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**JUDGING JENA'S D.A.: THE PROSECUTOR AND RACIAL ESTEEM**

*By Andrew E. Taslitz\**

**I. INTRODUCTION**

This article uses the views of the Jena 6 prosecutor, Reed Walters, concerning the justifications for his role in the Jena 6 affair, as a foil for exploring the proper role of prosecutors more generally in our system of justice.<sup>1</sup> Walters favors a traditional prosecutor-as-advocate role that is focused on the individual case. That 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 thus recognize his part in this economy of racial disesteem. Understanding Reed Walters' flawed vision and the superiority of its esteem-attentive alternative first requires, however, a brief review of the background to his decisions in the Jena 6 case.

*A. Who are the Jena 6?*

*1. Background*

The plight of the Jena 6 has recently made headlines throughout the nation, even leading to a congressional hearing on the subject.<sup>2</sup> The term, the "Jena 6," refers to six African-

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<sup>1</sup> See Reed Walters, *Justice in Jena*, N.Y. TIMES, September 26, 2007, A27.

<sup>2</sup> See, e.g., Abbey Brown, *All White Jury Selected for First "Jena Six" Trial; No Minorities Report for Jury Duty*, THE TOWN TALK (June 27, 2007); *Black Teen Guilty of Battery in Racially Charged La. Case*, WASH. POST, June 29, 2007, at A14; Arian Campo-Flores & Grege C. Kovach, *A Town in Turmoil*, NEWSWEEK 36 (August 20, 2007);

American students at Jena High School in Jena, Louisiana who were expelled from school and charged with attempted second degree murder and conspiracy to commit murder for what the students' supporters have called a "school yard brawl."<sup>3</sup> Five of the Jena 6 were juveniles at the time of the assault, though the prosecutor chose to proceed against the one student thus far tried and convicted, Mychal Bell, as an adult, the transfer to adult court having been done without a hearing.<sup>4</sup> Bell was ultimately convicted of the new charges of aggravated second-degree battery, conspiracy, and attempted second-degree battery after the complaint was amended to add those charges and delete the attempted murder-related ones—still exposing Bell to a maximum potential prison sentence of twenty-two-and-a-half years.<sup>5</sup> Although Louisiana's appellate courts ultimately sent Bell's case back to juvenile court, a major victory for Bell, he was nevertheless

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Farai Chideya, *Searching for Justice in Jena 6 Case*, NPR's News & Notes (aired July 5, 2007); Mary Foster, *Race is Talk of Small Louisiana Town*, THE ASSOCIATED PRESS (July 5, 2007); Howard Witt, *Racial Demons Rear Head in School Beating Case*, CHICAGO TRIBUNE June 29, 2007), available at <http://www.chicagotribune.com/news/nationworld/chi-elf2ulmmay20,1,3301167.story> (last visited September 10, 2007); Noose Hate Crime Act, H.R. 6777, 110th Cong. (2008); S. Res. 396, 110th Cong. (2007)

<sup>3</sup> See sources cited supra note 2; Walters, *supra* note 1, at A27 (Jena prosecutor's trying to rebut descriptions of the events by commentators as a "a schoolyard fight," as it has been commonly described in the news media and by critics").

<sup>4</sup> See Abbey Brown, *Jury Unanimously Convicts First "Jena 6" Teen to Face Trial*, LA GANNETT NEWS (June 29, 2007); Jesse Muhammed, *Jena 6: Young Black Males the Target of Small-town Racism*, BALTIMORE TIMES (July 25, 2007), available at <http://www.btimes.com/News/article/article.asp?NewsID=13762&5ID=3> (last visited September 10, 2007). The Jena 6 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 a New Trial, Louisiana v. Bell*, No. 82112, 1 (28<sup>th</sup> Jud. Dist. Ct. LaSalle Parish, La., Sept. 4, 2007). On the eve of Bell's trial, prosecutor Reed Walters again amended his complaint, this time charging Bell again with aggravated second-degree battery and conspiracy to commit aggravated second-degree battery. See *Supp. Motion for a New Trial, supra*, at 1; *Justice for the Jena 6: Take Action Now!!!* <http://www.snopes.com/politics/crime/jena6.asp> (last visited August 2007) [hereinafter *Justice for the Jena 6*]. 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 offense was committed. LA Code, Art. 305A. But the juvenile procedures transfer statute says nothing about mandatory transfer of *attempted* second-degree murder. However, the statute does grant 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 attempted aggravated second-degree battery. LA. Code, Art. 305B. Neither provision permits transfer solely on conspiracy charges. See also *Motion in Arrest of Judgment, La v. Bell*, No. 82112 (filed August 27, 2007). The late reduction of the charges may, therefore, 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, La. V. Bell*, No. 82112, 5-6 (filed August 27, 2007) (making analogous argument). These observations explain why I say that the prosecutor "chose" to proceed in adult court rather than that he was required to do so.

<sup>5</sup> See *Supplemental Motion for a New Trial, supra* note 4, at 1.

sentenced to an 18-month term as a juvenile.<sup>6</sup> The five remaining members of the Jena 6 still await trial.

## 2. *The “White Tree”*

To opponents of the prosecution, the plight of the Jena 6 is but one of the most overt recent examples of the usually more covert but routine racial disparities in the administration of American criminal justice.<sup>7</sup> Jena High is a mostly white school, and the schoolyard violence in question may have stemmed from a dispute over the “white tree,” a large oak tree under which only white students sat.<sup>8</sup> A black student had asked and received a school official’s permission to sit under the tree.<sup>9</sup> Shortly thereafter, students and school authorities found three hangman’s nooses dangling from the tree. Several black students responded by sitting under the tree, leading to scuffles, followed by a school assembly at which local prosecutor, Reed Walters, spoke.<sup>10</sup> At this assembly, Walters allegedly said, specifically to the black students, “I can be your friend or

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<sup>6</sup> Mychal Bell of ‘Jena 6’ ordered to juvenile facility, CNN, Oct. 12, 2007, <http://edition.cnn.com/2007/US/law/10/11/bell.jail/index.html>; *Judge Ousted for Remarks*, CHI. TRIBUNE, Aug. 2, 2008, at 4.

<sup>7</sup> See Tom Mangold, “Stealth Racism” Stalks Deep South, BBC NEWS (May 24, 2007), available at [http://news.bbc.co.uk/2/hi/programmer/this\\_world/6685441.stm](http://news.bbc.co.uk/2/hi/programmer/this_world/6685441.stm) (last visited September 10, 2007); Bill Quigley, *Injustice in Jena as Nooses Hang from the “White Tree,”* COUNTER CURRENTS (July 3, 2007), available at <http://www.countercurrents.org/quigley030707.htm> (last visited September 10, 2007); Sherrel Wheeler Stewart, *Supporters of the Jena 6 Gather 43,000 Signatures of Petition, Rally Calling for Equal Justice*, BLACK AMERICA WEB (July 31, 2007), available at <http://blackamericaweb.com/site.aspx/bawnews/jenasix731> (last visited September 12, 2007). For websites and blogs devoted heavily to Jena 6, see, e.g., *Free the Jena 6 (a coalition effort)*, <http://www.freethejena6.org>; *Friends of Justice*, <http://friendsofjustice.wordpress.com/jena-6>; *ACLU on Jena*, <http://www.aclu.org/racialjustice/racial/profiling/31880res20070917.html>; *Color of Change*, <http://colorofchange.org/jena/main.html>; *Davey D’s Hip Hop Blog*, <http://bloc.myspace.com/mrdaveyd>.

<sup>8</sup> See *Justice for the Jena 6*, supra note 4; Quigley, supra note 7.

<sup>9</sup> See *Justice for the Jena 6*, supra note 4; Quigley, supra note 7.

<sup>10</sup> See Quigley, supra note 7; Amy Goodman, “Modern-Day Lynching” —Parents of Jena Six Speak of Injustice, Racism in Sons’ Prosecution, DEMOCRACY NOW (July 10, 2007), available at <http://www.democracynow.org/article.pl?sid=07/07/10/1413228> (last visited September 10, 2007); Darrel Fears, *La Town Fells “White Tree,” But Tension Runs Deep; Black Teens’ Case Intensifies Racial Issues*, WASH. POST, August 4, 2007, at A03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080302098.html?nav=emailpage> (last visited September 10, 2007).

your worst enemy. I can end your lives [and/or make your lives disappear] with the stroke of a pen.”<sup>11</sup>

In the ensuing months, school officials put Jena High on lockdown, its main academic building thereafter burning down in what investigators deemed an act of arson.<sup>12</sup> The school principal had recommended that the three white students found to have hung the nooses be expelled, but the school board reduced the punishment to a three-days-long suspension.<sup>13</sup> Meanwhile, when Robert Bailey, who would later become one of the Jena 6, sought to attend a party, a white male attacked Bailey. The Jena prosecutor charged Bailey’s assailant with simple battery, his sentence mere probation.<sup>14</sup> The very next day, when Bailey and some of his friends entered a grocery store, a white man named Matt Windham grabbed a shotgun from his truck, purportedly to use on Bailey.<sup>15</sup> Bailey and his friends wrestled the gun away from Windham and took it to the police, reporting the incident. However, to their surprise, authorities charged Windham’s black victims, not the white Windham, with robbery and assault for the theft of the firearm.<sup>16</sup>

### 3. *The “Schoolyard Brawl”*

Only two days after the shotgun incident, the school fight that led to charges against the Jena 6 broke out at Jena High. This fight resulted in a white student, Justin Barker, being knocked unconscious, and treated at the local hospital for a concussion, a swollen eye, and a

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<sup>11</sup> See Wade Goodwyn, *Beating Charges Split La. Town Along Racial Lines*, NPR’S ALL THINGS CONSIDERED (aired July 30, 2007), transcript available at <http://www.npr.org/templates/story/story.php?storyid=12353776> (last visited September 16, 2007); Mike Taibbi, *In Depth; Racial Divide in Jena, Louisiana*, NBC NIGHTLY NEWS (aired July 31, 2007); Goodman, *supra* note 10.

<sup>12</sup> See *Justice for the Jena 6*, *supra* note 10.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* (describing the incident); Richard G. Jones, *Injustice in Jena? A tree, a fight, and questions of justice in a small Louisiana town*, N.Y. TIMES, Nov. 19, 2007, at 10..

<sup>15</sup> See *Justice for the Jena 6*, *supra* note 4 (describing the incident); Jason Whitlock, *Jena 6 case caught up in whirlwind of distortion, opportunism*, KAN. CITY STAR, .Sep. 30, 2007.

<sup>16</sup> See *Justice for the Jena 6*, *supra* note 4. [Note: Remember to say these were all allegations].

number of cuts and bruises.<sup>17</sup> The hospital released him after two hours, and he purportedly attended a class-ring ceremony that evening.<sup>18</sup> Witnesses conflict over who started the fight and whether some of the Jena 6 were even involved.<sup>19</sup> Authorities eventually charged Barker with possessing a firearm in an arms-free zone for bringing a loaded rifle to Jena High, but the courts released him on \$5000 bond.<sup>20</sup> Police arrested the Jena 6, however, for the assault on Barker.

Authorities first charged the Jena 6 with aggravated second-degree battery, with the complaint later being amended to include the charges of second-degree murder and conspiracy to commit second-degree murder.<sup>21</sup> The courts ordered bond imposed on each of the Jena 6, ranging from a low of \$70,000 to a high of \$138,000, a sharp contrast to Barker's relatively meager bond.<sup>22</sup>

Bell's conviction as an adult left him facing a potential sentence of 22 years in prison.<sup>23</sup> His trial counsel, according to his supporters, was ineffective, failing, among other things, to call witnesses in Bell's defense, to question or object to many jurors who admitted having formed

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> John Ydstie, 'Jena 6' Case Exposes Town's Racial Tensions, NPR: TALK OF THE NATION (aired Sept. 102007). .

<sup>20</sup> *Key dates surrounding the 'Jena 6'*, THE SHREVEPORT TIMES (LA.), Sep. 10, 2008, available at <http://uspolitics.about.com/gi/dynamic/offsite.htm?site=http://www.shreveporttimes.com/apps/pbcs.dll/article%3FAID=/99999999/NEWS01/70921001>.

<sup>21</sup> *See supra* note 4.

<sup>22</sup> *See Justice for the Jena 6*, *supra* note 4. Bell's high bond purportedly resulted from his having a prior juvenile conviction arising from a December 25, 2005 battery, then facing juvenile charges arising from three other incidents purportedly connected to the Jena noose-hangings but while Bell was still on probation for the first offense. *See Prosecutor: "Jena Six" Defendant Had Four Juvenile Convictions*, THE TIMES-PICAYUNE, August 25, 2007; *Abbey Brown, "Jena Six," Defendant's Criminal History Comes to Light; Bond Denied*, THE SHREVEPORT TIMES (August 25, 2007), available at <http://www.shreveporttimes.com/apps/pbcs.dll/article?Date=20070825&Category=NEWS03&ArtNo=708250353&template=printart> (last visited September 10, 2007). State and federal prosecutors investigating the case concluded, however, that the assault on Barker was unconnected to the noose-hanging incident. *See Justice for the Jena 6*, *supra* note 4, though the media, protestors, and many students and parents reached very different conclusions. *See generally Jena 6*, [http://en.wikipedia.org/wiki/Jena\\_Six](http://en.wikipedia.org/wiki/Jena_Six) (serving as a compendium of public views on the case, if not necessarily a recounting of whatever the true events may have been).

<sup>23</sup> *See supra* note 5.

prejudgments about the case, and to make serious protests to assure diversity on what turned out to be an all white jury.<sup>24</sup>

The lenient treatment of the white students contrasted sharply with the harsh treatment of the black students on a wide range of matters: the severity of the charges; the size of the bond; the length of the sentences sought; and the venue in adult versus juvenile court versus mere intra-school discipline. These apparent racial disparities ensured that prosecutor Reed Walters would find himself under fire.

*B. What Was the Prosecutor's Vision of His Ethical Obligations?*

Walters published an op-ed piece in several leading national newspapers defending his actions in the case.<sup>25</sup> He argued that the law prohibited him from bringing hate crimes charges against the white students who hung the nooses on the tree, while the law correspondingly required him to proceed against the black students, particularly Mychall Bell, as adults, seeking extremely harsh punishments.<sup>26</sup> Other writers have challenged the accuracy of his legal analysis.<sup>27</sup> But this piece will be far more concerned with the conception of the prosecutor's professional role, specifically concerning the racial impact of prosecutorial statements, policies, and actions embodied in the Jena prosecutor's letter—even assuming its assertions' accuracy.

The Jena prosecutor's vision of his professional role is to be bound by the "letter" of the law—a position that assumes that there is always such a crystal clear "letter" to be found and that his job is to resolve each case before him in isolation, ignoring whether it is part of a pattern of related cases, whether it sends destructive social messages, and whether it furthers "equal"

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<sup>24</sup> See *Supplemental Motion for a New Trial*, *supra* note 4.

<sup>25</sup> See Walters, *supra* note 1.

<sup>26</sup> See *id.*

<sup>27</sup> Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQUETTE L. REV. 85, 119 n. 165 (2007).

justice in society as a whole.<sup>28</sup> In short, this is a narrow, technical conception of the prosecutor's role that, this piece will argue, embodies a form of willful ignorance inconsistent with empirical realities, relevant psychological theories, the evolving recognition of a very different social role for the prosecutor, and the most normatively desirable vision of that role.

### C. *An Alternative Vision of the Prosecutor's Role*

The alternative vision of the prosecutor that this piece will defend is rooted in the idea of the "economy of esteem".<sup>29</sup> "Esteem," as I use the word here, 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. Because esteem evaluations are comparative, they are scarce, so individuals and groups compete for esteem.<sup>30</sup> They do so, in the language of economist Geoffrey Brennan and philosopher Philip Pettit, by competing for "esteem services"—providing or "purchasing" services that increase your esteem or decrease that of your competitor.<sup>31</sup> This

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<sup>28</sup> Thus, Walters said:

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.

Walters, *supra* note 1. 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." *Id.* Walters thus portrayed himself as straightjacketed by clear and absolute law, as if he had no discretion, thus no responsibility. While noting that the courts ultimately sent Bell's case back to juvenile courts, Walters saw no need therefore to re-think his charging decisions or his responsibilities—and even to admit the *possibility* of error. He specifically distanced himself from the question whether "America needs a new civil rights movement," focusing the bulk of his op-ed piece on why he thought Bells' alleged crime a heinous one and why he could not charge the noose-hangers with a hate crime given the facts of the two cases. *See id.* He devoted not one word to whether he should have considered the impact of his decisions in the Jena 6 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.

<sup>29</sup> *See generally* GEOFFREY BRENNAN & PHILIP PETTIT, THE ECONOMY OF ESTEEM (2004) (first articulating a theory of the esteem economy).

<sup>30</sup> *See id.* at 15-23 (defining "esteem").

<sup>31</sup> *See id.* at 55-62 (describing "esteem services").

competition will often occur subconsciously, permitting consciously truthful denials of the self-interested reasons for your actions.<sup>32</sup> There are at least three broad types of esteem service strategies: (1) performance strategies – behaving in ways that you believe will raise your esteem in the eyes of the relevant audience; (2) publicity strategies – expanding the audience aware of your purportedly esteem-enhancing activities and dispositions while shrinking the audience aware of the opposite; and (3) attempting to alter the standards for, dimensions of, and comparators for judging esteem in the relevant social sphere.<sup>33</sup> Esteem brings strong psychological rewards of its own as well as enhancing access to money, power, education, and a wide array of other resources.<sup>34</sup> Just as there is an esteem economy, so is there a *disesteem* economy in which some persons or groups demand services that will impose *disesteem* on other persons or groups.<sup>35</sup>

One of the major sources of esteem valuation and competition, centers upon race. Racial membership can bring esteem or disesteem, and one's race can alter how that individual is judged by certain observers, who may understand the same actions differently when engaged in by someone of one race versus another.<sup>36</sup> The prosecutor's social role is in part to assist in imposing disesteem on those convicted of crimes,—disesteem *proportional* to the wrong. But the prosecutor's actions will necessarily affect the esteem or disesteem respectively awarded to, or imposed upon, racial groups by the prosecutor's words and deeds. The prosecutor does not, of course, act alone, but he can contribute to the economy of esteem in conjunction with other psychological and cultural forces and social actors in important ways.

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<sup>32</sup> See *id.* at 39-48, 50-55.

<sup>33</sup> See *id.* at 68-74.

<sup>34</sup> See *infra* Part II at 10-12.

<sup>35</sup> See BRENNAN & PETTIT, *supra* note 29, at 223-29, 238.

<sup>36</sup> See *infra* Part II for details supporting all the assertions in this paragraph.

The causal chain can work the other way too, with racial esteem affecting how the prosecutor interprets individual and group actions. But the prosecutor unavoidably plays a role in the economy of racial esteem, the impacts of his actions are often foreseeable, and his own self-deception is capable of being overcome. He is, therefore, morally responsible for his actions in the economy of racial esteem. His “duty to do justice” is widely recognized to encompass at least ensuring procedural fairness to the individual, something he cannot do if blinded by esteem-colored glasses, but that duty must be broadened to recognize the broader social impacts of his actions.<sup>37</sup>

Prosecutors have many tools at their disposal for promoting racial esteem or disesteem. What charges they seek, what tactics they use in guilty plea negotiations, what publicity they give to a crime are but a few of those tools.

Jena’s economy of racial esteem in miniature offers a perfect opportunity to explore the prosecutor’s role in that economy. This article will take advantage of that opportunity. The article will also suggest alternative ethical models for prosecutors to follow to minimize the harm that they currently wreak in such an economy while maximizing the social gains of visiting proportional disesteem upon individual wrongdoers rather than upon their racial groups.

#### D. *A Roadmap to Esteem*

Part II explains what “esteem” is and how it can operate in a world of market exchange. Part IIA and B examines as well how the esteem economy can affect the fate of both individuals and groups, most of the work of the esteem economy being done at the level of the unconscious.

Part IIC first explores 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 ill. Next, Part III explores in

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<sup>37</sup> See generally Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 ILL. L. REV. 1573 (2003) (arguing that prosecutors’ duty to “seek justice” should give rise to a host of obligations not shared by other lawyers - and insufficiently recognized in existing ethical codes).

detail the primary means by which well-meaning prosecutors can tilt the esteem economy harshly against minority racial groups. Part III explores 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. Several trends contribute to the evolution of this new role, specifically the development of five new prosecutorial functions: the preventative, healing, procedural justice, unconscious non-adversarial, 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, including analyzing how Jena 6 prosecutor Reed Walters could have handled the case differently.

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

## **II. THE ECONOMY OF ESTEEM**

### *A. Defining Terms*

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.<sup>38</sup> Although esteem is an attitude, not an action, it is linked to action because esteem stems from one's performance on some good characteristic. Esteem must thus be earned.<sup>39</sup>

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<sup>38</sup> See BRENNAN & PETTIT, *supra* note 29, at 15-23.

<sup>39</sup> See *id.* at 16-17.

Furthermore, esteem, though bestowed based upon actions, is often seen as revealing of a deeper character trait, that is, of a virtuous nature.<sup>40</sup>

For example, a professor's volunteering to spend extra time tutoring students struggling in his course may be esteemed by his students as a "kind" or "caring" professor.<sup>41</sup> It is not simply his kind action that students value, but his kind nature, as revealed by that action. For the professor to be esteemed on this trait, however, it is not enough that he be seen as caring; he must, rather, be seen as *more caring* than most other professors in the institution, for esteem is by definition a comparative concept. Someone who is esteemed for many actions and qualities by varied audiences is "widely esteemed," benefitting from a more general approval than esteem achieved on one or two characteristics.<sup>42</sup> The same professor would, therefore, be widely esteemed if much of the student body—including students who had not seen him teach—as well as his colleagues, school administrators, alumni, and members of professional organizations considered him an all-around excellent teacher, scholar, and community servant.

Because esteem is comparative, it requires some understanding of average performance.<sup>43</sup>

The absence of esteem occurs, therefore, if others view someone as but an average achiever.<sup>44</sup>

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<sup>40</sup> 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....

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

<sup>41</sup> The example is mine. Brennan and Pettit notably identify at least three dimensions on which esteem may be bestowed: (1) "standard" properties that may be shared by all persons, such as cowardice or bravery; (2) "positional" properties, where esteem turns on one's ranking in an explicit or implicit competition within an organization, such as the most or least honest employee in a company or the persons coming in first and last in a race; and (3) "sortal" properties, turning on a person's social role, for example, as a "kind nurse, an honest politician, a corrupt accountant...." BRENNAN & PETTIT, *supra* note 29, at 17 (emphasis added). My example is of the last, "sortal", kind.

<sup>42</sup> See *id.* at 17 n. 1.

<sup>43</sup> See *id.* at 69, 92-94.

“Disesteem” occurs whenever someone is seen as being above average on a negative trait.<sup>45</sup> To say someone is a “cruel” person is thus at least to say that he shows a more active willingness to, and joy in, harming others than do most people. But being seen as below average on a positive trait may or may not lead to disesteem, the rating being revealed in the audience’s word choice. Thus to call someone “brave” is high praise, but the absence of that descriptor does not necessarily make that person a “coward”—a stinging disesteem-imposing description.<sup>46</sup> The absence of bravery may simply mean you have average fortitude in the face of danger, or perhaps that you are a tad below average but still not deserving of disapprobation. On the other hand, someone who cares nothing for other people—he is simply indifferent to them and their suffering—is not likely to be described as “cruel.” But he may be described as “indifferent,” “cold,” or “uncaring”—words of mild insult, albeit not to so great a degree as embodied in the idea of cruelty.<sup>47</sup>

Status is esteem’s close cousin. High social status is, of course, valued and inheres in some audience’s attitude toward the person observed. Moreover, status is also a comparative concept—one’s status existing only relative to others.<sup>48</sup> But status need not be seen as earned. A wealthy person may have high social status in some quarters merely by virtue of being wealthy, even if all his or her wealth was inherited.<sup>49</sup> Esteem requires more: the belief that the person

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<sup>44</sup> 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), 69, 92-94 (discussing average performance).

<sup>45</sup> *See id.* at 17-18.

<sup>46</sup> *Cf. id.* (using analogous examples).

<sup>47</sup> On the negative moral implications of ascribing “indifference” to another, *see* Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1290 (2000).

<sup>48</sup> *See* 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”).

<sup>49</sup> *See id.* at 15 (noting that income and one’s *parents’* social class are important determinants of status; 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 some forms of status as unearned is mine, not being addressed by Brennan and Pettit. Indeed, they sometimes conflate “status” with “esteem.” *See* BRENNAN & PETTIT, *supra* note 29, 1.

*deserved* his or her good fortune, earning it by her hard work or superior skills.<sup>50</sup> In practice, however, the distinction between status and esteem can be a fuzzy one. Thus, in a capitalist, highly individualist country like ours that is steeped in the Protestant work ethic, the wealthy inheritor's money may trace its roots back to an ancestor who did earn it.<sup>51</sup> Mere association with that ancestor may give his descendant a kind of reflected esteem.<sup>52</sup> For this and similar reasons, words like "status," "honor," and "esteem" are often used interchangeably, generally without any loss in clarity of expression.<sup>53</sup>

Esteem must also be distinguished from reputation. "Reputation" consists of what many others in a certain community say about an individual's performance in a particular field of endeavor.<sup>54</sup> Esteem, however, is an attitude held by audience members, whether or not communicated to others or acted upon by them.<sup>55</sup> Some audience members might believe in the truth of a person's good reputation, holding him in high esteem, but others might reject his reputation as undeserved.<sup>56</sup> Nevertheless, reputation can have an important influence on esteem, so a good reputation is highly desired, a bad one to be avoided.<sup>57</sup>

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<sup>50</sup> See *supra* text accompanying notes 38-47 (defining "esteem").

<sup>51</sup> Cf. DE BOTTON, *supra* note 48, at vii ("[S]tatus in the West...has been awarded in relation to financial achievement."), 181 ("Because societies are in practice trusted to be 'meritocratic,' financial achievements are necessarily understood to be 'deserved.'" The ability to accumulate wealth is prized as proof of the presence of at least four cardinal virtues: creativity, courage, intelligence, and stamina.").

<sup>52</sup> Cf. MARMOT, *supra* note 49, at 15 (just having parents of high social class brings the child status).

<sup>53</sup> See DE BOTTON, *supra* note 48, at 182-83 (using "honour" and "status" interchangeably); BRENNAN & PETTIT, *supra* note 29, at 24 (collecting as illustrating esteem's value a variety of quotes that also use phrases like "reputation," "honour," and "glory").

<sup>54</sup> See STEVEN FRIEDLAND, PAUL BERGMAN, & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE 103 - 08 (3d ed. 2007) (defining "reputation").

<sup>55</sup> See BRENNAN & PETTIT, *supra* note 29, at 15 ("[E]steem...involves an attitude, not an action, and...it may or may not be expressed in praise or criticism).

<sup>56</sup> See *id.* at 27-28 (esteem can be "in fact defective"), 147-48 (noting possibility of attaining high esteem—"fame"—though there is no provable basis for deserving it), 226 (esteem varies with who is doing the evaluating so that, for example, countercultural groups face disesteem from the broader society but esteem from the rebels); Taslitz, *Myself Alone*, *supra* note 40, at 104 -08 (explaining the potential inaccuracies of reputation); FRIEDLAND, ET AL, *supra* note 55, at 89, 138 (analyzing credibility of reputation witnesses).

<sup>57</sup> 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 PLAYERS RAPE CASE 1, 5-7 (forthcoming 2007) (draft manuscript). (summarizing reputation's value); BRENNAN & PETTIT, *supra*

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.<sup>58</sup> Closer relationships themselves bring material benefits, perhaps in job or educational opportunities.<sup>59</sup> Like social status, high esteem also brings political power, longer lives, better health, and more resource-rich mates.<sup>60</sup> 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.<sup>61</sup> They are thus more effective persuaders, leading to further snowballing of their access to money, psychic satisfaction, and power.<sup>62</sup>

But esteem is valued as of inherent worth too.<sup>63</sup> 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 another but more prestigious institution in a godforsaken corner of the country. They will do so merely to receive the enhanced esteem from being associated with the new

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note 29, at 3-4, 30-31, 197-200 (distinguishing reputation from esteem, largely viewing the former as a competitive tool or “service” for achieving the latter, while simultaneously critiquing other economists’ unduly narrow understanding of reputation’s meaning and value).

<sup>58</sup> See BRENNAN & PETTIT, *supra* note 29, at 26 (noting esteem-trust connection and resulting relationship advantage).

<sup>59</sup> See ABRAHAM TUCKER, *THE LIGHT OF NATURE PURSUED* 188 (1834) (“[W]e find it so extremely and continually useful to have the good opinion and esteem of others, which makes them friendly and obsequious to our desire, 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 CULTURE OF THE COURTROOM* 112 (1999), (discussing material benefits of high status).

<sup>60</sup> . *Cf.* TASLITZ, *RAPE AND CULTURE*, *supra* note 60, at 112 (“High status may also bring...more access to money, jobs, and political power.”); MARMOT, *supra* note 49, at 1-12 154-58, (arguing higher social status - - independent of other factors - - leads to longer, healthier lives); and that low social status norms marriageability); BRENNAN & PETTIT, *supra* note 29, at 26 (noting that another instrumental benefit of enjoying the esteem of those whom you esteem is providing you with grounds to think well of yourself too).

<sup>61</sup> *Cf.* TASLITZ, *RAPE AND CULTURE*, *supra* note 60, at 69-74 (defending similar point concerning gendered status).

<sup>62</sup> See *id.* at 111-13.

<sup>63</sup> Compare BRENNAN & PETTIT, *supra* note 29, at 29 (arguing esteem has intrinsic value); *with* DE BOTTON, *supra* note 48, at vii (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.”).

academic home.<sup>64</sup> Albeit often in somewhat different language, commentators from ancient Greece to modern times—including Cicero, Aquinas, Hobbes, Locke, Voltaire, Hume, Kant, and John Adams—have sung esteem’s praises.<sup>65</sup> Philosopher Adam Smith put 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.<sup>66</sup>

Modern disciplines as diverse as neuroscience, evolutionary psychology, and behavioral and bio-economics confirm the factual accuracy of Smith’s position.<sup>67</sup> It is important to remember that Smith spoke of “unfavourable regard” too—of disesteem. Disesteem is, however, esteem’s mirror, bringing just the opposite ill consequences to esteem’s positive ones.<sup>68</sup>

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<sup>64</sup> See BRENNAN & PETTIT, *supra* note 29, at 71 (using similar example).

<sup>65</sup> See *id.* at 24-25.

<sup>66</sup> ADAM SMITH, *THE THEORY OF THE MORAL SENTIMENTS* 116 (1769) (Liberty Classics ed. 1982).

<sup>67</sup> Brennan and Pettit argue that biology probably explains why esteem has *inherent*, not solely instrumental, value for human beings:

But there 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 29, at 29. See also Roy F. Baumeister & M. R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 *PSYCHOLOGICAL BULL.* 497 (1995) (psychological evidence of the central value of esteem in humans); 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).

<sup>68</sup> Cf. DE BOTTON, *supra* note 48, at vii-viii (noting that a “status anxiety” about lost, potentially losing, or low status can give us the sense of being stripped of human dignity and respect; leaves us in constant worry that our status hangs in the balance should we fail to achieve; and, from failure, brings 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 bitter and ourselves with shame.”); MARMOT, *supra* note 49, at 1-12 (noting low social status causes ill health); TASLITZ, *RAPE AND CULTURE*, *supra* note 60, at 69-75, 136-37, 141-45 (noting ill effects of low social status of women in the context of sexual assault). Although achieving equal esteem for all is likely impossible, especially if the imperative for comparative status and esteem has biological roots, there still may be ways to minimize the ill or unfair consequences of esteem/disesteem inequalities. Marmot, for example, posits that low status harms health and life-span because it decreases autonomy (the sense of control over the direction of our lives) and social integration (of connectedness to others). See MARMOT, *supra* note 49, at 11, 158-63. Marmot concedes, however, that status

## B. *How the Economy of Esteem Works: Basic Model*

Given esteem's being widely desired but scarce—scarce because esteem is a *comparative* ranking system in which not everyone can be on top—there is always an effective demand for it.<sup>69</sup> “Effective” demand means that individuals are willing to pay some price in time, money, or other resources to attain a desired level of esteem.<sup>70</sup> Individuals will vary in how much they are willing to pay for what degree of esteem, but everyone is willing to pay something.<sup>71</sup>

Esteem-seeking can be overt or virtual, conscious or unconscious.<sup>72</sup> Thus someone seeking to prove himself his generation's greatest mathematician can nakedly seek esteem among his colleagues, earning it by doing and publicizing brilliant work.

But this overt strategy is not viable for anyone who seeks to be esteemed for virtuous *character* traits. A person who is believed to act kindly, though not because he cares about others but solely to achieve public praise for his behavior will be little esteemed. (He will still have some

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inequalities will always be with us but argues that social institutions can be 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 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”—he insists, is a social ill that can be cured. *Id.* at 4. Indeed, 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 15-16. 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 101 -04 (defending the principle under the rubric of “esteem”). Furthermore, esteem—based on perceived performance—differs from recognition or respect, that is, from treating others in a way that recognizes the fundamental equality in certain crucial respects of all humans. *Cf.* BRENNAN & PETTIT, *supra* note 29, at 20, 23, 33, 154, 179, 185-90, 192, 194, 237; Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 27 -28 (2003) (defining “respect”). Humans doing evil deeds deserve “disesteem” but never “disrespect.” *See infra* text accompanying notes 192 - 95.

<sup>69</sup> *See* BRENNAN & PETTIT, *supra* note 29,

<sup>70</sup> *See id.* at 34.

<sup>71</sup> *See id.* at 35 (“[S]ocial esteem is something that everyone desires, and how much esteem people receive depends upon how they perform in this or that domain.”). This observation does not mean, however, 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; *infra* text accompanying notes 80 - 81.

<sup>72</sup> *See* BRENNAN & PETTIT, *supra* note 29, at 36-49.

esteem, for we prefer good behavior to bad.)<sup>73</sup> His heart and hand must be seen as in synch for him to be thought of as a good person.<sup>74</sup> Where they are not in synch, his actions seem deceptive; he is just “playing” at virtue.<sup>75</sup> Explains seventeenth-century French moralist, Jean de la Bruyere:

At heart men wish to be esteemed, and they carefully conceal this because they wish to pass for virtuous, and because desire to gain from virtue any advantage beyond itself would not be to be virtuous but to love esteem and praise—in other words, to be vain. Men are very vain, and they hate nothing so much as being regarded as vain.<sup>76</sup>

This conundrum is resolved by “virtual” demand for esteem.<sup>77</sup> A person may, therefore, overtly target a particular behavior for reasons other than gaining esteem,<sup>78</sup> say, volunteering to head a charitable fundraising drive for curing juvenile cancers because of a sincere love for children. But if that behavior brings him esteem, he is more likely to do more of it, more effectively and enthusiastically. Esteem-bestowal serves as a reward. On the other hand, if he chooses another behavior, say, competing in beer-guzzling contests because he likes getting drunk, disesteem for these actions among his co-workers, family, and church members will inhibit future drinking. Disesteem serves as a punishment. Each person can, therefore, demand more esteem by engaging in actions that bring it, thus indirectly or “virtually” demanding esteem.

But human beings usually act from multiple, often mixed motives.<sup>79</sup> The person who volunteers fundraiser to cure juvenile cancers may thus act both from a love of children and of

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<sup>73</sup> Cf. *Id.* at 36-37 (making similar point using different examples).

<sup>74</sup> See *id.* at 38.

<sup>75</sup> See *id.* at 37-38.

<sup>76</sup> A.O. LOVEJOY, REFLECTIONS ON HUMAN NATURE 144 (1961) (quoting de la Bruyere).

<sup>77</sup> See BRENNAN & PETTIT, *supra* note 29, at 40-46.

<sup>78</sup> See *id.*

<sup>79</sup> See, e.g., Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER & L. 1, 30 -49 (2002); Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. L. & GENDER 381, 423- 34 (2005) [hereinafter “*Willfully Blinded*”].

esteem. Yet the more that he is seen to be acting to gain praise, the less of it he will receive.<sup>80</sup> Furthermore, sincerity is hard to fake.<sup>81</sup> Self-deception—driving your true motivations into the less conscious or even the unconscious realms of your mind—makes your consciously-articulated motives seem sincere ones, so appearing to both you *and* your observers.<sup>82</sup> Indeed, there is strong evidence that self-deception evolved precisely to enhance individuals’ effectiveness at other-deception.<sup>83</sup> For this reason, much of the demand for esteem may occur unconsciously.

The supply of esteem is likewise complex. Because esteem is an attitude, would-be suppliers cannot choose to manufacture esteem. They can offer esteem only to those they see as earning it.<sup>84</sup> Nor can the benefits of esteem or the costs of supplying it be captured fully by any supplier—the old problem of externalities.<sup>85</sup> If A feels and expresses esteem for B, and if A’s words persuade others, thus catching fire, then B might become widely and highly esteemed. This benefits B the most, but does not benefit A apart from the satisfaction that A derives from sincerely esteeming B. A’s incentives for supplying esteem to B are consequently small. Esteem cannot, therefore, be directly produced for a price upon demand, nor can it be directly traded on an open market nor expressly bequeathed to heirs.<sup>86</sup> Furthermore, for esteem to confer its blessings it must also seem sincere, so any supplier having mixed motivations for holding and

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<sup>80</sup> See *supra* text accompanying notes 70 -75 (explaining why the demand for esteem as to character traits must be virtual); BRENNAN & PETTIT, *supra* note 29, at 48 (noting that persons seen even partly to be displaying character virtues for the purpose of gaining esteem will “as a result...not attain quite the level of esteem that would accrue to more saintly counterparts.”).

<sup>81</sup> See BRENNAN & PETTIT, *supra* note 29, at 39 (noting pure deception as means of concealing a conscious desire for esteem is likely a failing strategy).

<sup>82</sup> See Taslitz, *Willfully Blinded*, *supra* note 79, at 424 - 34.

<sup>83</sup> See *id.* at 393 - 98.

<sup>84</sup> See BRENNAN & PETTIT, *supra* note 29, at 52.

<sup>85</sup> See *id.* at 52-55.

<sup>86</sup> See *id.*

expressing esteem for another must once again hide this truth from himself as well as others.<sup>87</sup> He too must play the game of self-deception.

The problem of esteem supply is solved by indirect or virtual trade via “esteem services.”<sup>88</sup> 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.<sup>89</sup> There is indeed a separate economy of attention.<sup>90</sup> One way to gain another’s attention is to give it to him, generating an instinct for reciprocity.<sup>91</sup> Of course, if B nakedly attends to A’s purportedly virtuous behaviors solely to gain A’s attention, A may not grant it. A may perhaps resent B as an obvious sycophant.<sup>92</sup> But if B hides his true motives from himself and thus from A, A will appreciate B’s seemingly sincere attentions and reciprocate.<sup>93</sup> Furthermore, if A’s attending to B increases A’s esteem, A will pay still more attention to B, though A may not fully consciously appreciate why he does so. But if A’s attending to B brings A *disesteem*, or if B begins to ignore A, A’s attention to B will flag and perhaps vanish.<sup>94</sup>

Another sort of esteem service is to “testify” or speak on another’s behalf in an effort to enhance the breadth and depth of various audience’s esteem for that other.<sup>95</sup> Again, this

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<sup>87</sup> See *supra* text accompanying notes 81- 83(concerning need for apparent sincerity of motives for action other than esteem-seeking and the role of self-deception in creating this appearance).

<sup>88</sup> See BRENNAN & PETTIT, *supra* note 29, at 55.

<sup>89</sup> See *id.* at 56.

<sup>90</sup> See generally, RICHARD A. LANHAM, *THE ECONOMICS OF ATTENTION: STYLE AND SUBSTANCE IN THE AGE OF INFORMATION* (2006) (articulating one theory of an 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).

<sup>91</sup> See BRENNAN & PETTIT, *supra* note 29, at 61-62. More precisely, Brennan and Pettit argue that, to succeed, reciprocity may not be a conscious goal in supplying another with esteem. But if the person whom you esteem does not reciprocate, then you will take your esteem-grant elsewhere. See *id.*

<sup>92</sup> See *id.* at 58 (“But the problem is that my sincerity will always be in question where there is a straightforward exchange involved”).

<sup>93</sup> See *id.* at 60-61 (noting conscious concealment of esteem-reciprocating-goals is unlikely to succeed, so alternative “virtual” concealment strategies are required); Taslitz, *Willfully Blinded*, *supra* note 80, at 419-29 (explaining personal advantages of self-deception).

<sup>94</sup> See BRENNAN & PETTIT, *supra* note 29, at 61-62 (offering examples supporting this point).

<sup>95</sup> See *id.* at 56-57.

agreement may be conscious and overt or unconscious and virtual.<sup>96</sup> If testimony is highly effective, it may lead to “common belief” in the other’s virtue—just about everyone thinking well of him.<sup>97</sup> Common belief can stem from informational cascades in which so many people value *you* that more “choose” to share the belief just because they want to join the bandwagon.<sup>98</sup> Once common belief in virtue is achieved, it is hard (though far from impossible) to dislodge by contrary evidence.<sup>99</sup> The same is true of fame’s opposite—infamy.<sup>100</sup> Indeed, throughout this article, it is important to remember that all that I say about esteem applies to disesteem as well, though with the incentives often reversed (people generally want less disesteem rather than more).

There are a variety of strategies in competing for esteem. A performance-based strategy specializes performance in the areas in which one does best and seeks the maximum performance level that can be achieved at an acceptable cost.<sup>101</sup> A publicity-based strategy aims to publicize and positively-categorize a person’s achievements in as large and diverse audiences as is feasible.<sup>102</sup> Correspondingly, the performer can seek to hide or downplay his failures.<sup>103</sup> A related tactic is to aim publicity only at those audiences likely to be receptive to your performance.<sup>104</sup> Similarly, you can choose to value their opinion above another’s.<sup>105</sup> A rabid liberal chooses to give a red-meat speech to left-wing Democrats, not equally rabid right-wing

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<sup>96</sup> *See id.* at 60-61.

<sup>97</sup> *See id.* at 57.

<sup>98</sup> *See id.* (making this point); CASS SUNSTEIN, *REPUBLIC COM.* 2.0 84-85, 90-91 (defining “informational cascades”).

<sup>99</sup> *See* BRENNAN & PETTIT, *supra* note 29, at 57.

<sup>100</sup> *See id.* (making this point and further noting that “infamy amounts to stigma, as distinct from mere shame....”).

<sup>101</sup> *See id.* at 69-70.

<sup>102</sup> *See id.* at 70.

<sup>103</sup> *See id.* at 70-71.

<sup>104</sup> *See id.* at 70 (“[T]hey will want the audience to share a common awareness that their relative merits [but not demerits] are recognized”), 142, 204 (analyzing audience choice).

<sup>105</sup> This observation is an application of virtual reciprocity, discussed *supra* text accompanying notes 70-75.

conservatives. The quality of the audience matters too, the acclaim of the Democratic Presidential Convention meaning more than that of a local block captain.<sup>106</sup>

Presentation strategies offer a third option.<sup>107</sup> 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?<sup>108</sup> Many law school faculties long had, and perhaps some still have, debates over the relative value of teaching versus scholarship. Those professors skilled in both areas likely ignored the debate. But faculty members whose strongest talent by far lay on one side or the other of the scholarship/teaching divide engaged in heated, even angry conflicts.<sup>109</sup> In a world of merit pay, some of this anger was directed more at Deans than other colleagues, an effort to compete for scarce pay raises. But my own experience suggests that the depths of passion involved stemmed primarily from the desire to persuade faculty and administrators alike to grant esteem based more on one dimension than the other. Combatants on both sides often dismissed those highly skilled in both areas as aberrant, not to be counted in computing average versus above or below-average performance. Likewise, debate occurred over what “equivalent” schools should be used as comparators and what the standards should be for “good” or “bad” teaching or scholarship. This academic hubbub is one striking example of a set of presentation strategies.

The fundamental attribution error helps to explain why contests over esteem can be so fierce.<sup>110</sup> This error occurs when we explain another’s behavior more by their perceived

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<sup>106</sup> *See id.* at 204-08 (analyzing audience quality).

<sup>107</sup> *See id.* at 70-71.

<sup>108</sup> *See id.*

<sup>109</sup> *See id.* at 71 (discussing similar example).

<sup>110</sup> E.E. JONES, INTERPERSONAL PERCEPTION 138 (1990) (arguing that the fundamental attribution error is the “most robust and repeatable finding in social psychology....”).

character than by their situation.<sup>111</sup> If a colleague is repeatedly late, many of us will attribute it to his tardy nature, giving little weight to its more likely true cause: the sleep apnea from which he suffers. We assume, on the other hand, that were we in his circumstances, suffering his plight, our stronger character would prevail. *We* would still be punctual. Yet if we in fact found ourselves in our colleagues' situation, we would likely explain our resulting lateness more by our circumstances than our fundamentally flawed nature. The error is magnified by our willingness to make judgments about others' character based upon startlingly minimal information and by the "halo" and "devil's horns" effects.<sup>112</sup> The halo effect is the tendency to rely on one positive trait to obtain an overall positive opinion of a person's personality, the devil's horns' effect being the opposite.<sup>113</sup> Esteem-enhancing actions often have powerful contributing situational causes: the accident of sharing a Battlestar Galactica obsession with a boss, who accordingly offers you the opportunity to perform well on increasingly difficult tasks; the church fundraiser you head primarily because your spouse insisted you do so; or the unusual heroism you display primarily because the person you want to romance is watching when a crisis occurs. Observers are more likely, however, to attribute these achievements respectively to diligence, compassion, and bravery rather than to accident.<sup>114</sup> Furthermore, even a single observation of relevant behavior may be enough to support the observer's conclusions, and these positive conclusions will tend likewise to lead audiences to see the achiever as an all-around good person, at least in the absence of contrary evidence.<sup>115</sup>

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<sup>111</sup> See *id.* (describing the error as "the tendency to see behavior as caused by a stable disposition of the actor when it can be just as easily explained as a natural response to more than adequate situational pressure.").

<sup>112</sup> See Lenese Herbert, *Othello Error: Facial Profiling, Privacy, and the Suppression of Dissent*, 5 OHIO ST. J. CRIM. L. 79, 119 & n.247 (2007) (defining the "halo" and "devil's horns" effects).

<sup>113</sup> See *id.* at 119 - 20 & n. 247.

<sup>114</sup> See NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 57-62 (2000) (explaining and illustrating the fundamental attribution error).

<sup>115</sup> See Taslitz, *Myself Alone*, *supra* note 40, at 89 -91 (making similar point); BUCHANAN & PETTIT, *supra* note 29, at 74-75 (explaining the role of the fundamental attribution error in an economy of esteem as leading actors and

Social norms—regularities in behavior in society or a group—are also intimately linked to patterns of esteem.<sup>116</sup> Norms reflect and embody both attitudes and behavior.<sup>117</sup> A norm exists only if most persons in a particular society comply with it.<sup>118</sup> But a regular behavior is a norm only if people generally approve of those complying with it and disapprove of those doing the opposite.<sup>119</sup> Moreover, the approval or disapproval, whether conscious or not, must partly explain the behavior.<sup>120</sup> This approval or disapproval manifests itself with strong moral overtones, and moral talk plays a role in the rise, fall, and evolution of social norms.<sup>121</sup> Expression of the attitudes here called esteem and disesteem are thus both shaped by norms and instantiate them.<sup>122</sup> Changing norms can therefore change economies of esteem and vice-versa.<sup>123</sup> The often subconscious trade in the esteem economy; its connection to moralized judgments, especially about virtuous versus unvirtuous character; its close inter-relationship with

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observers to explain virtuous behavior based on enduring character traits rather than the presence of situations that enable actors to obtain esteem).

<sup>116</sup> See Lynn Stout, *Social Norms and Other-Regarding Preferences*, in *NORMS AND THE LAW* 13, 28 (John N. Drobak ed. 2006) (noting that, despite disagreement over the definition of social norms, “[t]here seems to be a general consensus, however, that norms are rules of behavior that are enforced not by courts but by other forces.”); BRENNAN & PETTIT, *supra* note 29, at 267 (emphasizing that norms are largely regularities of behavior that “need not be enforced by collective ratification in the manner of laws, even if they are occasionally buttressed by legal support.”).

<sup>117</sup> Explain Brennan and Pettit:

Our argument will suppose that norms involve patterns of more or less general behaviour that materialize in part—that emerge or are stabilized—by virtue of the fact that people generally approve or are expected to approve of others displaying that behaviour, and/or disapprove or are expected to disapprove of their not doing so. This core supposition about norms puts us in agreement with most recent authors on the subject and ought not to generate any controversy.

BRENNAN & PETTIT, *supra* note 29, at 269-70.

<sup>118</sup> See *id.* at 270 (noting a necessary part of the definition of a social norm is that it is “generally complied with....”).

<sup>119</sup> See *id.* (noting general approval of compliance, disapproval of its opposite, or at least an expectation of both, is another necessary definitional aspect of a norm).

<sup>120</sup> See *id.* (making this point).

<sup>121</sup> See generally *EVOLUTIONARY ORIGINS OF MORALITY: CROSS-DISCIPLINARY PERSPECTIVES* (Leonard D. Katz ed. 2000).

<sup>122</sup> See 4 BRENNAN & PETTIT, *supra* note 29, at 285-87; cf. RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 67-68, 180-82 (2008) (Illustrating How Law Can Help Use Social Norms To Change Behavior).

<sup>123</sup> See BRENNAN & PETTIT, *supra* note 29, 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.

social norms; and its abilities to alter behavioral incentives and to bring material and psychic rewards and punishments will all shortly be seen to play critical roles in understanding too-often ignored aspects of the criminal justice system and of the prosecutor's role in it.

### C. *Racial Groups and the Esteem Economy*

Esteem and disesteem can accrue to groups as well as individuals.<sup>124</sup> Some of these groups are voluntary, some involuntary.<sup>125</sup> 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, there being no individual or collective ability to exit or disband the group and no collective veto over membership.<sup>126</sup> A person sharing the characteristics defining the group is an automatic member.<sup>127</sup> Stereotypes, cognitive biases, and cultural narratives define the group collectively and its individual members as sharing certain traits and behaviors—traits and behaviors associated with fundamental moral qualities.<sup>128</sup> These assertions may be conscious or unconscious.<sup>129</sup> 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.<sup>130</sup>

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

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<sup>124</sup> See *id.* at 195-96, 223.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.* at 223-24.

<sup>127</sup> See *id.*

<sup>128</sup> See Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 124 - 29 (2006) (concerning moral associations triggered in many whites' minds upon seeing a black face).

<sup>129</sup> See Andrew E. Taslitz, *Racial Blindsight: the Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1 (2007) (analyzing barely conscious racial biases); Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 S.W.L. REV. 101, 108-18(2008) (analyzing subconscious racial biases).

<sup>130</sup> See *id.* at 222-29. Brennan and Pettit note that even mere association between esteemed and disesteemed groups' members reduces the former group's esteem. See BRENNAN & PETIT, *supra* note 29, at 228.

*Beauharnais v. Illinois*,<sup>131</sup> the President of the White Circle League challenged his conviction under a criminal statute prohibiting defaming groups of people, arguing that free speech guaranteed him the freedom to distribute a pamphlet spewing racial hatred. Said the pamphlet, “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.”<sup>132</sup> The Supreme Court affirmed *Beauharnais*’s conviction, rejecting 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 may depend as much *on the reputation of the racial and religious group to which he willy-nilly belongs as on his own merits*. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.<sup>133</sup>

Although *Beaucharnais* has never been expressly overruled, its current precedential vitality is in doubt, but its insight is not.<sup>134</sup>

Disesteemed group members have several options. Exit is costly and, for racial group members, generally impossible.<sup>135</sup> One strategy to improve esteem, therefore, is to look to the group itself for affirmation rather than to the broader society.<sup>136</sup> This can be a positive approach if the group accepts broadly-stated societal standards for evaluation but rejects society’s low

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<sup>131</sup> 343 U.S. 250 (1952).

<sup>132</sup> *Id.* at 252.

<sup>133</sup> *Id.* at 262-63 (emphasis added).

<sup>134</sup> See 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).

<sup>135</sup> See BRENNAN & PETTIT, *supra* note 29, at 222-23, 226-28.

<sup>136</sup> 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; they therefore form their own “esteem associations” of persons like them to esteem one another but without rejecting the wider society’s values other than the value that disesteems you simply by virtue of, for example, your skin color).

rating of the group as based upon factual inaccuracies.<sup>137</sup> This inner-focused approach can also be helpful if the group instead rejects broader evaluative standards, replacing them with reasoned and morally-defensible alternatives.<sup>138</sup> 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.<sup>139</sup> Where group members or sub-groups choose this last strategy, social disesteem of the group can end up increasing crime.<sup>140</sup> 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.<sup>141</sup>

Groups can take more outward-looking approaches as well. They can seek to publicize group members' accomplishments of which the broader society approves and to hide those of which it disapproves.<sup>142</sup> Groups and their members can alternatively agitate to change the broader societal standards by which they are judged.<sup>143</sup> 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, gains for others. Many of those standing to lose will mount counter attacks.<sup>144</sup> As noted above, struggles over esteem become struggles over

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<sup>137</sup> See *id.* at 228-29. 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 seriously.”).

<sup>138</sup> See *id.* at 226-26.

<sup>139</sup> See *id.* at 225-26 (describing the rise of countercultural groups, which may or may not adopt normatively undesirable alternative evaluative standards); cf. Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 L. & CONTEMP. PROB.S 221, 284 - 87 (2003) (describing the positive or negative social role of esteem's close cousin, honor—living according to a code—as turning on the normative worth of the rules of the particular honor code chosen); cf. ELIJAH ANDERSON, *CODE OF THE STREET* (2000) (offering an extended examination of a negative set of countercultural norms).

<sup>140</sup> See *infra* text accompanying note 450. (defending this point).

<sup>141</sup> See *infra* text accompanying notes 230-34.

<sup>142</sup> See BRENNAN & PETTIT, *supra* note 29 at 230, 234-37 (analyzing “secrecy” and “publicity” strategies).

<sup>143</sup> See *id.* at 236-37.

<sup>144</sup> Cf. generally RICHARD ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* (1999).

emotionally meaningful symbolism; the existence, meaning, and evolution of social norms; and basic principles of social and political morality.<sup>145</sup> 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.<sup>146</sup> Once again, much of this struggle can be waged unconsciously.<sup>147</sup> 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—prosecutors—play a particularly important role in waging esteem warfare.<sup>148</sup>

### 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*. Moreover, 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.<sup>149</sup>

#### 1. *Speech Acts*

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<sup>145</sup> See *infra* note 146 .

<sup>146</sup> Cf. generally ABEL, *supra* note 145, 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. OF RACE, RELIGION, GENDER & CLASS 306, 376- 79 (2001) (analyzing this point’s implications for regulating harmful speech).

<sup>147</sup> This observation follows from the frequently “virtual,” unconscious operation of the esteem economy. See *supra* text accompanying notes 70- 75.

<sup>148</sup> See *infra* Part III.

<sup>149</sup> See *infra* text accompanying notes 158-63.

“Speech acts” occur when words themselves *are* deeds.<sup>150</sup> 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.”<sup>151</sup> 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.<sup>152</sup>

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’s merely speaking the words “I do” changes their legal status. They are no longer simply “John and Mary” but “husband and wife.”<sup>153</sup> This change in status occurs even if one or both of them was lying—if, for example, the man married the woman solely to gain access to her wealth, having no intention of ever loving, honoring, or treasuring her. 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 few of the prominent examples.<sup>154</sup> Similarly, the new status carries with it legal

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<sup>150</sup> 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).

<sup>151</sup> See KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 57 (1989).

<sup>152</sup> 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 FRIEDLAND, ET AL., *supra* note 55, at 488.

<sup>153</sup> See *id.* at 488- 90 (offering similar examples).

<sup>154</sup> See, e.g., John G. Culhane, *Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage*, 17 LAW & SEXUALITY 7, 14-15, 17,26 (2008) (noting many of the legal rights created by marriage, including equitable property distribution; support payments; rights to consortium; joint health insurance; and probate rights; rights to social security, pension benefits, workers compensation, and wrongful death claims).

*obligations*, for example, in fault-based divorce states, spouses have the obligation of sexual fidelity to one another.<sup>155</sup>

Yet this changed legal status also changes the couple's social status. Sexual fidelity to spouses, even more than to boyfriends and girlfriends, is a strongly accepted social expectation even in states where there is no corresponding legal obligation.<sup>156</sup> Parents, grandparents, and authority figures more warmly and fully accept the couple.<sup>157</sup> Even modernly, children of the couple need not fear the ostracism of "bastardy."<sup>158</sup> Indeed, marriage has a secular sacred status—one that exists apart from any particular religious belief—in our culture.<sup>159</sup> It is a symbol of commitment, the making of two individuals into a family.<sup>160</sup> This status affects power

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<sup>155</sup> See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 955 (Mass. 2003) (noting many of marriage's benefits are available only to those who have "accepted the correlative responsibilities of marriage"); 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..."); 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); *Diosado v. Diosado*, 97 CAL. APP. 4<sup>th</sup> 470 (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).

<sup>156</sup> See Tiffany Graham, *Something Old, Something New: Civic Virtue and the Case for Same-Sex Marriage*, 17 UCLA WOMEN'S L.J. 53, 81-82 (2008) (noting that for many people marriage means a greater commitment to sexual fidelity than does mere cohabitation).

<sup>157</sup> See Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 SANTA CLARA L. REV. 999, 1031 n. 87 (2008) (noting marriage generally brings with it greater social acceptance of the couple's relationship).

<sup>158</sup> See MICROSOFT ENCARTA COLLEGE DICTIONARY 116 (2001) (defining "bastardy" as "the state of being a child with unmarried parents (*archaic; sometimes offensive*)) (emphasis in original).

<sup>159</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (describing marriage as a "noble and sacred relationship"); Angela P. Harris, *Loving Before and After the Law*, 76 FORDHAM L. REV. 2821, 2829-36 (2008) (describing the right to marry as a central dimension of citizenship). Explains Professor Harris:

In the grammar book of racialized gender, marriage is a key practice materially and symbolically linking the individual to the family and national bodies through kinship, and linking together ideas about economic, moral, and political self-governance. Proper and legitimate marriages create the body of the people, whose self-government creates the legitimate state. As a corollary, the people defend their collective identity by regulating who may be included in their patrimony through marriage.

*Id.* at 2829; see also *Reynolds v. United States*, 98 U.S. 145, 164-66 (1878) (describing marriage as both a sacred relationship and a civil contract).

<sup>160</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (describing marriage as "a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.").

relationships as well, both between the married partners and between them and the outside world.<sup>161</sup> Modern marriage, even in an ethos of gender equality, increases the bargaining power of each spouse vis-à-vis the other because the costs of exit are higher.<sup>162</sup> The enhanced pooled economic, psychic, and social resources of marriage increase the couple's financial and psychological security and their ability to compete as a team with life's challenges.<sup>163</sup> For these reasons among others, exclusion from the right to marry marks individuals as second class citizens deserving social disesteem.<sup>164</sup> The struggle between proponents and opponents of gay marriage can readily be understood as just such a competition over the social distribution of esteem and its opposite.<sup>165</sup>

A criminal conviction can likewise be understood as a negative counterpart to the marriage example. An accused felon is nevertheless *legally* presumed innocent unless and until he is convicted.<sup>166</sup> But the conviction consists of a single word spoken by the jury foreperson on behalf of the jury: "guilty."<sup>167</sup> Only then does the man become a "felon."<sup>168</sup> But this change in

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<sup>161</sup> See LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 7 (1998) (noting that adultery and fornication laws made marriage a necessary condition for sexual access, thus giving the party benefiting from the marriage bargain "gains in bargaining power by controlling all access to legitimate sex.").

<sup>162</sup> See *id.* at 226 (noting that in many families, female economic dependency makes exit from a marriage harder for that woman than it is for her husband). But in many other modern marriages *both* parties bring in a substantial income and become dependent upon a high-cost life style that makes exit economically challenging for both parties, as I have sadly observed when all too many of my friends and acquaintances have suffered through divorce.

<sup>163</sup> See Misha Isaak, "What's in a Name?: Civil Unions and the Constitutional Significance of "Marriage," 10 U. PA. J. CONST. L. 607, 615-16 (2008) (summarizing many of the psychological benefits of marriage); Culhane, *supra* note 155, at 24-27 (noting that married people on average live longer, healthier lives; have better housing; higher incomes; and more wealth than the unmarried, whether the latter are single or merely cohabiting). I am not trying to glorify marriage, which has its negatives, especially for the ill-matched members of a couple. My point is simply that the "speech act" that creates a marriage affects social status and esteem, in turn affecting access to material and intangible resources.

<sup>164</sup> See Harris, *supra* note 160, at 2829-36 (arguing that the right to marry is a core component of equal citizenship).

<sup>165</sup> Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMAN & L. 559, 600 & n. 320 (2008) (noting the "culture wars" between supporters and opponents of same-sex marriage).

<sup>166</sup> See Larry King, *How Do Juries See Beyond a Reasonable Doubt: A Historical View*, in *BEYOND A REASONABLE DOUBT* iii (Larry King ed. 2008).

<sup>167</sup> Philosopher Antony Duff and his colleagues powerfully capture the "performative" or speech act nature of a guilty verdict and its social consequences:

status has enormous legal, psychological, and social consequences for the new felon. He may lose many rights, including the rights to vote, to locomote freely, to choose what he will eat and when he will sleep, work, travel, pick his social companions.<sup>169</sup> He has new and painful obligations too: to report to a probation or parole officer, return to a halfway house, submit to imprisonment.<sup>170</sup> He may be barred from certain jobs, required to register as a “sex offender,” compelled to submit to psychological therapy.<sup>171</sup> Even if the sentencing judge shows leniency, for example, granting probation with few conditions when the law permitted far harsher sanctions, the individual’s freedom is then *bestowed upon him* by the court rather than a right upon whose enforcement he may insist.<sup>172</sup> But these diminished rights and enhanced obligations

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[W]hat is said, what is being done, when the fact-finder brings in a verdict of “Guilty” (or of “Not Guilty”)? When a jury finds that a defendant...did commit the offence charged, its finding is just that—a finding that this person committed this offence. But the formal declaration of a verdict of “Guilty” in open court by a jury or magistrate or judge does more than that: the verdict 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 declaration of guilt—the condemnation of his commission of that crime. That is why those who have been mistakenly or unjustly convicted might reasonably think it is so important to try to clear their name - - that they have been unjustly condemned as wrongdoers. 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.

3 ANTONY DUFF, ET. AL., *THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL* 83 (2007).

<sup>168</sup> See SEAN MCCONVILLE, *The Victorian Prison: England, 1865-1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 132 (Norval Morris & David J. Rothman ed.s 1995) (defining “felon”).

<sup>169</sup> See Norval Morris, *The Contemporary Prison, 1965-Present*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 227, 227-59 (Norval Morris and David J. Rothman, ed.s 1995) (describing life in prison and, more briefly, in less restrictive environments); 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).

<sup>170</sup> See PETERSILIA, *supra* note 170, at 18-19, 55, 82-83, 93-94, 98-100.

<sup>171</sup> See *id.* at 112-20, 127-29, 175-82.

<sup>172</sup> See Theodore Caplow and Jonathan Simon, *Understanding Prison Policy and Population Trends*, in *PRISONS* 63, 102 (Michael Tonry & Joan Petersilia ed.s 1999) (noting growth in probation and parole populations and concluding that, though probation and parole once “operated as alternatives to imprisonment by providing correctional supervision in the community,” today they “have become an increasing source of prison admissions” for violating conditions of release).

mark the felon as other, as outside the community of citizens *deserving* their full rights.<sup>173</sup> In our culture and perhaps most others, this mark will have powerful negative emotional resonance for observers.<sup>174</sup> The felon’s new status—created by a speech act—brings with it disesteem in the larger community.<sup>175</sup> Moreover, the criminal law purports to right public, not private, wrongs.<sup>176</sup> The jury’s declaration of the offender’s “felon” status thus labels him a community predator, one deserving of disesteem by all who learn of his status. The speech act, “guilty,” accordingly has significant social consequences. New status brings a new reality.

## 2. *The Expressive Function*

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<sup>173</sup> Here is how criminologist Joan Petersilia puts it:

They are back in society but not free. Under the federal law and the laws of every state, a felony conviction has consequences that continue long after a sentence has been served and parole has ended.

Convicted felons may lose many essential rights of citizenship, such as the right to vote and to hold public office, and are often restricted in their ability to obtain occupational and professional licenses. Their 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.

PETERSILIA, *supra* note 170, at 105.

<sup>174</sup> See *id.* at 106 (noting the stigmatizing effect of a criminal conviction).

<sup>175</sup> See DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* 11 (2004) (“Contrary to many popular accounts, the broad effects of stigma related to incarceration and criminality have not receded with the dramatic rise in incarceration rates,” being even more burdensome on non-offending family members than on the offenders themselves.). 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 moral quality. Guilt says something about the quality of the person who did this and has a “sticky,” indelible quality. Guilt 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-prisoner, an ex-offender, an ex-con. This becomes part of his or her identity and is difficult to remove.

HOWARD ZEHR, *CHANGING LENSES* 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.”).

<sup>176</sup> See generally S.E. Marshall & R.A. Duff, *Criminalization and Shared Wrongs*, in *CRIMINAL LAW CONVERSATIONS* 1, 1-14 (Paul Robinson, Kimberly Ferzan, & Stephen Garvey ed.s, forthcoming Oxford University Press 2009) (draft manuscript) (defending the idea that crimes harm “the public,” not merely individuals, and that convictions express condemnation of the offender on the public’s behalf).

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.<sup>177</sup> The criminal law's expressive role is particularly important.<sup>178</sup> Scholars endlessly debate what should be the purpose of criminal law.<sup>179</sup> I will not re-hash these debates here, but will simply note that the character-based variant of “communicative retributivism” is the theory I find most convincing and which best illustrates the points I want to make here.<sup>180</sup>

Retribution and revenge are close cousins. 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.<sup>181</sup> When a wrongdoer treats a victim badly, he sends the message that the victim is unworthy of better treatment.<sup>182</sup> When the state fails to condemn the wrongdoer, the state embraces and

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<sup>177</sup> See generally Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (explaining the law's expressive function, resulting ability to alter social norms, and the function's limits).

<sup>178</sup> See *infra* text accompanying notes 200-05 (defending this point); ERIC A. POSNER, *LAW AND SOCIAL NORMS* 108-10 (2000) (arguing that all 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, perhaps not even the primary, expressive function of the criminal law:

It is not clear to me that the expressive dimension of punishment is exclusively, primarily, or even importantly, moral opprobrium. In other words, while 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 merely moral message—a message about who is in control and about who gets controlled.

Bernard Harcourt, *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, 168-69 (2001).

<sup>179</sup> See Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L. J. 527, 548-53, 568-82 (2008) (summarizing some of these debates and defending her own theory).

<sup>180</sup> See ELLEN PODGOR, PETER HENNING, ANDREW E. TASLITZ, & ALFREDO GARCIA, *CRIMINAL LAW: CONCEPTS AND PRACTICE* 6 (2005) (concisely defining and illustrating “communicative retributivism”).

<sup>181</sup> See CHARLES K. BARTON, *GETTING EVEN: REVENGE AS A FORM OF JUSTICE* 62 (1999) (noting similar, though not identical, emotional roots of revenge and retribution).

<sup>182</sup> See Neil Vidmar, *Retribution and Revenge*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW* 38-39 (Joseph Sanders & Lee Hamilton ed.s 2000).

reaffirms that message.<sup>183</sup> 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.”<sup>184</sup> 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 he has done the plaintiff.<sup>185</sup> Tort-based retribution channels and controls the victim’s acting out of his resentment toward a wrongdoer.<sup>186</sup> In the criminal context, by contrast, retribution is expressed *by the community* for a public wrong done to it.<sup>187</sup> It is the community’s righteous indignation, rather than the victim’s personal resentment, that is channeled to social purposes.<sup>188</sup> 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 demean the individual.<sup>189</sup> Most Western liberal theories of rights are rooted in a commitment to the equal worth of all persons, or at least of all citizens.<sup>190</sup> Theorists dispute what quality inheres in equal amounts in all persons, but all agree that some such quality

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<sup>183</sup> See 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); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari Matsuda et al. ed.s, 1993).

<sup>184</sup> MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 12 (1998).

<sup>185</sup> This point follows from Alan Calnan’s similar analysis. See ALAN CALNAN, JUSTICE AND TORT LAW 111-18 (1997).

<sup>186</sup> See *id.* at 114 (“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.”).

<sup>187</sup> See Marshall & Duff, *supra* note 177 (defending this point); Andrew E. Taslitz, *The Inadequacies of Civil Society: Law’s Complementary Role In Regulating Harmful Speech*, 1 MD. J. RACE, RELIGION, GENDER, AND CLASS 305, 348-49 (2001) (similar) [hereinafter *Civil Society*].

<sup>188</sup> See Taslitz, *Civil Society*, *supra* note 188, at 348-49.

<sup>189</sup> See *id.* at 335-38, 355-66.

<sup>190</sup> See JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT 3-15 (1999).

exists.<sup>191</sup> That quality entitles all persons to equal respect, partly meaning that all are entitled to some minimal set of equal rights.<sup>192</sup> To “demean” someone is to treat them as unworthy of such equal respect.<sup>193</sup> The theory of communicative retributivism rejects any punishment that demeans the offender, even if the offender demeaned his victim.<sup>194</sup> Indeed, communicative retributivists seem generally to be saying that offenders always demean their victims, treating them as less than full human beings, requiring a strong message to topple the offenders from their unfairly assumed heights of worth relative to their targets.<sup>195</sup> But the ultimate aim of criminal punishment is *to restore equality* and no more.<sup>196</sup>

I do not believe, however, 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.<sup>197</sup> In particular, Americans believe

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<sup>191</sup> See *id.* at 13, 116-22 (contrasting Kantian theory of reason with alternative theory of capacity to achieve “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. SCHULTZ, *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).

<sup>192</sup> See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1697 (1992).

<sup>193</sup> 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), and “degrading” (actually lowering a person’s worth in some sense). See JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 44-53. Hampton defines a “wrong” as treating another “in a way that is objectively demeaning,” that is, as disrespectful of that person’s worth. See *id.* at 5-253.

<sup>194</sup> See Taslitz, *Civil Society*, *supra* note 188, at 338-39, 355-66.

<sup>195</sup> See MURPHY & HAMPTON, *infra* note 193, at 52-53 (defining a wrong as demeaning another), 137-43 (justifying criminal punishment as necessary to rejecting the offender’s message demeaning his victim and replacing 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 we will return. See DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 29-30 (2008). I am unclear about whether Hellman defines “demeaning” identically to my use here (though I think she does) because she at points 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 69, 193-94.

<sup>196</sup> See Taslitz, *Civil Society*, *supra* note 188, at 338-39.

<sup>197</sup> 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 full status as human beings.”).

in the ideal of getting what you deserve, however much critics may bemoan our failures to live up to this aspiration.<sup>198</sup> Moreover, Americans see deserving behavior as reflective of a person's fundamental nature.<sup>199</sup> Given the criminal law's expressive, moral educative role in sanctioning breaches of society's most strongly held norms (in the ideal, anyway), behavior seen as indicative of core moral dispositions—what psychologists call “personality” traits and folk wisdom labels “character”—is of greatest consequence.<sup>200</sup> Good moral behavior marks good persons meriting rewards; ill behavior marks bad persons deserving punishment.<sup>201</sup> Good and bad are not dichotomous variables but relative points on a spectrum.<sup>202</sup> In other words, criminal punishment marks offenders as deserving of various degrees of disesteem, the degree turning on the severity of the harm done, the context, and the offender's state of mind.<sup>203</sup> Criminal punishment assumes, furthermore, that this mark will change minds: society will in fact embrace the attitude of disesteem toward the offender.<sup>204</sup>

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.<sup>205</sup> I say this with full recognition that it is an approach fraught with danger. Badly implemented or understood, it can lead to viewing

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<sup>198</sup> See Paul H. Robinson, “*Empirical Desert*,” in *CRIMINAL LAW CONVERSATIONS* 1, 1-9 (forthcoming Oxford University Press 2009) (draft manuscript) (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).

<sup>199</sup> See ZEHR, *supra* note 176, at 69.

<sup>200</sup> Taslitz, *Myself Alone*, *supra* note 40, at 1, 7-9, 31-34 (1993) (defining “personality” and “character”); Andrew E. Taslitz, *Race and Two Concepts* (defending a variant of character-based morality as the most appropriate justification for criminal punishment).

<sup>201</sup> See Taslitz, *Two Concepts*, *supra* note 201, at 45-52.

<sup>202</sup> 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”).

<sup>203</sup> See Taslitz, *Myself Alone*, *supra* note 40, at 3, 10-12, 21-23 (grading evil based on mental state); see *infra* text accompanying notes 212-13 (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); HELLMAN, *supra* note 196, at 27-29 (arguing context and culture affect what conduct is and is not “demeaning”).

<sup>204</sup> See Robinson, *supra* note 199, at 1-2 (“[S]ome of the system's power to control conduct derives from its potential to stigmatize violators....But the system's ability to stigmatize depends upon it having moral credibility with the community.”).

<sup>205</sup> See Taslitz, *Two Concepts*, *supra* note 201, at 45-58.

offenders as so unworthy as to be irredeemably evil, thus more demon than human.<sup>206</sup> Down that road lay many tyrannies, both small and large. I have explained, however, that appropriate safeguards against abuse are feasible, though in practice too oft-ignored.<sup>207</sup> But whether I am right that a character-based retributive criminal justice system is a desirable one, it is the one we have,<sup>208</sup> and the risks of its abuses are precisely why, I shall explain below, prosecutors have an obligation to take care that their role in this disesteem-imposition system is an appropriate one.<sup>209</sup>

To accept 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 offender and victim are of equal human worth but, in my variant, that the former merits less esteem than the latter? Philosopher Jean Hampton, apparently focusing solely on the equal human worth part of this moral equation, and the leading exponent of communicative retributive theory, examined this question by discussing a heinous case in which a white farmer hung from a tree a black farmhand and his four sons in burlap bags.<sup>210</sup> The farmer next sliced off the farmhand's penis and stuck it in his mouth, then burned all five victims to death.<sup>211</sup> 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:

Re-establishment of the acknowledgement of the victim's worth is normally not accomplished by the mere verbal or written assertion of the equality of

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<sup>206</sup> See Taslitz, *Civil Society*, *supra* note 188, 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.'").

<sup>207</sup> See *id.* at 330-42 (suggesting principles and procedures for properly limiting character-based retributive punishment to avoid dangers of abuse).

<sup>208</sup> See *supra* notes 204 -06 and accompanying text (arguing that Americans implicitly embrace stigmatizing, character-based assessments of criminal offenders).

<sup>209</sup> See *infra* Part III.

<sup>210</sup> See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1675 (1992).

<sup>211</sup> See *id.*

worth of wrongdoer and victim. For a judge or jury merely to announce, after reviewing the facts of the farmer's murder of the farmhand and his sons, that they were his equal in value is to accomplish virtually nothing. The farmer, by his actions, did not just "say" that these men are worthless relative to him, but also sought to make them into nothing by fashioning events that purported to establish their extreme degradation. Even if we believe that no such 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.<sup>212</sup>

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, 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.<sup>213</sup> But that message always includes a component of at least temporary disesteem.<sup>214</sup>

Critics object that there is no empirical evidence to prove that criminal convictions and sentences are the major source of disesteem involved here. 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.<sup>215</sup> 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 indeed assumes that conviction carries stigma with it and that the degrees of, and actual imposition of, various

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<sup>212</sup> *Id.* at 1686-87 *cf.* HELLMAN, *supra* note 196, at 49-51 (arguing that *proportionate*, non-discriminatory punishment is never itself demeaning); *but cf.* George P. Fletcher, *Disenfranchisement as Punishment: Reflection 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).

<sup>213</sup> See Taslitz, *Civil Society*, *supra* note 188, at 322-23 (making this point and discussing Hampton's position).

<sup>214</sup> See BRENNAN & PETTIT, *supra* note 29, at 311-13 (discussing the unavoidable positives, and the avoidable pathologies, of the disesteem-imposing function of the criminal justice system).

<sup>215</sup> See Ronald J. Allen, *Theorizing about Self-Incrimination*, \_\_\_\_ CARDOZO L. REV. \_\_\_\_, 10-13 (forthcoming 2009) (draft manuscript).

sentences reflect degrees of disesteem.<sup>216</sup> 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 fora<sup>217</sup>—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’s imposing harsh sanctions on offenders rather than the victims themselves doing so.<sup>218</sup> This preference, there is reason to believe, 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.<sup>219</sup> This explanation is but 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.<sup>220</sup>

Similarly, there is significant empirical data demonstrating that a criminal conviction is an obstacle to offenders’ getting jobs after completing their sentences.<sup>221</sup> Employers worry that the offenders are neither trustworthy nor desirable enough people to welcome into the workplace.<sup>222</sup> 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-

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<sup>216</sup> See *supra* text accompanying notes 202 - 04.

<sup>217</sup> I discuss this evidence in several forthcoming pieces, including one shortly to be published, Andrew E. Taslitz, *Confessing in the Human Voice: A Defense of the Privilege Against Self-Incrimination*, 6 CARDOZO J. PUB. L., POL’Y & ETHICS \_\_\_\_ (forthcoming spring 2009).

<sup>218</sup> See generally Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U.L. REV. 1059 (2007) (extended empirical examination and defense of this point).

<sup>219</sup> See *id.* at 1062, 1068-91.

<sup>220</sup> 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....[T]he *status-and-esteem-restoring function of punishment* explains and guides the (usual) preference for delegating revenge.”), 1088-89 (arguing that empirical data now support the philosophers’ embrace of an expressive theory of punishment).

<sup>221</sup> See generally DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007) (articulating a book-length defense of this proposition).

<sup>222</sup> See *id.* at 53- 59.

offender's mere presence in the community is viewed as a disease of the body politic.<sup>223</sup> Ample studies of the extreme severity of American sentences, the harshness of prisons, the resulting disruption of family ties and neighborhood bonds, the many "invisible punishments" that plague those who long ago paid their debt to society suggest indeed 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.<sup>224</sup> 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 under-caste 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.<sup>225</sup>

The stigmatizing power of criminal conviction and punishment is so powerful,<sup>226</sup> as I hope to explain further below, that even its mere *potential* corrodes an accused's social status. Bald accusations, arrests, and even trials resulting in acquittals rob each accused of whatever positive

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<sup>223</sup> See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Punishment*, 51 HASTINGS L.J. 829, 8678-70, 874-76, 882-87 (2000) (explaining moral panics, illustrating them with our treatment of juvenile sexual predators); see generally 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).

<sup>224</sup> 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 ed.s 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, debilitating or even fatal illness); *supra* text accompanying note 169 (recounting the harshness of prison conditions).

<sup>225</sup> George P. Fletcher, *Disenfranchisement as Punishment: Reflection on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898 (1995).

<sup>226</sup> It is indeed likely that the "criminal moniker" is even more stigmatizing, for example, than the insanity label. See CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 59, 291 n. 179 (2006) (making this point and citing supporting empirical evidence, though noting that being labeled both criminal and insane *Race and* as insanity acquitees effectively are in our culture *Race and* is even more stigmatizing).

social status they have.<sup>227</sup> Mere proximity to the system is seen as a fall from grace, despite paens to the “presumption of innocence.”

### 3. *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.<sup>228</sup> 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.<sup>229</sup> Other studies suggest a common strategy employed by individuals is simple self-deception about their own racial prejudice.<sup>230</sup> Truly unconscious racial prejudice, even by whites thoroughly consciously committed to racial equality, is likely even more widespread.<sup>231</sup>

Professor Lu-in Wang describes unconscious racial prejudice as “discrimination by default.”<sup>232</sup> 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

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<sup>227</sup> See Taslitz, *Free Press Paradigm*, supra note 40, at 10-20 (summarizing media-coverage literature showing that publicizing mere arrests is highly stigmatizing).

<sup>228</sup> See WASHINGTON POST, June 22, 2008, at A1.

<sup>229</sup> Cf. CAROL TAVRIS & ELLIOTT ANDERSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 62-63 (2007) (“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’”).

<sup>230</sup> 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 harborer’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); Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 4 (2007) (discussing self-deception about racial prejudice) [hereinafter Taslitz, *Racial Blindsight*].

<sup>231</sup> See LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 4 (2006) (noting Whites often engage in racial discrimination unconsciously).

<sup>232</sup> See *id.* at 4.

readily and consciously justify his choices based on reasons other than racial bias.<sup>233</sup> 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.<sup>234</sup> “Failures of imagination” describe our limited empathy for those on the short end of the stereotyping stick.<sup>235</sup> 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.<sup>236</sup> These mechanisms work so powerfully that 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.<sup>237</sup> These forces are likely 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.<sup>238</sup> This combination means that, all else being equal, racial minority group members, particularly African-Americans, are likely as a group to hold a disproportionate share of society’s stock of disesteem.

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<sup>233</sup> See *id.* at 17.

<sup>234</sup> See *id.* at 17; 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 *Patriarchal Stories I* (discussing “epistemological filters” and other unconscious processes affecting our preconceptions and behavior)].

<sup>235</sup> See WANG, *supra* note 232, at 18.

<sup>236</sup> See *id.* at 18, 83-84.

<sup>237</sup> 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 60, at 133 (explaining why such first steps are insufficient, further requiring “subjects who view a prejudiced belief as wrong” to be told by qualified experts how “it may nevertheless affect their judgments,” for only then can bias be reduced).

<sup>238</sup> See Taslitz, *Patriarchal Stories I*, *supra* note 235, at 399 (defending similar point).

Critics of the psychological bias literature argue, however that even racially prejudiced attitudes do not necessarily translate into discriminatory *action*.<sup>239</sup> But, here again, ample evidence rebuts this argument,<sup>240</sup> particularly in the criminal justice system. For example, the available studies show that a disproportionate number of those wrongly convicted have been racial minorities.<sup>241</sup> This is no random outcome. Thus ample 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.<sup>242</sup> Likewise, ample evidence supports both conscious and unconscious racial profiling by the police, that is, the police being more likely to watch, investigate, and arrest racial minority group members than whites.<sup>243</sup> Police are also more likely to interpret minority responses to officer questioning as deceptive, thus leading to harsher interrogation techniques, again raising the risk of false confessions.<sup>244</sup> There is also some archival evidence that police are more likely to believe what turn out to be false informants’ tips when the tipster fingers blacks rather than whites, leading to more wrongful arrests.<sup>245</sup> Yet, once arrests are made, police are likely to blind themselves to alternative perpetrators, instead collecting evidence confirming their racially-biased suspicions.<sup>246</sup> Indeed, police repeatedly believing that they have found such confirming evidence

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<sup>239</sup> See Samuel R. Bagenestros, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477 (2007) (summarizing and effectively debunking this critical literature).

<sup>240</sup> See *id.*

<sup>241</sup> See Andrew E. Taslitz, *Wrongly Accused*, *supra* note 129, at 121, 121-23 (summarizing the most important of these studies).

<sup>242</sup> See *id.* at 124-25.

<sup>243</sup> See Taslitz, *Redux*, *supra* note 130, at 109-18. (summarizing the empirical data on unconscious profiling: the “selection effect”) [hereinafter *Redux*]; see generally DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 16 - 30 (2003) (documenting the extent of overt racial profiling by the police).

<sup>244</sup> See Taslitz, *Wrongly Accused*, *supra* note 242, at 130-33.

<sup>245</sup> See Taslitz, *Redux*, *supra* note 244, at 133-35.

<sup>246</sup> See *id.* at 118-22.

leads them to devote ever-more resources to policing minority communities, continually raising the percentage of those ensnared in the criminal justice system who are racial minorities.<sup>247</sup>

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 are more likely to ignore mitigating evidence.<sup>248</sup> The jurors treat evidence of the defendant’s bad character as more representative of the “true character” of his “kind” than are instances of good behavior.<sup>249</sup> White jurors also engage in what sometimes has been called the “ultimate [fundamental] attribution error.”<sup>250</sup> Remember that the fundamental attribution error is the human tendency to attribute behavior more to individual character than to good or bad circumstances.<sup>251</sup> 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.<sup>252</sup> Furthermore, argues at least one commentator, some whites are “regressive racists” able to accept egalitarian norms, *except* when their anger is aroused by racial insult.<sup>253</sup> Such insult occurs, for example, in a black assault upon a white victim, which strengthens racial stereotypes, helping to explain the greater likelihood of the death penalty in such black offender/white victim situations.<sup>254</sup>

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<sup>247</sup> See *id.* at 122-24 (describing this “ratchet effect.”).

<sup>248</sup> See Sheri Lynn Johnson, *Race and Capital Punishment*, in *BEYOND REPAIR? AMERICA’S DEATH PENALTY* 11, 135-39 (Stephen P. Garvey ed., 2003).

<sup>249</sup> See *id.* at 11, 135-39.

<sup>250</sup> See CRAIG HANEY, *DEATH BY DESIGN, CAPITAL PUNISHMENT AS A SOCIAL-PSYCHOLOGICAL SYSTEM* 203-09 (2005); T. Pettigrew, *The Ultimate Attribution Error: Extending Allport’s Cognitive Analysis of Prejudice*, in *INTERGROUP RELATIONS: ESSENTIAL READINGS* 162-73 (Michael Hogg & Dominic Abrams ed.s, 2001) (coining the term “ultimate attribution error”).

<sup>251</sup> See *supra* text accompanying notes 110 - 15; 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).

<sup>252</sup> See sources cited *supra* note 252.

<sup>253</sup> See Johnson, *supra* note 240, at 138.

<sup>254</sup> See *id.*

Juvenile probation officers are likewise more likely to view black than white families as uncooperative, their misbehavior indicative of future dangerousness, their problems due to deeply rooted character flaws.<sup>255</sup> Juvenile court judges seem to buy into these judgments, for young black males are again more likely than their white counterparts to be institutionalized.<sup>256</sup> There is disturbing new evidence of adult criminal court judges suffering similar bias. Thus 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.<sup>257</sup>

Indeed, evidence of racial bias in decision making arises at every stage of the criminal process—from setting bail, to the effectiveness of defense counsel, to arrest, guilty-plea outcomes, and sentencing.<sup>258</sup> Often 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.<sup>259</sup> 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.<sup>260</sup> Second, other

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<sup>255</sup> See Taslitz, *Wrongly-Accused*, *supra* note 242, at 127-28 (summarizing the empirical data).

<sup>256</sup> See MICHAEL K. BROWN, ET. AL., *WHITENING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 140-47 (2003).

<sup>257</sup> 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 read 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 The Sentencing Project, *Racial Disparity in Sentencing: A Review of the Literature* (2003) (reaching this conclusion); Justice Kennedy Commission, 2004 A.B.A. Just. Kennedy Commission Rep. (similar); SHAUN L. GABBIDON & HELEN TAYLOR GREENE, *RACE AND CRIME* 182-90 (2005) (concisely summarizing the literature supporting a similar conclusion).

<sup>258</sup> See generally GABBIDON & GREENE, *supra* note 258 (documenting these effects at every stage of the system).

<sup>259</sup> See *supra* note 257 and accompanying text (supporting this point in the illustrative area of sentencing).

<sup>260</sup> See GABBIDON & GREENE, *supra* note 298, at 138, 142, 154-55, 213 (summarizing the plea-bargaining disparities literature).

outcomes, such as biased sentences, are unlikely to occur absent prosecutor active support, or at least prosecutor non-resistance.<sup>261</sup> Third, overburdened prosecutors often rely on the police or other justice system actors, rather than second-guessing them, thus effectively ratifying others' decisions.<sup>262</sup> Fourth, prosecutors are human beings, thus being subject to the same cognitive biases as the rest of us.<sup>263</sup>

The reality or appearance of bias is, however, consciously well-understood by minority communities. Perceived unfair procedures, as the vast psychological literature on procedural justice effects shows, decrease law-abidingness and willingness to cooperate with the police.<sup>264</sup> These effects thus raise crime rates in minority communities, further strengthening the unconscious link between race and crime.<sup>265</sup> Moreover, “bystander effects” occur when the entirely innocent suffer from the resulting deterioration of neighborhood services and safety, also contributing to weakened job opportunities, furthering the impression of racial minorities as poor, uneducated, or dangerous *because of their own character failures*.<sup>266</sup>

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.<sup>267</sup> Experimental data suggests, for example, that whites are more likely to notice race first, to process generalized racial features rather than

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<sup>261</sup> 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 also 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).

<sup>262</sup> 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 (prosecutors with heavy caseloads devote “the most attention to the most serious cases”), 39-40 (arguing prosecutors are often “willfully blind” to police misjudgments, errors, and abuses).

<sup>263</sup> See TAVRIS & ARONSON, *supra* note 230, 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).

<sup>264</sup> See Taslitz, *Redux*, *supra* note 244, at 124-28.

<sup>265</sup> See *id.*

<sup>266</sup> See *id.* at 128-30.

<sup>267</sup> See LEE, *supra* note 238, at 175-89 (describing unconscious police stereotyping of young black males as dangerous and explaining its connection to police use of excessive force).

the unique physical features identifying a person as an individual, not merely a group member.<sup>268</sup>

Other research shows the increased involvement of the amygdala—which plays a role in identifying threat—when whites perceive black faces.<sup>269</sup> Two researchers summarized this literature this way:

Thus, the brain has a propensity to detect very early in the time course of perception, the presence of threat. Threatening objects (or faces) must then be processed differently for an evolutionarily adaptive purpose. Threatening objects 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.<sup>270</sup>

Much damage is thus 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.<sup>271</sup> Before prosecutors can act, however, they must first have some sense of how they contribute to the problem. It is that task to which this article next turns.

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

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

##### 1. *The Charging Decision*

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<sup>268</sup> See Taslitz, *Redux*, *supra* note 244, at 110-11.

<sup>269</sup> See *id.* at 112.

<sup>270</sup> 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 ed.s, forthcoming 2008) (manuscript at 13).

<sup>271</sup> See DAVIS, *supra* note 261, 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....”); Comment, Rule 3.8 Model RULES PROF. CONDUCT (reciting prosecutor’s duty to “do justice”).

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 as not worth pursuing given limited resources.<sup>272</sup> Alternatively, they might reach a “pretrial probation,” sometimes called a “diversion,” program agreement with an offender.<sup>273</sup> Such an agreement postpones charging to permit an offender the opportunity to prove he can stay out of trouble and to address recidivism risk factors by, for example, getting drug treatment or a high school diploma.<sup>274</sup> If he successfully completes pretrial probation, the case against him is dropped, almost as if it had never been.<sup>275</sup> The prosecutors’ power to set conditions for successfully completing pretrial probation gives him enormous clout in shaping a suspect’s life, at least in the short term.

If a prosecutor does decide to proceed with a case, she must decide whether there is sufficient evidence to support what particular 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.”<sup>276</sup> Prosecutors may also use the charging function to lay the groundwork for “wired pleas.”<sup>277</sup> These pleas arise when prosecutors “charge third parties, such as family members, in order to pressure a defendant

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<sup>272</sup> See DAVIS, *supra* note 261, at 23, 31 (noting prosecutors’ charging decisions are affected by caseload pressures, and a prosecutor might decline to charge); JOHN W. SUTHERS, NO HIGHER CALLING, NO GREATER RESPONSIBILITIES: A PROSECUTOR MAKES HIS CASE 67-68 (2008) (discussing and illustrating factors affecting charging decision, including the willingness not to charge a case lacking adequate proof); THE CENTER FOR PUBLIC INTEGRITY: INVESTIGATING AMERICA’S LOCAL PROSECUTORS 14-15 (2003) (noting too many instances of harm from charges being failed despite, inadequate proof) [hereinafter INTEGRITY, LOCAL PROSECUTORS].

<sup>273</sup> See DAVIS, *supra* note 261, at 24.

<sup>274</sup> See *id.*

<sup>275</sup> See *id.*

<sup>276</sup> 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); INTEGRITY, LOCAL PROSECUTORS, *supra* note 273, 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).

<sup>277</sup> See ALEXANDRA NATAPOFF, “SNITCHING”: USING CRIMINALS TO MANAGE CRIME 40 (forthcoming N.Y.U. PRESS 2009) (draft manuscript).

to cooperate.”<sup>278</sup> In one well-known case, *United States v. Pollard*,<sup>279</sup> for example, 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 otherwise to charge the defendant’s wife with a crime. Said the court, “almost anything lawfully within the power of a prosecutor acting in good faith can be offered in exchange for a guilty plea.”<sup>280</sup>

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.<sup>281</sup> Such cooperators may reveal information, or even testify about, past crimes.<sup>282</sup> But they also may agree to work undercover, wearing wires, doing drug deals, or otherwise participating in new criminal activity in an effort to ensnare other lawbreakers.<sup>283</sup> In federal cases, in particular, there are tremendous incentives for suspects to cooperate, for by doing so they gain release from otherwise applicable statutory mandatory minimum sentences and gain a “5K1.1 letter” from the prosecutor recommending a downward departure from the Federal Sentencing Guidelines.<sup>284</sup> Even though the Guidelines are technically now “advisory,” in practice, they still control in most cases.<sup>285</sup> Prosecutors may also have some discretion whether to charge crimes seeking mandatory minimums in the first place.<sup>286</sup> Likewise, as in the Jena 6 case, prosecutors may often have some discretion whether to proceed against a youthful

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<sup>278</sup> *Id.*

<sup>279</sup> 959 F. 2d 1011 (1992).

<sup>280</sup> *Id.* at 1021.

<sup>281</sup> See DAVIS, *supra* note 261, at 52.

<sup>282</sup> See *id.*

<sup>283</sup> 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 278, at 57-61 (focusing on wiretaps, other electronic surveillance, and undercover work.).

<sup>284</sup> See HARRY I. SUBIN, BARRY BERKE, & ERIC TIRSCHWELL, *THE PRACTICE OF FEDERAL CRIMINAL LAW: PROSECUTION AND DEFENSE* 145-48 (2005).

<sup>285</sup> See *id.* at 146.

<sup>286</sup> See DAVIS, *supra* note 261, at 56-57.

offender in juvenile or adult court.<sup>287</sup> The prosecutor’s charging decision thus 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.<sup>288</sup>

The United States Supreme Court recognized this last point in *Rothgery v. Gillespie, County, Texas*.<sup>289</sup> 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, therefore, not a convicted felon, he committed no crime by possessing a firearm. The current charges against him should, therefore, have readily been dismissed. They were not because of 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 his 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

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<sup>287</sup> See FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 139-58 (2005) (analyzing the various approaches to when a juvenile may be tried as an adult).

<sup>288</sup> See, e.g., DAVIS, *supra* note 261, 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).

<sup>289</sup> 128 S.Ct. 2578 (2008) (slip op.).

stigmatic impact of charges being laid, regardless of whether “the machinery of prosecution was turned on by the local police or the state attorney general.”<sup>290</sup> Explained the Court:

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 charges pending against him.” [citation omitted]. 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.<sup>291</sup>

Corporations in the post-*Arthur Anderson* world likewise recognize the stigmatizing power of criminal charges.<sup>292</sup> The mere filing of such charges can send stock prices plummeting, destroying a business before it has any chance to defend itself.<sup>293</sup> To avoid such a calamity, corporations readily accept even the most onerous of “deferred prosecution agreements”—a form of corporate pretrial probation.<sup>294</sup> Individual white-collar offenders and other middle-class suspects also fear the humiliation in their local communities caused by the filing of criminal charges.<sup>295</sup> 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.<sup>296</sup> Indeed, as research in the area of pretrial publicity reveals, formal charges are not even needed.<sup>297</sup> Ostracism flows from the mere fact of arrest—or even of *potential* arrest.<sup>298</sup> Although

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<sup>290</sup> *Id.* at 15.

<sup>291</sup> *Id.*

<sup>292</sup> See Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions: Through the Looking Glass of Contract Policing*, 96 KY. L. J. 1, 2 (2007).

<sup>293</sup> See *id.* at 2-4.

<sup>294</sup> See *id.* at 2-24.

<sup>295</sup> See Kathleen F. Brickley, *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.’”); 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).

<sup>296</sup> See *supra* notes 221-227, and accompanying text.

<sup>297</sup> See *supra* text accompanying notes 226 - 27.

<sup>298</sup> See *supra* text accompanying note 227.

charges may later be dropped or the offender acquitted, the stigma of association with the criminal process lingers.<sup>299</sup>

Does this stigma often extend beyond individuals to their racial groups? There is little, if any, hard data, but there is good reason to think so.<sup>300</sup> Notably, the same prosecutor cognitive biases and institutional forces discussed earlier will still be at work. Those forces suggest a greater likelihood of whites getting greater access to diversionary programs, lighter charges, fewer referrals of juveniles to adult courts, fewer mandatory minimums, and “sweeter” cooperation agreements than will be true of blacks.<sup>301</sup> These likely disparities may be the natural consequences of biases earlier in the system so that a vastly disproportionate percentage of all offenders will be racial minorities in the first place.<sup>302</sup> 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.<sup>303</sup> Partly this is so because prosecutors have enormous discretion in charging decisions. Absent proof of consciously intentional race or similar discrimination, the prosecutor can largely do as she pleases.<sup>304</sup> However, such a wide berth for discretion allows for

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<sup>299</sup> See Taslitz, *Free Press Paradigm*, *supra* note 58, at 26 (discussing the stigma lingering over the Duke Lacrosse Players, who were proven to have falsely been charged with rape).

<sup>300</sup> See DAVIS, *supra* note 261, at 35, 204-05 nn. 29-31 (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).

<sup>301</sup> See DAVIS, *supra* note 261, 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).

<sup>302</sup> See GABBIDON & GREENE, *supra* note 258, 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); TONRY, MALIGN NEGLECT, *supra* note 258, at 49-68, 97-104 (collecting data showing racially disproportionate arrests and convictions for drug offenses).

<sup>303</sup> Cf. *generally* Taslitz, *Redux*, *supra* note 244 (explaining the cumulative impact of these effects interaction on racial disparities in convicting the innocent).

<sup>304</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987) (declaring that finding 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”); *United States v. Armstrong*, 517 U.S. 456, 458-61 (1996) (refusing even to permit discovery in a civil case alleging discriminatory charging and sentencing decisions absent plaintiffs’ proof that similarly situated whites had *not* been prosecuted).

the free play of *unconscious* biases for which there is currently little legal redress and which consciously well-meaning prosecutors will sincerely deny anyway.<sup>305</sup>

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, for example, 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.<sup>306</sup> 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. The white prosecutor promptly invited defense counsel to identify witnesses to testify before the grand jury on their client's behalf. Indeed, the prosecutor told McKnight's counsel that a good case could be made that McKnight had acted in self-defense. Moreover, suggested the prosecutor, there should be witnesses willing to testify that Nguyen had a violent reputation, while McKnight had a peaceful one. The two experienced defense attorneys promptly provided the names of such witnesses willing to testify. They did just that, and the grand jury voted not to indict.

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 at manual labor.<sup>307</sup> 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. The argument arose because Brown allegedly threatened Ware's younger brother. The argument ended with Brown's 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 eyewitnesses confirming

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<sup>305</sup> See DAVIS, *supra* note 261, at 35-37 (illustrating this point).

<sup>306</sup> See *id.* at 19-20.

<sup>307</sup> See *id.* at 20-22.

her client's version of the events, as well as witnesses familiar with Brown's violent reputation. 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. Yet Ware had at least as strong a self-defense claim as did McKnight. 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 concluded,

Although race and class appear to have played a part in the decision in McKnight's case, there was no evidence that the prosecutor took either race or class into account in making his decision. In fact, it is very unlikely that he consciously decided to give favorable treatment to McKnight because he was white. However, the prosecutor, who was white, may very well have unconsciously empathized with McKnight as a young college student with a future, while simultaneously feeling no such empathy for Nguyen, a poor Vietnamese immigrant whose future extended no further than the kitchen of the restaurant where he worked. The fact that Nguyen had no family or anyone else demanding that McKnight be punished made the decision even easier.<sup>308</sup>

Davis's reading of the case is consistent with the sort of failures of racial empathy described in the cognitive scientific literature.<sup>309</sup>

Another tale makes the impact of the charging decision on racial stigma even sharper. Marcus Dixon, a football player at Pepperel High School in Rome, Georgia, was an honor student with a 3.96 GPA, over 1,200 on his SATs, and awarded a full scholarship to attend Vanderbilt University.<sup>310</sup> Marcus, eighteen-years-old at the time, was charged with rape, sexual battery, aggravated assault, false imprisonment, statutory rape, and aggravated child molestation in a single incident involving a fifteen-year-old white girl. He claimed, however, that the sex was consensual, and a jury quickly agreed, acquitting him of most of the charges within twenty minutes. However, the jurors convicted him of the two charges for which consent was irrelevant:

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<sup>308</sup> *Id.* at 21-22.

<sup>309</sup> See WANG, *supra* note 231, at 51 -60.

<sup>310</sup> See DAVIS, *supra* note 261, at 32-33.

statutory rape (sexual intercourse with a minor) and aggravated child molestation (sex with a minor that causes injury, the injury being the deflowering of a virgin). However, Georgia's penalty for the latter charge was a mandatory ten years imprisonment, a sentence that a prosecutor sought and the trial judge imposed. 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. One of the legislators who had spearheaded the legislation creating the defense publicly declared that it was intended "to protect children from predators. Marcus Dixon was not a predator."<sup>311</sup> The African-American community clearly perceived the conviction and sentence as a group insult, members of that community holding "rallies and otherwise advocat[ing] for Marcus's release, alleging that the prosecution was racially motivated."<sup>312</sup> 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."<sup>313</sup> The case prosecutor, John McClellan, admitted that he added the aggravated child molestation charge as a "backstop" in case Dixon were acquitted of rape.<sup>314</sup> Apparently, not once did the prosecutor, who apparently was really concerned about *forcible*, non-consensual rape, ask himself whether, if the jury disagreed, the mandatory ten-year sentence for the mere "backstop" charge was appropriate.<sup>315</sup> Not once did he consider whether the charge was truly consistent with legislative intent. Not once did he weigh the resulting likely heightened public perception of group-based stigma arising from a conviction playing into hoary

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<sup>311</sup> See *id.* at 32; *Nightline* (ABC News television show, Jan. 21, 2004).

<sup>312</sup> DAVIS, *supra* note 261, at 33.

<sup>313</sup> *Dixon v. State*, 596 S.E. 2d 147, 148 (2004).

<sup>314</sup> See *Nightline*, *supra* note 312.

<sup>315</sup> See DAVIS, *supra* note 261, at 32 (quoting a state legislator as making a similar point about the legislature's intent).

stereotypes about oversexed black men who prey on white women, nor did he pause to reflect upon whether his own unconscious biases may have entered into the (over)charging decision.<sup>316</sup>

## 2. Guilty Pleas: *The Pricing Decision*

### a. *Criminal Justice Markets*

There is a branch of behavioral economics known as “fair pricing theory.”<sup>317</sup> This discipline addresses the emotional reaction of buyers to prices that they perceive to be unfair.<sup>318</sup> 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.<sup>319</sup> The plea itself and any conditions imposed on it (for example, the offender’s 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.<sup>320</sup>

I do not plan to address fair pricing theory here in any detail, though I have done so in a forthcoming work.<sup>321</sup> Instead, I want briefly to summarize those of its teachings that are relevant to the guilty plea process as a framework for understanding how that process affects the disesteem economy.

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<sup>316</sup> See *id.* at 32-33 (making no mention of the prosecutor considering these matters); TASLITZ, RAPE AND CULTURE, *supra* note 60, at 8-13 (summarizing racial rape myths).

<sup>317</sup> See Jon Luther, *Foreword*, in SARAH MAXWELL, THE PRICE IS WRONG: UNDERSTANDING WHAT MAKES A PRICE SEEM FAIR AND THE TRUE COST OF UNFAIR PRICING ix-xiv (2008) (summarizing many of the teachings of fair price theory).

<sup>318</sup> See *id.*

<sup>319</sup> See, e.g., United States v. Mezzanato, 513 U.S. 196, 805 (1994) (“If the prosecutor is interested in ‘buying’ the reliability assurance that accompanies a [rights-]waiver agreement, then precluding waiver can only stifle the market for plea bargains”) (discussing the validity of a prosecutor’s willing to plea bargain only if the defendant first waived his right to keep statements made during negotiations from the jury at trial if negotiations break down); Richard Birke, *The Role of Trial in Promoting Cooperative Negotiation in Criminal Practice*, 91 MARQUETTE 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).

<sup>320</sup> See Birke, *supra* note 320, at 70-73.

<sup>321</sup> See Andrew E. Taslitz, *Plea Bargaining and Fair Price Theory* (draft manuscript August 2008).

The major relevant fair price theory teachings are these. First, prices that violate social norms of equity, equality, and need will be perceived as distributively unfair.<sup>322</sup> “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.<sup>323</sup> Second, pricing processes that deny the buyer voice and choice, transparency, and impartiality will be perceived as procedurally unfair.<sup>324</sup> “Voice” means having some real say in the pricing decision—a sense of control and of not being subjected to unfair advantage-taking.<sup>325</sup> A buyer having a real choice among a range of viable alternatives and the freedom to exit one potential deal for a better one gives the buyer some measure of voice.<sup>326</sup> Transparency means that the negotiating process and outcome seem rational and understandable.<sup>327</sup> “Impartiality” means that favoritism does not affect the negotiating process.<sup>328</sup> Third, violations of these fairness principles trigger reciprocity norms—norms of retaliation sparked by anger at unfair treatment.<sup>329</sup> 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.<sup>330</sup> But the primary cause of retributive anger, we have already seen, is the

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<sup>322</sup> See MAXWELL, *THE PRICE IS WRONG: UNDERSTANDING WHAT MAKES A PRICE SEEM FAIR AND THE TRUE COST OF UNFAIR PRICING* 26, 34-46 (2008).

<sup>323</sup> See *id.* at 57, 59, 64.

<sup>324</sup> See *id.* at 74.

<sup>325</sup> See *id.* at 76.

<sup>326</sup> See *id.* at 76; cf. ALBERT HIRSCHMANN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (articulating the first economic analysis of the voice/exit choice but viewing the two more as alternatives than variants of the same phenomenon).

<sup>327</sup> See MAXWELL *supra* note 323, at 77-79.

<sup>328</sup> See *id.* at 80.

<sup>329</sup> See *id.* at 42-44, 85-90, 96-97, 105; Dale T. Miller and 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 and Sally C. Lerner ed.s, 1981); Jeffrey P. Carpenter, Peter Hans Matthews, and Okombi Ong’ong’a, *Why Punish? Social Reciprocity and the Enforcement of Prosocial Norms*, 24 *J. OF EVOLUTIONARY ECONOMICS* 407, 407-29 (2004).

<sup>330</sup> See MAXWELL, *supra* note 323, at 56-71; Margaret Campbell, *Why Do You Do That? The Important Role of Inferred Motive in Perceptions of Price Fairness*, 8 *J. OF PRODUCT AND BRAND MANAGEMENT* 145, 145-53 (1999).

perception of being treated as less worthy than you are, partly meaning being disesteemed.<sup>331</sup>

Unfair seller treatment of a buyer in bargaining thus both reflects the buyer's lower status and marks him 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 denied retributive justice. Furthermore, if they see the wrongs done them as relatively permanent, their own control over and responsibility for the wrongs minimal, and the prosecutor's motives ill ones, offenders will react with retributive anger. Such anger will impede rehabilitation and encourage re-offending.<sup>332</sup> Equally importantly, the offenders' perceptions likely reflect, at least at the unconscious level, those of the prosecutor and the broader society, making treatment of the offender during the bargaining process a mark of disesteem.<sup>333</sup> If the existence of this opprobrium is linked to race, whether via racial disparities, unconscious racial biases, or harsher prosecutor treatment of racial minorities on all measures of unfairness because of the offender's

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<sup>331</sup> See *supra* text accompanying notes 181, 210-14; 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, victims of circumstance and unable to change their future, are least likely to be rehabilitated).

<sup>332</sup> See *supra* text accompanying notes 217- 20; see generally JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 10-13 (2001), [http://www.urban.org/UploadedPDF/from\\_prison\\_to\\_home.pdf](http://www.urban.org/UploadedPDF/from_prison_to_home.pdf).

<sup>333</sup> See *supra* text accompanying notes 181, 210-14 (analyzing communicative aspects of insulting behaviors and their role in the disesteem economy); see generally DJ SILON, *US 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).

race (for many of these bargaining ills may affect whites as well, but to a lesser degree and not because of their race), then it is *racial* disesteem that the plea bargaining process will reflect and promote.<sup>334</sup>

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?*

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.<sup>335</sup> 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.<sup>336</sup> It is true that *Brady v. Maryland*<sup>337</sup> and *Giglio v. United States*<sup>338</sup> require prosecutors to produce respectively direct and impeaching exculpatory evidence at trial. A broad reading of the more recent *United States v. Ruiz*<sup>339</sup> case, however, suggests that no such evidence need be produced *before a guilty plea*.<sup>340</sup> 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 defense counsel cannot compel prosecution witnesses to give even informal pretrial interviews.<sup>341</sup> Nor, in many jurisdictions,

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<sup>334</sup> See *supra* text accompanying notes 267-71 (defining “racial disesteem”).

<sup>335</sup> See Timothy Lynch, *The Case Against Plea-Bargaining*, REGULATION 2-3 (Fall 2003); DAVIS, *supra* note 261, at 44 (“[I]n reality, the prosecutor always has the upper hand because of her control over the process.”).

<sup>336</sup> See *United States v. Ruiz*, 536 U.S. 626, 629 (2002).

<sup>337</sup> 373 U.S. 83 (1963).

<sup>338</sup> 405 U.S. 763 (1972).

<sup>339</sup> 536 U.S. 626.

<sup>340</sup> See Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations: “Voluntary” Waivers of Constitutional Rights*, 23 CRIM. J. \_\_\_, 8-12 (forthcoming 2008) [hereinafter *Prosecutorial Preconditions*] (arguing that just such a reading of *Ruiz* is the fairest reading of it).

<sup>341</sup> See Stephen J. Schulhofer, *A Wake-up Call from the Plea-Bargaining Trenches*, 19 L. & SOCIAL INQUIRY 135 (1994).

can defense counsel simply get the name of prosecution witnesses.<sup>342</sup> Even jurisdictions with “open file” policies in practice provide the defense with little information relative to the civil system.<sup>343</sup> “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.”<sup>344</sup> 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.”<sup>345</sup>

Heavy caseloads result in assembly-line justice in which relatively little time is devoted to the run-of-the-mill case.<sup>346</sup> 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.<sup>347</sup> Defense counsel are overworked and underpaid, and private defense counsel radically underpaid.<sup>348</sup> This under-resourcing creates incentives to settle cases in brief negotiations and with equally brief consultation with clients.<sup>349</sup> The bazaar-like atmosphere of a system in which most cases end in pleas promotes a case-processing, “teamwork” approach, rather than true adversarialness, at least for the vast numbers of cases that never get to trial.<sup>350</sup> Lawyers under time pressure and with inadequate information engage in stereotyping, cases starting to fit into categories, each of which

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<sup>342</sup> *See id.*

<sup>343</sup> *See id.*

<sup>344</sup> *See id.* at 137.

<sup>345</sup> *Id.*

<sup>346</sup> *See* Taslitz, *Myself Alone*, *supra* note 40, at 18.

<sup>347</sup> *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 341, at 17-22 (summarizing social science literature demonstrating why *Bordenkircher* is wrong on this point).

<sup>348</sup> *See* AMERICAN BAR ASSOCIATION, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY: THE REPORT OF THE ABA CRIMINAL JUSTICE SECTION’S AD HOC COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS* 87-89 (2006).

<sup>349</sup> *See* Schulhofer, *supra* note 342, at 137.

<sup>350</sup> *See id.* (noting that this working environment “generates intense pressure to bypass whatever avenues for factual investigation remain open.”).

has a “going rate,” rather than each client’s being envisioned as unique.<sup>351</sup> Clients can often be too young, drug-addicted, or mentally-impaired to understand the consequences of their choices and rarely get adequate time to consider them.<sup>352</sup>

It is true that prosecutors are also often fatigued and time-pressed.<sup>353</sup> But they have the police’s investigation efforts, often have ready access to a significant number of their own investigating detectives and of police forensics units, and in large cities have huge reservoirs of additional resources that they can draw on where needed.<sup>354</sup> Furthermore, the law empowers them. 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.<sup>355</sup> The risk of suffering grave punishment upon going to trial gives most defendants little convincing ability to insist upon a trial if they dislike a prosecutor’s offer.<sup>356</sup>

Many prosecutors are eager to press their advantage. Stunningly, the law often permits prosecutors to refuse even to attempt bargaining unless defendants first waive their rights to

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<sup>351</sup> See Taslitz, *Prosecutorial Preconditions*, *supra* note 341, at 17-19 (defending this point); Taslitz, *Myself Alone*, *supra* note 40, at 18 (explaining how the criminal justice system in practice reduces defendants to categories rather than unique persons).

<sup>352</sup> See Abbe Smith, *I Ain’t Takin’ No Plea: The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11 (2007).

<sup>353</sup> Explains former United States Attorney, former Colorado Springs elected District Attorney, and current Colorado Attorney General John W. Suthers:

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 273, at 84 (2008). See *id.* at 85-86 (noting that docket congestion creates similar pressures even in felony cases).

<sup>354</sup> See DAVIS, *supra* note 261, 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.

<sup>355</sup> See *id.* at 103-13; see *supra* text accompanying notes 281-86.

<sup>356</sup> See Lynch, *supra* note 336, at 23 (“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.”); *id.* at 26-27 (“[T]oday we punish people—punish them severely—simply for going to trial. It is sheer sophistry to pretend otherwise.”) (quoting Chief Judge Young).

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.<sup>357</sup> Defendants face grave trial risks if they refuse waiver, for making that choice leaves trial as the only option.<sup>358</sup> 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 client distrust of both his counsel and the state.<sup>359</sup> Negotiations are more likely to feel like coerced self-immolation than an opportunity for an effective voice in the plea-bargaining “pricing” decision.<sup>360</sup> Limited options, all harsh, mean no real choice, no chance to exit as a means of conveying dissent.<sup>361</sup> When prosecutors press their power to the fullest, defendants (and even defense counsel) fear their weakness has led to advantage-taking.<sup>362</sup> The sense of equity—of getting equal value for what you paid—is missing.<sup>363</sup> Poverty, danger, and poor neighborhood educational opportunities may lead some defendants to see themselves as in need, perhaps society partly being at fault for these defendants’ plight, yet the state offers them no “discount” for their suffering.<sup>364</sup>

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<sup>357</sup> See Taslitz, *Prosecutorial Preconditions*, *supra* note 341, at 1-6.

<sup>358</sup> See *id.* at 5, 14-16.

<sup>359</sup> J. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 105-15 (1972) (defendants' distrust of their public defenders).

<sup>360</sup> See Taslitz, *Prosecutorial Preconditions*, *supra* note 341, at 12-14 (discussing duress in plea bargaining).

<sup>361</sup> See *id.* at 16-17 (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, 163-89 (2007) (making a more elaborate defense of this point).

<sup>362</sup> For a powerful description of such advantage-taking by prosecutors even in a case where there was much evidence of the defendant's innocence, see ABBE SMITH, *CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY* (2008)

<sup>363</sup> Cf. Hollander-Blumoff, *supra* note 362, 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 he has lost and how little he has gained).

<sup>364</sup> See DAVIS, *supra* note 261, at 50-52 (recounting the example of Emma Faye Stewart, “a poor African-American woman with very limited education and even less understanding of the criminal justice system” who a prosecutor bullied into an extremely harsh plea based upon an informant later proven to have lied, the prosecutor thereupon “offer[ing] no assistance and express[ing] no regrets.”).

Nor will the plea-bargaining process seem “transparent” (rational and understandable) to them.<sup>365</sup> Sentencing guidelines, for example, are notoriously complex, especially at the federal level, as are many aspects of criminal procedure.<sup>366</sup> In routine cases, defense lawyers negotiate outside their client’s involvement or even presence.<sup>367</sup> 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 agreed upon.<sup>368</sup> At best, the client understands only that he will receive that sentence.<sup>369</sup> The rote, mantra-like guilty plea colloquy reinforces the mystery of the process rather than diminishing it.<sup>370</sup>

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—police whom the client might already hold in contempt.<sup>371</sup> The price imposed on the client is not temporary either. It may last

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<sup>365</sup> See Taslitz, *Prosecutorial Preconditions*, *supra* note 341, at 16-21 (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).

<sup>366</sup> See SUBIN, ET. AL., *supra* note 285, at 122-43 (summarizing sentencing guidelines’ complexity), 316-483 (detailing the complexity of many other aspects of criminal procedure).

<sup>367</sup> Again, this has been my experience and that of every one of the many prosecutors and defense counsel whom I have known in over 25 years of practicing and teaching criminal law.

<sup>368</sup> 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 he can as quickly as possible).

<sup>369</sup> See generally Hollander-Blumoff, *supra* note 362 (detailing criminal defendants’ limited understanding of plea deal).

<sup>370</sup> See SUBIN, ET. AL., *supra* note 285, at 185-92 (reproducing an illustrative guilty plea colloquy in federal court).

<sup>371</sup> For a summary of evidence of racial minority communities’ general distrust of the police, see Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 24 -26 & n. 62 (2003); cf. MAXWELL, *supra* note 323, at 70 (noting in the context of fair pricing theory, that “unlike some cultures, we [Americans] are more likely to blame another person rather than our stars. We in the Western world tend to take credit for successes and blame others for failures.”).

five, ten, twenty years, even a lifetime.<sup>372</sup> The client will likely attribute ill motives to the state and be angry.

Perceived disparate racial treatment from profiling, racially biased sentences, racially biased verdicts, and other sources (detailed above) likewise violates equality norms.<sup>373</sup> 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 their re-offending.<sup>374</sup> But their local communities are fully aware of the biases and abuses suffered by individuals.<sup>375</sup> 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, filled with others whose criminal records leave them with little hope for useful employment.<sup>376</sup> Neighborhoods deteriorate further, as does respect for and cooperation with the law, and crime rises as procedural justice theories suggest.<sup>377</sup>

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 his race and class.<sup>378</sup> Political scientist Murray Edelman explains: "It is common and easy to define various kinds of disadvantaged

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<sup>372</sup> See The Sentencing Project, *Comments and Recommendations Submitted to the Justice Kennedy Commission of the American Bar Association* (November 5, 2003) (summarizing the ways in which federal sentencing practices are unduly harsh).

<sup>373</sup> See generally GABBIDON & GREENE, *supra* note 258 (cataloguing in book-length form the various racial biases at each step in the criminal justice process).

<sup>374</sup> Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiation: "Voluntary" Waivers of Constitutional Rights*, 26-27 (forthcoming 2008).

<sup>375</sup> See Taslitz, *Respect and the Fourth Amendment*, *supra* note 372, at 25 - 26.

<sup>376</sup> See Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From "Elia" to the Internment*, 70 *FORDHAM L. REV.* 2257, 2259 - 62 (2002) (making similar point).

<sup>377</sup> See Taslitz, *Redux*, *supra* note 244, at 126-33 (discussing procedural justice research and its relevance to racial bias in the criminal justice system and the resulting ill bystander effects).

<sup>378</sup> See Taslitz, *Redux*, *supra* note 244, at 126 - 30 (discussing race-crime link); *supra* text accompanying notes 124 - 41 (discussing forces contributing to racial disesteem).

groups as inferior, dangerous, unworthy, or even non-human.”<sup>379</sup> Such labels, argues Edelman, seem necessary to justify continuing their unequal treatment and to intensifying their disadvantage.<sup>380</sup> 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.<sup>381</sup> “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.”<sup>382</sup> For some people, criminal justice institutions represent justice and safety, but for the oppressed minorities, these institutions are but symbols of unequal status and power.<sup>383</sup> The result of this labeling process and division of world views is to divide society into those presumed respectable and those presumed the contrary.<sup>384</sup> 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 avoid, to the extent they can, minorities like the plague.<sup>385</sup> 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.<sup>386</sup> This polarization of the population makes common cause with, and on behalf of, racial minorities hard. That absence of joint

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<sup>379</sup> MURRAY EDELMAN, *THE POLITICS OF MISINFORMATION* 60 (2001).

<sup>380</sup> *See id.*

<sup>381</sup> *See id.* at 60, 117.

<sup>382</sup> *Id.* at 117.

<sup>383</sup> *See id.* at 121.

<sup>384</sup> *See id.* at; CHARLES TILLY, *CREDIT AND BLAME* 53-60 (2008).

<sup>385</sup> *See* EDELMAN, *supra* note 380, at 115-22; TILLY, *supra* note 385, at 102-06; ABEL, *supra* note 144, at 7-23.

<sup>386</sup> *See* EDELMAN, *supra* note 380, at 118-19; Jeanine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47 (2007).

political action further promotes differing worldviews and group polarization—“us/them” thinking.<sup>387</sup>

Yet most racial minority group members do not engage in crime.<sup>388</sup> They struggle to make their lives work but often see what seem to them to be unfair obstacles before them while the wicked prosper. Speaking on their behalf, 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 or no 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 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.<sup>389</sup>

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 of offenses—makes the point.<sup>390</sup> The data show that *within* every jurisdiction type—urban, suburban, rural, poor—white defendants do better than minority defendants.<sup>391</sup> Explains law professor Josh Bower, “minorities were convicted and sent to jail more frequently, they received longer jail sentences than whites, and they were offered fewer ACDs [pretrial probations]”.<sup>392</sup> But across jurisdictions a different pattern emerged. For “quality of life offenses,” annoying, minor crimes, parents are likely to be particularly incensed

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<sup>387</sup> See EDELMAN, *supra* note 380, at 117; TILLY, *supra* note 385, at 53-60; CASS SUNSTEIN, REPUBLIC.COM 2.0 *supra* note 99, at 69-76 (2008) (explaining group polarization); DAVID BERREBY, US AND THEM: UNDERSTANDING YOUR TRIBAL MIND (2005).

<sup>388</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008 202,212 (2008); See William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1802 (1998).

<sup>389</sup> EDELMAN, *supra* note 380, at 55.

<sup>390</sup> For a scathing attack on order-maintenance policing, see generally BERNARD HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2005).

<sup>391</sup> See Bowers, *supra* note 27, at 118.

<sup>392</sup> *Id.* at 118.

at their children suffering serious punishments.<sup>393</sup> In poor, urban, minority areas, residents usually do “not...wield terrific electoral clout.”<sup>394</sup> Nevertheless, they have the power of resistance—of non-cooperation with the police, anger, looking away from offenses they do observe, a power that procedural justice research suggests they will use.<sup>395</sup> 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.<sup>396</sup> Police cannot ignore growing community pushback. They need some base level of community trust, however small.<sup>397</sup> 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.<sup>398</sup> Such sentencing decreases did not occur in majority white neighborhoods.<sup>399</sup> 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.<sup>400</sup> Bowers calls this “grassroots plea-bargaining”—community resistance alters going rates in individual cases.<sup>401</sup>

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

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<sup>393</sup> See *id.* at 112-12.

<sup>394</sup> *Id.*

<sup>395</sup> See *id.* (making similar point); Taslitz, *Redux*, *supra* note 244, at 108 - 09 (discussing effects of denial of procedural justice).

<sup>396</sup> See Bowers, *supra* note 27, at 111-12.

<sup>397</sup> See *id.* 111-12; Taslitz, *Respect and the Fourth Amendment*, *supra* note 372, at 25- 26.

<sup>398</sup> See Bowers, *supra* note 27, at 111-19.

<sup>399</sup> See *id.*

<sup>400</sup> See *id.* at 118.

<sup>401</sup> See *id.* at 87.

discretion to the benefit of white defendants.”<sup>402</sup> Moreover, disparate treatment of racial minorities in minority neighborhoods relative to whites seems to continue apace.<sup>403</sup> Furthermore, 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.<sup>404</sup> 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.

### 3. *Publicity Strategies*

Prosecutors’ use of publicity as a way to promote disesteem is important yet can be addressed briefly because the central points are not in dispute. Most criminal cases escape media coverage.<sup>405</sup> Pre-trial publicity is, therefore, usually local, limited to the friends, family, and neighborhood of the accused and the victims, largely being passed along by word-of-mouth. In the subset of cases that do receive media coverage, however, the coverage is usually heavily biased against the defendant.<sup>406</sup> 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 primarily the law enforcement version of events is what makes the evening news.<sup>407</sup> Moreover, the press is dependent upon law enforcement for rapid access to information

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<sup>402</sup> *Id.* at 119.

<sup>403</sup> See Bowers, *supra* note 27, at 118 - 20 (need more cites?)

<sup>404</sup> See David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97 (2007).

<sup>405</sup> See JON BRUSCHKE & WILLIAM E. LOGES, FREE PRESS VS. FAIR TRIALS: EXAMINING PUBLICITY’S ROLE IN TRIAL OUTCOMES 81, 105 (2004).

<sup>406</sup> See Taslitz, *Free Press Paradigm*, *supra* note 40 at 10-14 (summarizing empirical data on this point).

<sup>407</sup> See *id.* at 11-12.

needed to make deadlines, especially early in the case.<sup>408</sup> 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 affected by media crime coverage, strong evidence suggests that there are often significant effects detrimental to the accused.<sup>409</sup> In high-profile cases with long time spans, the defense may over time be able to offer a counter-story, but early media coverage has done much damage to an accused's reputation along the way—damage that may not be entirely undone even by an acquittal.<sup>410</sup> 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.<sup>411</sup> But even a fair trial followed by an acquittal does not necessarily erase the damage done to the accused's esteem.<sup>412</sup>

A conviction, of course, magnifies disesteem, but, where the trial was a fair one, that is how it should be.<sup>413</sup> But press coverage of pending sentencing proceedings may arguably heighten disesteem beyond what the facts warrant. In any case, disesteem imposed upon the individual for his wrongful actions never justifies imposing resulting disesteem upon his racial group.<sup>414</sup> Yet ample empirical evidence suggests that, at least in racially-charged cases, that may be just what

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<sup>408</sup> *See id.* at 11.

<sup>409</sup> *See id.* at 14-15; BRENNAN & PETIT, *supra* note 29, at 311 (discussing “unbalanced” publicity in criminal cases distorting disesteem market regulation efforts).

<sup>410</sup> *See* Taslitz, *Free Press Paradigm*, *supra* note 40, at 11-12.

<sup>411</sup> *See id.* at 14-20.

<sup>412</sup> *See id.* at 11-12 (making general point), 23-27 (illustrating this point in the context of the Duke LaCrosse Players' Rape Case).

<sup>413</sup> *See supra* text accompanying notes 149 (addressing the sometimes positive role of disesteem-imposition by the criminal justice system); 166-75 (explaining disesteem-magnifying effect of a guilty verdict).

<sup>414</sup> *See supra* Part II (defending this point).

happens.<sup>415</sup> 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.<sup>416</sup>

Ethics rules do govern the proper scope of prosecutors’ statements to the media in individual cases.<sup>417</sup> But the rules may too often be honored in the breach and do not address cumulative racial-group biases, conscious or otherwise, fostered by prosecutor comments.<sup>418</sup> Few prosecutors would consciously seek to fan racial bias, though there are a small number of glaring exceptions.<sup>419</sup> But neither the ethics rules nor hurried legal practice require, or even encourage, prosecutors simply to give thought to the broader racial impact of their words to the press—though many careful prosecutors likely try to do so.<sup>420</sup> Furthermore, prosecutors simply cannot control the media statements of many other criminal justice system actors, from victims, to

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<sup>415</sup> 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.

<sup>416</sup> See *id.* at 81-86; See generally *Negative News and Little Else*, L.A. TIMES, Dec. 11, 1990, at 1; Tarso Luis Ramos, *L.A. Story: Who gains from framing gang attacks as ethnic cleansing?*, COLORLINES, July 1, 2007.

<sup>417</sup> See MODEL RULES PROF. CONDUCT 3.6, 3.8.

<sup>418</sup> See *id.* (containing no references to race-bias); Taslitz, *Free Press Paradigm*, *supra* note 40, at 21-27 (offering Duke rape case as an infamous example of the rules being honored in the breach). *But see* Comment, MODEL RULES PROF. CONDUCT 8.4 (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—a relatively toothless aspirational comment that, while admirable in spirit, is likely to address only the most extreme, overt, conscious racist appeals by prosecutors rather than the far more subtle issues of racial esteem discussed here).

<sup>419</sup> See Taslitz, *Free Press Paradigm*, *supra* note 40, at 1-4, 21-27 (discussing one such egregious exception).

<sup>420</sup> Cf. SUTHERS, *supra* note 273, 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).

interest-group commentators, to potential jurors. First amendment rights also limit what can be done to limit either these voices or the prosecutor's.<sup>421</sup> Nevertheless, the risks of racial harm seem sufficiently high as to counsel extreme prosecutor caution in dealing with the press, not only in individual cases but in the overall tenor of the comments flowing from various assistants in a prosecutors' office. Even if other societal forces may explain much of the media's racial bias in criminal cases, prosecutors should not contribute to worsening the problem.

#### 4. *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—again, usually “virtual,” subconscious demand—will be to visit disesteem not merely upon the individual but upon his racial group should that group be one in the minority and having 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 disesteem will also be at least partly local, thus varying in nature and degree from one geographic area to another.<sup>422</sup>

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

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<sup>421</sup> See Taslitz, *Free Press Paradigm*, *supra* note 40, at 28-42 (discussing these constitutional limitations).

<sup>422</sup> See SUTHERS, *supra* note 273, at 109 (noting service both as a locally-elected prosecutor and a federally-appointed one), 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).

seek can have profound consequences in contributing to racial disesteem. The extreme example of the Jena 6 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, the inter-racial violence spawned in the wake of these events all support this (informed) speculation. If it 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. That may or may not be so. 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.<sup>423</sup> 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

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<sup>423</sup> Cf. CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* (2007).

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?

#### IV. PROSECUTORS' OBLIGATIONS

##### A. *Modified Do-Justice Adversarialism*

The current ethical model for prosecutors is what I will 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 his side.<sup>424</sup> "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.<sup>425</sup> 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 he or she can to win.<sup>426</sup> 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 (class actions, "cause lawyering") not relevant here that may vary somewhat this portion of the central model.<sup>427</sup> The combat of adversaries over individual disputes is, however, thought to maximize *societal welfare* in the aggregate and in the long run.<sup>428</sup> Adversarialism is thus consistent with free market principles of

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<sup>424</sup> See TASLITZ, RAPE AND CULTURE, *supra* note 60, 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 *Temporal Adversarialism*] (describing the ideologies, benefits, and costs underlying legal adversarialism and the broader political adversarialism that supports it).

<sup>425</sup> Cf. TASLITZ, RAPE AND CULTURE, *supra* note 60, at 103 (describing the adversary system as a zero sum game).

<sup>426</sup> Cf. *id.* at 103-04 (making similar point); see, e.g., N.Y. CODE OF PROF'L CONDUCT CANON 7 (2008) ("A lawyer should represent a client zealously within the bounds of the law.").

<sup>427</sup> Cf. *id.* at 103 ("[W]inning is all, and devotion to the client is alone what matters"); see generally AUSTIN SARAT & STUART SCHEINGOLD, CAUSE LAWYERS AND SOCIAL MOVEMENTS (2006) (discussing special nature of various types of cause lawyering); RACHEL MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE 23-46 (2004) (describing the identifying features of class actions).

<sup>428</sup> See Taslitz, *Temporal Adversarialism*, *supra* note 425, at 1594-1601 (describing adversarialism's purported social benefits).

an “invisible hand” moving self-interested parties toward serving an overall social good that they never intended.<sup>429</sup>

Prosecutors, especially at trial, are indeed expected to embrace the adversarial model.<sup>430</sup> But they have another obligation—to “do justice”—that may in theory often require tempering adversarial zeal.<sup>431</sup> The meaning of the obligation to “do justice” is ambiguous and disputed.<sup>432</sup> More specific rules give it meat in only the narrowest slice of professional situations.<sup>433</sup> At a minimum, however, there is broad support for the principle that doing justice means ensuring fair procedures.<sup>434</sup> Yet even this minimalist conception is often narrowly understood. Notably, the obligation focuses on conscious and overt actions that may undermine fair procedures.<sup>435</sup> 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

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<sup>429</sup> See TASLITZ, RAPE AND CULTURE *supra* note 60, at 103-05 (describing the “market metaphor” of the adversary system); ADAM SMITH, THE THEORY OF THE MORAL SENTIMENTS 184-85 (Liberty Classics 1982) (coining the “invisible hand” term to capture how markets move society toward a greater overall good likely never intended by the individual market participants).

<sup>430</sup> See DAVIS, *supra* note 261, at 12 (“The criminal justice system is adversarial by design. Ideally, a capable and zealous defense attorney represents the accused, and a similarly capable prosecutor represents the state.”).

<sup>431</sup> See *id.* at 13.

<sup>432</sup> See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L. J. 607, 613-18 (1999) [hereinafter *Why Seek Justice?*]

<sup>433</sup> See MODEL RULES PROF. CONDUCT, RULE 3.8.

<sup>434</sup> See Green, *supra* note 433, at 634-35. Green describes the scope of the prosecutor’s duty to do justice thus:

Doing justice comprises various objectives which are, for the most part, implicit in our constitutional and statutory schemes. They derive from our understanding of 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 of paramount 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 severely 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 nothing novel but rather “a reminder of the traditional understanding.”

<sup>435</sup> See *id.* at 634 (cataloguing “do justice” obligations that all seem to involve primarily conscious prosecutor choices, though also seeming to include prosecutorial negligence-avoidance as well).

seeking to introduce blatantly inadmissible evidence for the sole purpose of prejudicing the jury would 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.<sup>436</sup> 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.<sup>437</sup> 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.<sup>438</sup> The do-justice model also seems to extend to some acts of prosecutorial negligence.<sup>439</sup> Nevertheless, as a general rule, the minimalist conception of Do-Justice Adversarialism focuses on what the prosecutor consciously knows or intends or what he should know given what information is already available to his conscious deliberation.<sup>440</sup> 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.<sup>441</sup>

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<sup>436</sup> See THE CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA’S LOCAL PROSECUTORS 26-30 (2003) [hereinafter HARMFUL ERROR] (listing examples of prosecutorial misconduct); R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 95-101 (2005) (surveying ethical limits on prosecutors’ trial and pre-trial behavior).

<sup>437</sup> See HARMFUL ERROR, *supra* note 437, at 31-32 (discussing this form of prosecutorial misconduct); CASSIDY, *supra* note 437, at 66-78 (analyzing the legal bases for this obligation).

<sup>438</sup> See CASSIDY, *supra* note 437, at 66-67 (rooting prosecutor’s obligation to produce exculpatory evidence in the prosecutor’s unique duties not shared by defense counsel).

<sup>439</sup> See *supra* text accompanying notes 424 - 26; *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”). Professor Cassidy elaborates:

There is no *mens rea* requirement under the Model Rule [13.8(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 437, at 71.

<sup>440</sup> See generally CASSIDY, *supra* note 437 (surveying prosecutors’ major ethical obligations without once addressing duties arising from the risks of unconscious or institutional biases).

<sup>441</sup> See HARMFUL ERROR, *supra* note 437, at 14 (noting that Brooklyn, NY 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).

I propose expanding the minimalist ideal in two ways. First, prosecutors have an affirmative obligation to 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.<sup>442</sup> This obligation does *not* mean that prosecutors must be able to “read” their own or others’ subconscious minds in individual cases. But it does mean that the prosecutor must use care to consider the potential racial subtext of each action the prosecutor takes—from charging, to plea bargaining, to opening arguments, to sentencing.<sup>443</sup> Doing so requires attention to the raced “cultural meaning” of prosecutor actions, thus requiring the prosecutor to be familiar with the relevant psychological literature.<sup>444</sup> Various law reform entities are indeed working on training courses to help prosecutors with just this task.<sup>445</sup> Modified Do-Justice Adversarialism thus brings a concern with deliberation about raced cultural meanings into the prosecutorial mindset, but this

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<sup>442</sup> See DAVIS, *supra* note 261, at 19- 22 (discussing the phenomenon of prosecutorial willful blindness); 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).

<sup>443</sup> See Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (arguing that unconscious and systemic prosecutor racial bias occurs at every stage of the criminal justice process); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 Geo. J. Legal Ethics 355, 400 (2001) (acknowledging that prosecutors serve an important social function but nevertheless counseling “those who are committed to social and racial justice: Please don’t join a prosecutors office.”).

<sup>444</sup> Cf. Charles H. Lawrence, III, *The Id, the Ego, and Equal Protection*, 39 STAN. L. REV. 317, 322-23 (1987) (suggesting a cultural meaning test to identify unconscious racism); 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 (2007) (empirical study suggesting that unconscious racial bias leads judges and jurors to misremember facts in a racially biased way).

<sup>445</sup> 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, *Racial Fairness Gaining Ground in the Justice System*, [www.baltimoresun.com](http://www.baltimoresun.com) (July 30, 2008) (describing federal legislation, the bipartisan 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” and state level legislation requiring preparation of “racial impact statements” for proposed new legislation in both Connecticut and Iowa.)

model is still one focused largely on the individual case, albeit with a heightened sensitivity to its social implications.

But 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.<sup>446</sup> 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 this model’s emphasis on the prosecutor’s lawyerly role, but the term, the “Medical Model” for now captures mostly clearly the controlling metaphor.

#### B. *The Medical Model*

The Medical Model would be 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 of the Body interact.<sup>447</sup>

The prosecutor’s duty to do “do justice” stems from his representing the People—all the People, rather than any individual.<sup>448</sup> The argument has even been made that the prosecutor in

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<sup>446</sup> See *supra* text accompanying notes 375 - 77.

<sup>447</sup> Cf. LEONARD ROY FRANK, QUOTIONARY 600 (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), 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), 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).

part represents the interests of the defendant, who, though suffering temporary limitations on his political and other freedoms, is still part of the American people; the prosecutor thus shows respect for the offender by holding him to account for his wrongs, for he is then treated as an autonomous individual capable of making reasoned choices and being responsible for his actions.<sup>449</sup> 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 any on the innocent. Moreover, because the prosecutor represents the People, he should do what is reasonably within his 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 it would be without treatment and indeed should try to maximize the return to 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) come into play when we treat only the symptom (the crime)—and treat it as an isolated symptom—at that. Given this country's sordid racial history and its continuing racial troubles and the criminal justice system's role in these troubles,<sup>450</sup> the argument for application of these Medical Model principles seems particularly strong in the area of race.

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<sup>448</sup> 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," thus "shift[ing] the constitutional 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").

<sup>449</sup> See CASSIDY, *supra* note 437, at 2-3 ("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."); Justin D. Levinson, *Prosecutorial Discretion in an Adversarial System*, 1992 BYUL. REV. 669, 698 (1992) ("Prosecutors represent the interests of society as a whole, including the interests of defendants as members of that society." ).

<sup>450</sup> See generally RANDALLY KENNEDY, RACE, CRIME, AND THE LAW (1998) (tracing the history of racial bias in the American criminal justice system); see *supra* Part II (arguing that racial disesteem has especially ill effects in the criminal justice system).

A variety of recent trends converge toward the Medical Model. Prosecutors are increasingly involved in crime prevention, including through such innovations as nuisance suits against owners of drug houses, anti-gang injunctions, forfeiture of organized crime assets, community prosecutors, and promoting specialty courts, for example, drug courts.<sup>451</sup> Prosecutors are also increasingly involved in minimizing the harm that they and the police do in investigating and prosecuting crime. Thus new ABA Standards regulate prosecutor behavior where prosecutors *investigate*, and not merely prosecute, crime.<sup>452</sup> 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.<sup>453</sup> 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.<sup>454</sup>

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<sup>451</sup> See, e.g., JAMES JACOBS, *GOETHAM UNBOUND: HOW NEW YORK CITY WAS LIBERATED FROM THE GRIP OF ORGANIZED CRIME* (2001) (explaining civil and other novel remedies used by prosecutors to combat organized crime); 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.); 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" and further noting that "district attorneys seek to encourage local prosecutors to expand their professional objectives beyond conviction and sentencing of defendants and to prioritize the reduction of crime as a principle goal. I call this the new prosecution.").

<sup>452</sup> AMERICAN BAR ASSOCIATION, *STANDARDS FOR CRIMINAL JUSTICE: INVESTIGATIVE STANDARDS FOR THE PROSECUTOR* (2008).

<sup>453</sup> See ABA, *ACHIEVING JUSTICE* *supra* note 349.

<sup>454</sup> See *id.* Professor Bruce Green has 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, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 855-56 (noting that it is at least subject to debate whether the prosecutors' duty of neutrality—which

Prosecutors have played a part in efforts to create or expand Criminal Justice Coordinating Councils and related reforms to focus on or include reducing racial bias, a mission that is a subset of an easily-expanded broader mission of focusing on the system's contribution to generating racial disesteem.<sup>455</sup> These trends converge on an implicit recognition of a broader prosecutorial social role in preventing and healing harm to the Body Politic. But this role is parallel to and supplementary to the prosecutors' adversarial role. The two prosecutorial functions—generating only justified disesteem on individuals in individual cases and helping to heal the Body Politic via more general reforms—are conceptually distinct, though each may impact the other. In the area of race, both Modified Due Process Adversarialism and the Medical Model must hold sway in their respective spheres.

### C. *But What Can The Prosecutor Do?*

Here I will be very brief because I have provided details for how prosecutors can address an analogous problem in a similar fashion in an earlier work.<sup>456</sup> New ethics rules would likely generally be ignored; would, for political reasons, probably be aspirational anyway; and, if somehow enforced, might inflict punishments on prosecutors trying in good faith to deal with a difficult and elusive problem.<sup>457</sup> Yet, without ethical rules rigidly enforced, many might fear that calls to end prosecutorial contributions to the imposition of racial disesteem will be but more Law Day rhetoric, sound without fury.

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

<sup>455</sup> See ABA, *ACHIEVING JUSTICE*, *supra* note 349, at 1 - 10; THE CONSTITUTION PROJECT, *MANDATORY JUSTICE: THE DEATH PENALTY REVISITED* 67 - 76 (2006); *supra* note 445 and accompanying text (discussing new federal and state legislation investigating in part prosecutor racial bias).

<sup>456</sup> See Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO J. PUB. L. POL'Y & ETHICS 271 (2006) [hereinafter *Democratic Deliberation*] (arguing for "internal" and "external" deliberative mechanisms to help prosecutors reduce the risk of convicting the innocent).

<sup>457</sup> See Andrew E. Taslitz, *Still Officers of the Court: Why the Fourth Amendment Is No Bar to Challenging Racism, Sexism, and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781 (1996) (recounting the author's difficulties in seeking to amend ethics rules to bar racist and similar appeals by attorneys).

Yet there is a third way: use transparency and principles of deliberate institutional design to encouraged continuing, widespread, aggressive prosecutor efforts to do what is right.<sup>458</sup> For reasons explained elsewhere, the best sort of approach is two-stage deliberation: internal and external.<sup>459</sup> Internally, a high-level prosecutor might be given primary responsibility for collecting and analyzing relevant empirical data and best practices, consulting with defense counsel, the judiciary, and the local community and chairing a committee of prosecutors designed to craft both policies and training programs to reduce prosecutors' contributions to racial disesteem.<sup>460</sup> Externally, local Criminal Justice Racial Coordinating Councils having representatives from all stakeholder groups, including prosecutors, should be created to collect data, pursue complaints, exchange information, and foster ideas.<sup>461</sup> Prosecutors would need to be forthcoming about the outcomes of their internal efforts and where they see need for improvement. Public accountability, broad two-step deliberation, and, once the public story is told, perhaps even coalitional electoral politics create institutional incentives for creative, collaborative prosecutorial reform efforts involving the community in efforts to minimize racial disesteem.<sup>462</sup> Had such procedures been in place, perhaps Reed Walters may at least have paused, widely consulted, and worried through the racial impacts of his handling of the Jena 6. Had he done so, I suspect the chances of a more sensible resolution, and of community healing rather than enhanced pain, would have been much improved.

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<sup>458</sup> See Taslitz, *Democratic Deliberation*, *supra* note 457, at 314-15 (justifying transparency and other deliberative mechanisms); Davis, *Prosecution and Race*, *supra* note 444, at 62-67 (arguing for publication of racial impact statements as a way to improve prosecutors' handling of unconscious and institutional racial bias).

<sup>459</sup> See Taslitz, *Democratic Deliberation*, *supra* note 457, at 325.

<sup>460</sup> Cf. 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).

<sup>461</sup> Cf. Taslitz, *Democratic Deliberation*, *supra* note 457, at 316-18 (making analogous proposal); ABA, ACHIEVING JUSTICE, *supra* note 349, at 7 -8 (discussing Criminal Justice Coordinating Councils).

<sup>462</sup> See Taslitz, *Democratic Deliberation*, *supra* note 457, at 314-18; Taslitz, *Racial Auditors*, *supra* note 139, at 293-98; Davis, *Prosecution and Race*, *supra* note 444, at 55-60 (analyzing role of electoral politics in improving prosecutor behavior).