note 392, at 190.

⁴⁴⁶ See *id.*

⁴⁴⁷ See KENNEDY SCHOOL REPORT, *supra* note 436, at 6-7.

⁴⁴⁸ See Nugent-Borakove, *supra* note 433, at 94.

Perhaps the most-discussed aspect of this broader model of prosecutor behavior is the embrace by some prosecutors of the “community prosecution strategy.”⁴⁴⁹ The elements of this strategy are the mirror image of the case processing strategy. Accordingly, community prosecutors see their mission as making communities safer, a mission that may mean strengthening bonds with citizens—including those in the communities most damaged by crime and by law enforcement—and strengthening bonds with other governmental agencies and civic groups.⁴⁵⁰ Improving the community’s own capacity to enhance security and justice are likewise central to the mission.⁴⁵¹ Correspondingly, the sources of the prosecutor’s authority expand to include “relationships with specific neighborhoods and communities,” and prosecutors gain legitimacy by “responding to discrete problems in particular locations affecting particular individuals and groups” and drawing “support directly from leaders and ordinary citizens in these local areas.”⁴⁵² Furthermore, citizens have “a direct line to the prosecutor’s office.”⁴⁵³ The demand for prosecutorial services comes not only from police arrests, but from community members who may demand different solutions to various problems.⁴⁵⁴

Permitting greater community involvement and more flexible, problem-solving strategies requires a decentralized, less hierarchical organizational structure in which some prosecutors spend substantial time in the community and may need to work in multi-agency task forces requiring greater exercise of initiative and creativity by line-prosecutors.⁴⁵⁵ This requires a change in prosecutorial culture, and hiring strategies must be aimed at those committed to both community service and problem-solving as well as litigation.⁴⁵⁶ Prosecutors must likewise expand their tactics to include “targeted and expedited criminal prosecutions, civil remedies, nuisance abatement, code enforcement, establishing new institutions (a day report center, or problem court), crafting legislation, developing working protocols among agencies, and fundraising for new activities.”⁴⁵⁷ A community-based strategy further embraces transparency of operations and decision-making with prosecutorial accountability for results—an “open” rather than “closed” system of justice.⁴⁵⁸ Prosecutorial success should no longer be gauged solely by convictions and sentences—though these remain relevant—but by reduced crime victimization, increased perceived community safety, measura-

⁴⁴⁹ See Coles, *supra* note 392, at 191.

⁴⁵⁰ See *id.* at 193.

⁴⁵¹ See *id.*

⁴⁵² See *id.*

⁴⁵³ See *id.*

⁴⁵⁴ See *id.* at 194.

⁴⁵⁵ See *id.* at 196.

⁴⁵⁶ See *id.* at 200.

⁴⁵⁷ *Id.* at 196.

⁴⁵⁸ See *id.* at 196 (analyzing the new model’s required environment of greater transparency and accountability); Worrall, *supra* note 393, at 18-20 (analyzing the concepts of “closed” versus “open” shops or systems).

ble contribution to enhancing local institutions central to overall community health, and closer ties among citizens, the police, and prosecutors.⁴⁵⁹

The community prosecution strategy is often but an “add-on” to the case processing mission, though a very small number of offices have reorganized their entire operational structure based upon this model.⁴⁶⁰ Political and cultural resistance to its spread has, however, thus far proven to be strong.⁴⁶¹ I here suggest several strategies to promote further change in the prosecutor’s role along analogous lines.

First, the community prosecution model is too narrowly associated with specific, often marginal administrative programs rather than the broader lessons such programs must teach.⁴⁶² The model is also sometimes perceived as nothing more than a public relations gambit, and it does not yet focus on prosecutor sensitivity to subconscious social forces and community conciliation as essential additional skills.⁴⁶³ The Medical Model seeks to make community healing central to the prosecutorial mission, and to draw on the teachings of therapeutic jurisprudence, which looks to the therapeutic value of lawyering practices. Too often in the criminal arena, however, these teachings focus on the defense attorney rather than the prosecutor, and on the specific case rather than on healing the entire community.⁴⁶⁴ Ultimately, at least aspirational ethics standards will be required to help change the prosecutorial mindset, and the healing imagery I suggest provides an appealing way of approaching any such efforts.

Second, although broader change is the ultimate goal, incremental change may be the most realistic means to get there. Focusing on race seems to me a particularly effective short-term strategy, for, as I have explained elsewhere, racial justice is a powerful motivating and organizing tool among

⁴⁵⁹ See Coles, *supra* note 392, at 196-97; Nugent-Borakove, *supra* note 433, at 96-104 (describing ways to measure prosecutorial performance in an age of expanded prosecutorial roles).

⁴⁶⁰ See Coles, *supra* note 392, at 191-92; M. Elaine Nugent-Borakove & Patricia L. Fanflik, *Community Prosecution: Rhetoric or Reality?*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR*, *supra* note 392, at 211, 214-27 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (analyzing the “continuum of implementation” of community prosecution in a variety of prosecutors’ offices).

⁴⁶¹ See Coles, *supra* note 392, at 196; Nugent-Borakove & Fanflik, *supra* note 460, at 221-22 (noting resource obstacles to change); *id.* at 226-27 (noting that no state or local prosecutor’s office has moved completely beyond reliance on specialized community prosecution units and that all but a handful have failed to institutionalize funding to support community prosecution efforts).

⁴⁶² See, e.g., *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR*, *supra* note 392 (collecting essays that discuss broader lessons but, when offering specific examples, focus on specific programs as definitional to community prosecuting).

⁴⁶³ Not one of the articles that I have read has focused on the importance of subconscious social forces as an overt consideration in crafting community prosecution programs.

⁴⁶⁴ See generally *REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE* (David B. Wexler ed., 2008) (collecting excerpts of the leading published works on therapeutic jurisprudence in the criminal context, all of which focus on defense counsel’s role and emphasize healing individuals without serious independent consideration of healing communities).

poor urban racial communities.⁴⁶⁵ Indeed, congressional efforts are already afoot to mandate that United States Attorneys' Offices engage in a years-long study of systemic and subconscious racial biases with the goal of embedding new procedures for combating their influence.⁴⁶⁶ Outside the prosecutor's world, some jurisdictions have considered adopting practices of collecting data on police encounters by race to monitor inappropriate actions such as traffic stops.⁴⁶⁷ Focusing on race also exposes more clearly the disesteem-generating function of the prosecutor, laying the groundwork for greater sensitivity to how to ensure its proper operation in all criminal justice contexts, not only those involving race.

Third, the healing metaphor puts the patient's—the Body Politic's—interest first. Just as physical doctors must hear from and listen to the patient to diagnose and treat her properly, and just as the patient's autonomy requires her control over certain therapeutic decisions, so must the prosecutor hear from his patient, giving her some measure of control over her fate. In more concrete terms, the prosecutor must create mechanisms for real, deliberative community input into prosecutor decision-making.⁴⁶⁸ A growing body of empirical research suggests that the greater the local community's input, the greater the demand for more community-therapeutic, rather than routinely punitive, solutions to the problem of crime.⁴⁶⁹ Creating procedural mechanisms for such community input on questions of race helps to build political pressure for a prosecutorial therapeutic role. Consequently, it is changes in prosecutorial management structures—whether done voluntarily, encouraged by bar-drafted aspirational standards, or imposed legislatively—rather than new ethical rules providing for sanctions against individual prosecutors that are most likely to promote embrace of the Medical Model.⁴⁷⁰

⁴⁶⁵ See Taslitz, *Racial Auditors*, *supra* note 74, at 221-98.

⁴⁶⁶ See Mauer, *supra* note 418 (describing the proposed legislation).

⁴⁶⁷ See Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. L.J. 19, 32-33 (2007) (proposing that jurisdictions adopt "racial impact statements" prospectively to assess the likely racial impacts of any proposed criminal justice legislation). *Cf.* Davis, *supra* note 413, at 54-55 (recommending that prosecutors internally create their own racial impact statements to track the effects of office policies and practices).

⁴⁶⁸ See Taslitz, *Democratic Deliberation*, *supra* note 419.

⁴⁶⁹ See Taslitz, *Fourth Amendment Federalism*, *supra* note 433.

⁴⁷⁰ See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, www.bepress.com (2007) (arguing for internal redesign of the structure of prosecutors' offices as a way of limiting prosecutorial overreaching); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. (forthcoming 2009), available at <http://lsr.nellco.org/upenn/wps/papers/253> (arguing, while drawing on management literature and viewing prosecutorial flaws as reflecting a classic "agency problem," that revised hiring, promotion, and tenure practices; new pay structures; feedback from judges, defense counsel, and victims; better data-collection combined with greater transparency and thus more informed voters; an increased emphasis by managers on developing office culture, norms, and ideals to embrace more than conviction and sentence-maximization; and more creative use of office policies to promote increased deliberation, consistency, and fairer notice will do more to improve prosecutorial decision making than will any heightened effort at punishing prosecutors via meatier ethics codes); Davis, *supra* note 413, at 55-60, 62-

Finally, it is important to remember that the therapeutic model is parallel to and supplementary to the prosecutor's modified do-justice adversarial role. The two prosecutorial functions—generating only justified disesteem on individuals in particular cases and helping to heal the Body Politic via more general reforms—are conceptually distinct, though each may impact the other. The former focuses on case-specific decisions, the latter on programmatic, systemic ones. In the area of race, both Modified Do-Justice Adversarialism and the Medical Model must hold sway in their respective spheres.

V. WHAT THE JENA PROSECUTOR SHOULD HAVE DONE

Reed Walters published an op-ed piece in the *New York Times* defending his actions in the Jena Six case.⁴⁷¹ He argued that the law prohibited him from bringing hate crimes charges against the white students who hung the nooses on the tree, but required him to proceed against the black students, particularly Mychal Bell, in adult court, and to seek extremely harsh punishments.⁴⁷² The accuracy of his legal analysis is subject to challenge,⁴⁷³ but even assuming that his understanding of Louisiana law was correct, his ethical analysis remains questionable. Walters explained his position:

I can understand the emotions generated by the juxtaposition of the noose incident with the attack on Mr. Barker and the outcomes for the perpetrators of each. In the final analysis, though, I am bound to enforce the laws of Louisiana, as they exist today, not as they might in someone's vision of a perfect world.

That is what I have done. And that is what I must continue to do.⁴⁷⁴

Walters also described himself as a “small-town lawyer and prosecutor” whose job for 16 years has been “to review each criminal case brought to me by the police department or sheriff, match the facts to any applicable laws, and seek justice for those who have been harmed.”⁴⁷⁵ Walters portrayed himself as straight-jacketed by clear and absolute law, as if he had no

67 (arguing for publication of racial impact statements as a way to improve prosecutors' handling of unconscious and institutional racial bias and analyzing role of electoral politics in improving prosecutor behavior); Taslitz, *Democratic Deliberation*, *supra* note 419, at 314-18, 325 (arguing for “internal” and “external” deliberative mechanisms to help prosecutors reduce the risk of convicting the innocent); Taslitz, *Racial Auditors*, *supra* note 74, at 293-98; Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 *Geo. J. Legal Ethics* 781, 785 (1996) (recounting the authors' difficulties in seeking to amend ethics rules to bar racist and similar appeals by attorneys).

⁴⁷¹ See Walters, *supra* note 1.

⁴⁷² See *id.*

⁴⁷³ Bowers, *supra* note 335, at 119 n.165.

⁴⁷⁴ Walters, *supra* note 1.

⁴⁷⁵ *Id.*

discretion, and thus no responsibility. Though he noted that the appellate court ultimately sent Bell's case back to the juvenile courts, Walters saw no need to rethink his charging decisions or his responsibilities—or even to admit the *possibility* of error. He specifically distanced himself from the question of whether “America needs a new civil rights movement,” focusing the bulk of his op-ed piece on why he thought Bell's alleged crime was a heinous one and why he could not charge the noose-hangers with a hate crime given the facts of the two cases.⁴⁷⁶ He devoted not one word to whether he should have considered the impact of his decisions in the Jena Six case on the local and national African American communities, on inter-racial conflict, on the perceptions and reality of governmental legitimacy, on likely future crimes by others in these various communities, on the educational culture at Jena High, on the racial culture in the town of Jena itself, or even on the rehabilitation of all the teenagers in the varied Jena High incidents.

Walters's defense of his actions is a classic embrace of do-justice adversarialism, as informed by case processing ideology. His job is to prosecute all alleged criminal wrongs vigorously to verdict, then subject the new felon to the harshest penalty “dictated” by the law, for that is what “seeking justice” means. He is a passive actor, receiving cases funneled to him by the police and sheriff, acting only on their request. Though his actions may heighten certain emotions (read this as, “the black community's emotions”), and though they may *perhaps* implicate equality concerns, considering such matters would wrongly involve him in a “new civil rights movement” that can be none of his concern as a prosecutor. Finally, he seems simultaneously to evoke an “aw-shucks” purity of heart, while offering an implied appeal to limited resources to do other than he does, for he is “a small town lawyer.” But the small town reference seems also to portray him as a protector of local justice against big-city outsiders, and he ends with a proud insistence that he will continue to do what he has always done, for it is part of his job to resist political pressures.

Modified Do-Justice Adversarialism would require more. It takes no great training in psychology or history to understand the cultural meaning of “noose-hangings” or the prohibition against blacks sitting under “the white tree.” Nor is it difficult to understand how observers could see unequal justice being done. There were also genuine factual disputes over whether those charged with the schoolyard assault were in fact those involved in it and over who was responsible for it—factual disputes in which race surely must have played a role.⁴⁷⁷ Even if Walters was right that he could not bring criminal charges against the noose-hangers, that limitation should have suggested to Walters that seeking the harshest possible penalties against the black students might not be consistent with equal justice. That Walters

⁴⁷⁶ *See id.*

⁴⁷⁷ *See* sources cited *supra* note 3; Brown, *supra* note 7.

chose the most aggressive possible interpretive stance toward the relevant law is suggested by the appellate court returning Mychal Bell's case to the juvenile, rather than adult, court. Moreover, Walters seems blind to the inequities wrought by seeking probation for a misdemeanor charge against a white assailant of several of the Jena Six, arresting some of the Jena Six for theft when they defended themselves against Matt Windham's shotgun-bearing threats, and imposing a minor bond on Justin Barker for bringing a loaded rifle onto school property. Walters is simply silent about these incidents in his op-ed piece.⁴⁷⁸

A better stance would have required a more aggressive and skeptical investigation of the facts, a greater reluctance to send the cases to adult court, and a more creative approach to sentencing than "lock-'em-up and throw away the key." Additionally, Walters should have been more willing to re-examine his own earlier decisions regarding the whites involved in the various alleged assaults against the black students and to question whether his leniency in those instances might have reflected his own biases.

Walters's breach of the Medical Model's dictates is even more severe. If the reports are true, Walters's only effort at crime-prevention was to threaten at a school assembly to destroy the black students' lives with "the stroke of a pen." That comment hardly portrayed him as the champion of the entire Jena community and likely exacerbated, rather than softened, racial tensions. Walters should not have considered it outside his bailiwick to side publicly with the school principal by seeking expulsion of the noose-hangers, or at least some harsher penalty than the three day suspension. The community as a whole needed tough action and a clear rejection of the hateful message sent by the incident. Likewise, the mere existence of a perceived "white tree" should have set off warning bells of racial tension at Jena High, and Walters should have worked closely with school authorities and, if need be, sought the volunteer assistance of mediators and educational psychologists to work on healing such tensions. This would require a long, difficult process of inter-group dialogue that would necessarily involve black and white parents and thus the racial culture of Jena as a whole. Such an effort may have helped to reduce tensions, and to prevent the crimes that allegedly followed. A healer would have seen that the connection between social institutions like schools and crime is unavoidable; both need attention. It is not a defense for Walters to cry "resource-poor country lawyer," for not every criminal case or series of cases before him required this sort of effort. Jena was an extreme case.

Furthermore, as a healer, he would be a catalyst and educator, bringing together other governmental and private resources to do the job. No new civil rights movement was needed. Equal justice for all persons and groups, healing the local community, and embracing all its members, thus helping to

⁴⁷⁸ See Walters, *supra* note 1.

prevent crime and social dissolution, were already his job. By not doing that job, he became part of the disease rather than its cure.

VI. CONCLUSION

The Jena Six case demonstrates that Do-Justice-Adversarialism is an inadequate model for modern prosecutors' ethics. Unfortunately, change is politically difficult and best proceeds incrementally. Focusing on race is a good first step in continuing a paradigm change already slowly taking root among some prosecutors, in efforts such as community prosecuting, prosecutor-crafted drug therapy programs, and persistent systemic reforms designed to protect the innocent by viewing the prosecutor's job as more than just processing individual cases efficiently. Although that job must continue, it must be supplemented by greater awareness of raced cultural meanings and a stronger concept of equal justice that I have called "Modified Do-Justice-Adversarialism." Moreover, when prosecutors look beyond the four corners of individual cases, as they must, they should embrace a Medical Model of community-healing. That model requires creative multi-disciplinary efforts to foster the health of the social institutions that otherwise breed crime, and to satisfy the more complex true needs of justice demanded by the community. Here again, healing the wounds inflicted by race is an excellent place to start. Reed Walters made those wounds fester. My sole hope is, through this Article, to assist in the journey begun by a number of prosecutors toward a better way—a way led by focusing not on professional discipline but on creative institutional design to foster the prosecutorial virtues not only of the warrior but also of the healer.

