ARE THERE STORIES PROSECUTORS SHOULDN'T TELL?: THE DUTY TO AVOID RACIALIZED TRIAL NARRATIVES

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ABSTRACT

The purportedly race-neutral actions of courts and prosecutors protect and perpetuate the myth of colorblindness and the legacy of white supremacy that define the American criminal system. This insulates the criminal system's racially disparate outcomes from scrutiny, thereby precluding reform. Yet prosecutors remain accountable to the electorate. In recent years, activists and community organizers have mobilized communities to support and elect prosecutors who have pledged to address the racial inequities of the criminal system. After a summer of protests for racial justice and growing acceptance for the demands of the Movement for Black Lives, we find ourselves in a moment that demands and necessitates transformative proposals that call on prosecutors to reject the myth of colorblindness and adopt a race-conscious approach to criminal prosecution. This creates an opportunity—and need—to generate and articulate specific and innovative frameworks to change the culture of prosecution.

This Article seeks to provide one such framework by examining the ethical duties of American prosecutors in the underexplored area of prosecutorial storytelling. This Article focuses on trial narratives as a lens through which to view the ethical duties of the prosecutor writ large, arguing that trial narratives that advance or invoke a racialized stereotype or stock story violate the prosecutor's duty to justice. A race-neutral or "colorblind" approach to prosecution ignores the ethical violations inherent in racialized prosecutorial storytelling. By contrast, a color-conscious approach offers prosecutors a path to address the systemic racism that pervades every aspect of the American criminal system—including the stories that prosecutors tell.

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INTRODUCTION

Prosecutorial storytelling in criminal trials often bleeds into prosecutorial misconduct in argument, yet courts rarely sanction the behavior. Prosecutorial trial misconduct that involves racial stereotypes or "stock stories"[1] risks wrongful convictions, injures the legitimacy of the criminal process, and poses substantial harm to the community. Past and current reform proposals call for increased judicial response, higher disciplinary standards, mandatory reporting, self-policing, and other mechanisms to enforce the prosecutor's duty to avoid appeals to racial bias.[2] However, few proposals explicitly focus on prosecutorial storytelling, and those that do often do so only to note the difficulty of policing such

1. A "stock story" is typically defined as an archetype or conventional story type, which is stripped of all but the most essential details. It functions as a story template or skeleton allowing similar stories to be told in the future with different details, characters, and events overlaid atop the traditional structure. *See* Stephen Paskey, *The Law is Made of Stories*: *Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC: JALWD 51, 70 (2014). For an exhaustive treatment of how stock stories shape human understanding and communication, see Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 5–11 (1984). However, the term stock story has also been used in Critical Race Theory and Legal Storytelling literature to describe the stories told by the dominant group in a society that justify and uphold their place in the societal hierarchy. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989). In this way, stock stories are akin to a mindset about the rules which govern the world. Stories that reinforce and uphold white supremacy as a natural outcome of race-neutral processes, for example, could be considered stock stories.

2. *See, e.g.*, THE SENT'G PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 34–38 (2008) (discussing strategies for reducing racial disparity at the prosecution phase of the criminal justice system); *see also* Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 372 (2010); Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1285–86 (2018); Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 368 (2015); Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 909 (2018); Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 345 (2006); Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091 (2018).

behavior.[3] None have considered the duty of the prosecutor in cases where the State's narrative necessarily triggers a racialized stock story[4] regardless of prosecutorial intent.[5] Consider the following two cases.[6]

In the first case, the defendant is charged with two counts of assault arising from his involvement in a physical fight at a large event. One complainant ends up with a black eye; the other has no injuries. The defendant has no visible injuries, but his shirt is torn. Eyewitnesses tell varying accounts of the incident. One eyewitness says that one complainant instigated the fight and that the defendant was trying to get away when he accidentally struck the other complainant. Another eyewitness painted the defendant as the primary aggressor. All agree that the defendant caused the injury to the complainant. The defendant is a 300-pound Black bodybuilder; both complainants—and the vast majority of the event attendees—are white.

In the second case, police are dispatched for a noise complaint at a public park where an extended family is having a cookout. Video of the incident shows the defendant, who appears intoxicated, repeatedly yelling at the officer. The officer orders her to stop cursing and asks other partygoers to take her home. When she fails to leave quickly enough, he places her under arrest for disorderly conduct. In the video, the officer appears calm and patient while the defendant seems volatile.[7] In the back

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3. *See* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 52 n.70 (2009) ("It may be that the system asks too much of a lawyer to both play the game and call a foul on himself during it." (quoting Jane Campbell Moriarty, *"Misconvictions," Science, and the Ministers of Justice*, 86 NEB. L. REV. 1, 25 (2007))).

4. In this Article, I use the phrase "racialized stock story" to make clear that I am referring to stock stories that rely on or evoke subordination narratives—stories that have historically been told or relied on by the dominant social group in the United States (white people) to justify legal and social treatment of other groups. Because I intend the term to apply to both consciously and unconsciously held beliefs, I avoid the term "racist stock story." Many may take the term "racist" to mean a deliberate or consciously held animus. Because many of these stock stories operate at an unconscious level, and often are at odds with an individual's consciously held beliefs, I settled on the imperfect phrase "racialized stock stories." *See, e.g.*, Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1740 n.4 (1993) ("I use the adjective 'racial' rather than 'racist' throughout this Article. Most of the remarks and images to which I refer I consider racist, but I think debate on that point is distracting. Racial images pose risks regardless of the motives that generate them.").

5. It seems clear from both the ethical standards guiding prosecutors and the Supreme Court that such actions are inconsistent with the pursuit of justice, albeit perhaps only in the Court's idealized criminal system and not in the one it has helped shape. *See, e.g.*, Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017) ("The unmistakable principle underlying these precedents is that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.' . . . Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State." (first quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979); and then quoting Powers v. Ohio, 499 U.S. 400, 411 (1991))).

6. Both cases are taken from the Author's Criminal Prosecution Clinic, which operates in a predominantly white community with majority white jury pools and juries.

7. What the students prosecuting the case eventually learn is that the woman suffers from extreme PTSD after losing a child in a violent homicide. This knowledge transforms one's perception of the video. Instead of seeing a woman out of control with misdirected anger at a seemingly

of the police car on the ride to the station, she repeatedly yells about police brutality. She kicks at the police car window, throws herself around in the backseat, and audibly plots to frame the arresting officer for victimizing her. In this case, the defendant is a Black woman and the police officer is a white man.

Both of these cases are likely to trigger a racialized stock story at trial. In the first case, the allegation that a large, muscular Black man assaulted two white people may trigger in the minds of the jurors one of the oldest and most persistent racial stereotypes in the United States: the Black man as "the brute."[8] This powerful stock story could profoundly affect juror decision-making—imperiling the defendant's constitutional right to a fair trial. The second case could trigger two racialized stock stories: the first, the stereotype of the "angry [B]lack woman,"[9] the second, the stock story (held primarily by white Americans) that Black Americans exaggerate or invent claims of police brutality.[10] Like the

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polite police officer, one sees a woman hemorrhaging her pain. That transformation, however, would not necessarily form the basis of a viable legal defense.

8. Leonard M. Baynes, *A Time to Kill, the O.J. Simpson Trials, and Storytelling to Juries*, 17 LOY. L.A. ENT. L.J. 549, 564 (1997) ("Whenever there are allegations of violent acts committed by African American men, the stereotype of the savage Black brute rears its ugly head."); Alford, *supra* note 2, at 345 ("The brute caricature portrays Black men as innately savage, animalistic, destructive, and criminal—deserving punishment, maybe death." (quoting David Pilgrim, *The Brute Caricature*, FERRIS ST. UNIV., http://www.ferris.edu/news/jimcrow/brute/ (last visited Mar. 21, 2021))). One recent example is the killing of Michael Brown by Darren Wilson. Wilson, a Ferguson police officer, shot and killed the unarmed Michael Brown, describing him as "a demon," "Hulk-Hogan," and "bulking up to run through the shots, like it was making him mad that I was shooting him." Sherri Lee Keene, *Victim or Thug? Examining the Relevance of Stories in Cases Involving Shootings of Unarmed Black Males*, 58 HOW. L.J. 845, 852–53 (2015) (quoting Terrence McCoy, *Darren Wilson Explains Why He Killed Michael Brown*, WASH. POST (Nov. 25, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/11/25/why-darren-wilson-said-he-killed-michael-brown/). Sherri Lee Keene summarized Wilson's testimony: "Wilson's story aligned with popular narratives and negative stereotypes of young, African American men. In the story, Brown was cast as a belligerent individual who relentlessly attacked a police officer and was unstoppable by anything other than a bullet." *Id.* at 853.

9. Ritu Prasad, *Serena Williams and the Trope of the 'Angry Black Woman'*, BBC (Sept. 11, 2018), https://www.bbc.com/news/world-us-canada-45476500 ("Black women are not supposed to push back and when they do, they're deemed to be domineering. Aggressive. Threatening. Loud." (quoting law professor, Trina Jones)). Prasad further explained that the "'angry [B]lack woman' trope has its roots in 19th Century America[n] . . . minstrel shows . . . [where] [B]lack women were often played by overweight white men who painted their faces black and donned fat suits 'to make them look less than human, unfeminine, ugly.'" *Id.* (quoting Blair Kelley, associate professor of history at North Carolina State University). "The stereotype of the 'angry [B]lack woman' has dominated society's view of African American females; however, empirical evidence supporting the stereotype is nonexistent . . . . Summarily, results of the current study provide initial empirical evidence disconfirming the stereotype of the 'angry [B]lack woman.'" J. Celeste Walley-Jean, *Debunking the Myth of the "Angry Black Woman": An Exploration of Anger in Young African American Women*, 3 BLACK WOMEN, GENDER, & FAMS. 68, 68 (2009). "In the aftermath of slavery and the resulting social, economic, and political effects, Black women have become the victims of negative stereotyping in mainstream American culture. Such stereotypes include the myth of the angry Black woman . . . ." Wendy Ashley, *The Angry Black Woman: The Impact of Pejorative Stereotypes on Psychotherapy with Black Women*, 29 J. SOC. WORK PUB. HEALTH 27, 27 (2013).

10. *See* Keene, *supra* note 8, at 846 (noting that public opinions of cases involving police shootings of unarmed Black men vary widely along racial lines); *see also* Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 SOC. PROBS. 305, 305, 320 (2004) (noting that "race remains a key factor in structuring attitudes toward police misconduct even after control-

stereotype of the brute, the angry Black woman stereotype poses a risk that racial bias will infect the defendant's trial by affecting juror decision-making and the verdict. The second stock story in this case raises a more complicated question: does the State's perpetuation of a dangerous narrative about racialized police violence pose harm beyond the outcome of the case—does it pose harm to the community as a whole?

This Article asserts that prosecutors in the age of mass incarceration have an ethical duty to consider the impact of racialized trial narratives and to use their discretion to avoid the harm that such narratives pose. However, current standards for prosecutorial behavior offer little concrete guidance for those who seek to do so.[11] Most proposals for prosecutorial reform focus on the ways prosecutors can mitigate an unjust criminal system.[12] This Article seeks to address the cases where mitigation is insufficient: cases that put prosecutors in the position of invoking or triggering racial stereotypes or stock stories that pose harm to criminal defendants and to society. In these cases, the ethical duties of a prosecutor should warrant consideration of dismissal or referrals to a nonadjudicatory process.

Part I of this Article reviews the history of racialized criminality in the United States, which forms the underpinning of these prevalent stereotypes and explains their persuasiveness. This background illustrates the ways purportedly colorblind institutions—like the criminal system[13]—now function without explicit connections to race while continuing to categorize people and to determine outcomes based on race.

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ling for these other variables," and that "[w]hites tend to be favorably disposed toward the police and inclined to deny the existence of police misconduct"). Note that this attitude has changed over the past few years, particularly over the summer of 2020 after the killings of George Floyd and Breonna Taylor and the subsequent protests that swept the nation. *But see* Lauran Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do*, PBS (June 5, 2020, 12:00 PM), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do (citing a poll conducted in June of 2020 showing that 42% of white Americans believe that police treat people equally on the basis of race, compared with only 6% of Black Americans and 27% of Latinx Americans).

11. *See* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400 (2006) (citing as a significant contributing factor to prosecutorial misconduct the "vague ethics rules that provide ambiguous guidance to prosecutors").

12. *See, e.g.*, Howard, *supra* note 2, at 372; Thompson, *supra* note 2, at 1285–86; Bowman, *supra* note 2, at 368.

13. The omission of the word "justice" here and throughout this Article is deliberate. For reasons discussed in this Article, as well as countless others, I do not use the word justice in describing the American system of criminal law enforcement. For people intimately acquainted with the practices of the system, the use of the word justice seems misleading and inaccurate. *See, e.g.*, Alice Speri, *The Criminal Justice System is Not Broken. It's Doing What it was Designed to Do*, INTERCEPT (Nov. 9, 2019, 8:32 AM), https://theintercept.com/2019/11/09/criminal-justice-mass-incarceration-book/ (reviewing Alec Karakatsanis's book *Usual Cruelty* and noting that "the author never once refers to [it] as a criminal 'justice' system" and instead uses phrases like "criminal punishment bureaucracy" to more accurately describe the daily workings of the criminal system).

Part II explores the power of stock stories and stereotypes and the potential dangers they pose within and outside the criminal system.[14] This Part considers the harm that stock stories and stereotypes pose to the parties as well as to the legitimacy of the criminal system, particularly when used by the State. Finally, it considers the wider societal harm created when the State legitimizes these narratives in the public sphere.

Part III discusses the various legal restraints on criminal trial narratives and the common arguments used to justify these restrictions. In particular, this Part looks at restrictions on defense narratives such as rape shield laws and proposed bans on panic defenses and considers the societal concerns that drove those restrictions.[15] This Part then reviews some of the academic literature in this area, noting that it has primarily focused on defense storytelling and only recently begun to critique prosecutorial storytelling.[16] The academic debate involving prosecutors tends to focus on explicit appeals to race, intentionally coded racial stereotyping, and increasingly on implicit bias.[17] What remains under-examined is what duty prosecutors have when mitigating efforts fail to ensure that they are not allowing the implicit biases of the factfinder to increase the persuasiveness of their trial narratives. This Part argues that even unintentional prosecutorial appeals to race prompt the same set of concerns as explicit appeals and therefore should be subject to the same scrutiny. Acknowledging the failures of courts, disciplinary boards, and prosecutor offices to hold prosecutors accountable even for explicit appeals to racial bias, this Part then considers the possibility of internal regulation. This possibility assumes an electorate that chooses to elect prosecutors who will pursue a race-conscious, rather than race-neutral, approach to prosecution.

Part IV looks at the specific prosecutorial duties that require prosecutors to proactively consider and avoid racialized trial narratives: the prosecutor's duty to seek justice;[18] to protect the rights of the defend-

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14. *See* Susan J. Stabile, *Othering and the Law*, 12 U. ST. THOMAS L.J. 381, 383 (2016) ("Stereotyping involves making judgments about a person based on perceived characteristics of the particular group to which the person belongs rather than on an individual assessment of the person.").

15. *See, e.g.*, Aimee Wodda & Vanessa R. Panfil, *"Don't Talk to Me About Deception": The Necessary Erosion of the Trans* Panic Defense*, 78 ALB. L. REV. 927, 933 (2015) ("[C]laims of gay panic or trans* panic are typically presented within the context of an existing criminal law defense, such as temporary insanity, provocation, or self-defense.").

16. *See, e.g.*, Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1587 (1999) (objecting to Anthony V. Alfieri's argument that defense attorneys should consider their civic responsibility to society as well as the needs of their individual clients in avoiding certain racialized trial narratives).

17. *See, e.g.*, Prasad, *supra* note 2, at 3091.

18. *See* STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS'N 2017) ("The prosecutor generally serves the public . . . ."); *see also* Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885, 900 (2018) ("[T]he most likely candidate for the prosecutor's client is the community which the prosecutor represents.").

ant;[19] and to be proactive in efforts to eliminate improper biases "with particular attention to historically persistent biases like race"[20]—including the racial disparities exacerbated by mass incarceration.[21] Part IV acknowledges the ideology of colorblindness that defines the U.S. criminal system and obscures the ways race currently drives prosecutorial discretion.[22] Accordingly, it proposes a "color-conscious" framework for prosecutorial decision-making that includes consideration of the trial narrative. This Part then uses the two case examples above to illustrate the proposed decision-making process. Finally, this Part considers potential objections to this proposal.

This Article ultimately endorses using a race-conscious framework to reduce the size and scale of the criminal system through the exercise of prosecutorial discretion. This proposal explicitly intends to challenge prosecutors to view the ways they routinely, and often unconsciously, violate their ethical duties to seek justice and eradicate racial bias, using trial narratives as a singular example. This Article is written during a moment in American history when the Movement for Black Lives has gained considerable support (particularly among white citizens) and calls are growing to shift away from criminalization and back toward the community to address harmful antisocial behaviors.[23] This Article seeks to bring prosecutors into that conversation. Prosecutors can reduce the size and scope of the criminal system by declining and dismissing cases that pose more harm to the community than the conduct they purport to address.[24] This Article also encourages prosecutors to seek alternative means of addressing harm, such as shifting resources to restorative justice practices and investing in community resources that prevent, rather than punish, harmful, antisocial behavior. This larger project is beyond

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19. *See* STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017); Howard, *supra* note 2, at 407 ("This responsibility to seek justice includes a duty 'to see that the defendant is accorded procedural justice.'" (quoting MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2020))).

20. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6(b) (AM. BAR ASS'N 2017).

21. Ellen Yaroshefsky, *Can a Good Person be a Good Prosecutor?*, 87 FORDHAM L. REV. ONLINE 35, 36 (2018) ("A good prosecutor must acknowledge [their] role in creating mass incarceration, develop a deep understanding of the history and effects of racial discrimination, and implement remedial policies.").

22. *See, e.g.*, Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 847 (1997).

23. *See, e.g.*, Gene Demby, *How the Recent Black Lives Matter Movement Gained Increased White Support*, NPR: ALL THINGS CONSIDERED (June 17, 2020, 4:02 PM), https://www.npr.org/2020/06/17/879682823/how-the-recent-black-lives-matter-movement-gained-increased-white-support; Brent J. Cohen, *Implementing the NEAR Act to Reduce Violence in D.C.*, D.C. POL'Y CTR. (May 25, 2017), https://www.dcpolicycenter.org/publications/implementing-near-act-reduce-violence-d-c/.

24. *See* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 140 (2019) ("Prosecutors could keep the docket moving by screening cases with greater care at the outset, and dropping the ones that don't hold up."). In the misdemeanor system, which makes up 80% of the U.S. criminal system, this is likely the majority of cases. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 n.8, 1332 nn.101 & 103 (2012).

the scope of this Article. However, critically, this Article intends that this proposal is understood to fit into a larger abolitionist agenda and not as a stand-alone reform.[25]

I. HISTORY OF RACIALIZED CRIMINALITY IN THE UNITED STATES

Many scholars trace the racial disparities that characterize the modern criminal system to the period of African enslavement.[26] The United States' system of enslavement created and perpetuated a theory of racial hierarchy that, over time, became accepted as natural.[27] This notion of a "natural" hierarchy was "an elaborate and enduring mythology about the racial inferiority of black people [that] took hold to legitimate, perpetuate, and defend slavery. The ideology of white supremacy survived the Civil War and endures in ways that are evident even today."[28]

Even before this, the European settlers who arrived in North America forged democracy by drawing distinctions among people based on race.[29] They created and perpetuated dehumanizing stereotypes of Native people to justify the harsh, cruel, and inhumane treatment that accompa-

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25. *See, e.g.*, L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 150 (2014) ("[W]e envision a new legal regime that places the onus on the state to remedy the institutional factors that exacerbate hegemonic racial violence. The state has a duty to ensure that police officers use force equitably. Thus, it should have a concomitant duty to intervene when incontrovertible evidence of disparate treatment by its agents, the police, exists . . . . This conception rests culpability not on the demonstration of racial animus, but on the state's failure to remedy the racial subordination that is built into existing systems and practices . . . . [O]ne can imagine a legal system—better informed by the mind sciences—that . . . punishes the state for failing to take affirmative steps to protect all of its citizens from violence when the duty and means to do so exist."); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 35 (2008) ("There are no easy paths out of the racial dead end in which American crime policy finds itself. The damage has been done to living [B]lack Americans: lives have been blighted, life chances have been reduced, and communities have been undermined. Even radical changes in American crime policies can change none of that . . . . Nonetheless, things can be done. One approach, radical decarceration, is corrective. Three others, elimination of bias and stereotyping, abandonment of policies and laws that do unnecessary damage, and creation of devices making their later replication of such policies and laws less likely, are preventative.").

26. *See, e.g.*, Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 3, 6 (Angela J. Davis ed., 2017).

27. *See id.*

28. *Id.*; *see also* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 3 (2017) ("The former police chief of Los Angeles Daryl Gates once suggested that there is something about the anatomy of African Americans that makes them especially susceptible to serious injury from chokeholds, because their arteries do not open as fast as arteries do on 'normal people.'"); Neveen Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities*, 26 VA. J. SOC. POL'Y & L. 65 (2019). Again, this mythology is rooted in the notion of a "natural" hierarchy or difference based on race.

29. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 23 (2010) ("The concept of race is a relatively recent development. Only in the past few centuries, owing largely to European imperialism, have the world's people been classified along racial lines."); Stevenson, *supra* note 26, at 5 ("From the moment white settlers reached this continent, color emerged as the defining feature that would shape the cultural, social, political, and economic development of the United States.").

nied European occupation of North America.[30] White lawmakers, attorneys, and judges consistently relied on these stereotypes to justify their treatment of Native people by arguing that without measures such as assimilation, extermination, or forced removal, Native people would descend into savagery.[31]

Proponents of enslavement retooled this type of dehumanizing rhetoric decades later.[32] To justify and preserve the institution of slavery, proponents created an "elaborate and enduring mythology about the racial inferiority of [B]lack people."[33] Many of these stereotypes persist today.[34] During enslavement, the Fugitive Slave Act and the use of police forces to capture and return escaped or freed enslaved people to the South weaponized the criminal system to protect and strengthen the institution of slavery.[35] "[S]lave patrols were the first uniquely American form of policing and the first publicly funded police agencies. This means that at its inception, American policing was designed to police [B]lack bodies, particularly [B]lack male bodies."[36]

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30. Debra Merskin, *The S-Word: Discourse, Stereotypes, and the American Indian Woman*, 21 HOW. J. COMMUNICATIONS 345, 351 (2010) (describing how the dehumanizing treatment of Native Americans as one-dimensional "Others" was used to justify the violence used to take their land); RUBY HAMAD, WHITE TEARS/BROWN SCARS: HOW WHITE FEMINISM BETRAYS WOMEN OF COLOR 35–39 (2019) (describing the Princess Pocahontas stereotype and ways in which the characterization of Native women as mystical and animal-like was used to justify colonization, including assimilation and extermination).

31. *See* ALEXANDER, *supra* note 29, at 23 ("As sociologists Keith Kilty and Eric Swank have observed, eliminating 'savages' is less of a moral problem than eliminating human beings, and therefore American Indians came to be understood as a lesser race—uncivilized savages—thus providing a justification for the extermination of the native peoples." (citing Keith Kilty & Eric Swank, *Institutional Racism and Media Representations: Depictions of Violent Criminals and Welfare Recipients*, 34 SOCIO. IMAGINATION, no. 2–3, 1997, at 106)).

32. *See id.* at 26 ("Faith in the idea that people of the African race were bestial, that whites were inherently superior, and that slavery was, in fact, for [B]lacks' own good, served to alleviate the white conscience and reconcile the tension between slavery and the democratic ideals espoused by whites in the so-called New World."); Richardson & Goff, *supra* note 25, at 121 ("Implicit dehumanization . . . refers to the tendency to unconsciously associate [B]lack with beasts, particularly apes. The stereotype of [B]lack men as bestial can be traced back for centuries.").

33. Stevenson, *supra* note 26, at 6–7 ("Advocates of slavery argued that science and religion supported the fact of whites' racial superiority: white people were smart, hardworking, and more intellectually and morally evolved, while [B]lack people were dumb, lazy, childlike, and in need of guidance and supervision.").

34. *See* BUTLER, *supra* note 28, at 27 (explaining that the ape stereotype has persisted for decades, surfacing even in recent decades in slurs against the first African-American President and First Lady) *see also* Austin Frakt & Toni Monkovic, *A 'Rare Case Where Racial Biases' Protected African-Americans*, N.Y. TIMES (Nov. 25, 2019), https://www.nytimes.com/2019/11/25/upshot/opioid-epidemic-blacks.html (citing persistent research in the medical field showing enduring belief among medical professionals that Black people experience physical pain less than white people); Richardson & Goff, *supra* note 25, at 136–37 ("Young [B]lack men in poor urban environments are stereotyped, both consciously and unconsciously, as violent, criminal, dangerous, and animal-like. These images are so deeply embedded in our culture that they have become common-sense truths."); HAMAD, *supra* note 30, at 17, 44 (explaining biases and binaries still used against women of color today).

35. ALEXANDER, *supra* note 29, at 186–87.

36. Katheryn Russell-Brown, *Making Implicit Bias Explicit: Black Men and the Police*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, *supra* note 26, at 135, 140.

After the Civil War, the period of enslavement that created and depended on these narratives purportedly ended, yet the stereotypes and racial hierarchy persisted.[37] The passage of the Thirteenth Amendment institutionalized the use of the criminal system as a method of obtaining free labor by codifying enslavement as a legal punishment for crime.[38] In the wake of abolition, Southern legislatures passed laws known as the Black Codes, the main purpose of which "was to control the freedmen."[39] The codes enforced strict racial segregation and explicitly created new laws that only applied to Black citizens (such as requiring written proof of employment).[40] Convict-leasing laws essentially re-entrenched enslavement as punishment for a crime: sentencing Black defendants to prison and then leasing them as unpaid laborers.[41] The conditions of the convict-leasing program were sometimes worse than enslavement, as the lessees had no financial interest in the individual workers.[42] Without a financial incentive to keep the workers alive, lessees often worked, beat, or starved them to death and then leased a new group to replace them.[43]

After the brief—albeit significant—gains of the Reconstruction Era came the backlash of Jim Crow,[44] where police arrested Black Americans by the tens of thousands for vague, innocuous conduct such as "vagrancy" or "mischief."[45] Again, prison sentences resembled enslavement as convicts performed hard labor to repay their court costs and fines.[46] As proponents of racial subordination increasingly succeeded in quashing the gains made during the Reconstruction Era, they also began to shift their language.[47] Perhaps the most notable example is Justice Harlan's dissenting opinion in *Plessy v. Ferguson*,[48] which gave opponents of

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37. *See* Stevenson, *supra* note 26, at 7 ("The ending of slavery hardly did away with the racist ideology created to defend it."); *see also* ALEXANDER, *supra* note 29, at 28 ("Rumors of a great insurrection terrified whites, and [B]lacks increasingly came to be viewed as menacing and dangerous. In fact, the current stereotypes of [B]lack men as aggressive, unruly predators can be traced to this period.").

38. ALEXANDER, *supra* note 29, at 31.

39. *Id.* at 28 (quoting WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861–1915, at 33 (1991)).

40. Hammad, *supra* note 28, at 67 ("These laws collectively were called the Black Codes, and they prohibited [B]lack people from engaging in common, everyday activities that were free and legal for whites to engage in . . . . [T]he Black Codes punished [B]lack people for activities including vagrancy, lack of employment, and violating labor contracts.").

41. ALEXANDER, *supra* note 29, at 20.

42. *Id.* at 20, 28; Hammad, *supra* note 28, at 69.

43. *See* Hammad, *supra* note 28, at 69.

44. ALEXANDER, *supra* note 29, at 20–21 ("Since the nation's founding, African Americans repeatedly have been controlled through institutions such as slavery and Jim Crow, which appear to die, but then are reborn in new form, tailored to the needs and constraints of the time.").

45. *See* Hammad, *supra* note 28, at 67–68.

46. *Id.* at 67–68, 78; *see also* ALEXANDER, *supra* note 29, at 21.

47. *See* Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 WASH. U. J. URB. & CONTEMP. L 157, 163–64 (1998) (chronicling the failure of Congress to enact language of nondiscrimination in the Reconstruction Amendments, resulting in the equal protection language that ushered in the long period of anti-Black discrimination of the Black Codes and Jim Crow laws).

48. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in

Black advancement the language of colorblindness to protect white supremacy while feigning a commitment to equality.[49] At this point in history, the American system of racial subordination was so well-entrenched that it no longer required explicit reference to race to continue.[50] Once explicit reference to race was removed, laws that created or exacerbated racial disparities became difficult, if not impossible, to challenge.[51]

Viewing the criminal system through the lens of history reveals that its racial bias is not only intentional but also seemingly intractable.[52] This historical background helps explain the systemic racial discrimination that appears in law enforcement both on the street and in the courthouse.[53] "Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race."[54] The criminal system defines Black Americans as inherently criminal and treats them with increased punishment and control.[55] This differential treatment persists today in the explicit and implicit bias informing every major stage of the criminal process—arrests, charging, plea bargaining, trial outcome, and sentencing.[56] In this way, the American criminal system and American racism mutually constitute one another.[57]

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education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty . . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.").

49. Butler, *supra* note 22, at 847; Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988-990, 1047 (2007); *see also* David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635, 678–79 (2019). Simson traces the corrosive effect of colorblind ideology back to the *Dred Scott* decision, as the opinion sought to separate the country's racist past from its egalitarian present, insulating white privilege by giving it the legitimacy of a privilege earned rather than one granted by an unequal society. *Id.*

50. *See* Simson, *supra* note 49, at 680 (describing the Supreme Court's decisions in *Dred Scott* and *Bakke* as "disconnecting the legitimacy of white privilege in the present from racism in the past allowed the Justices to insulate present racial privilege and yet make doing so seem consistent with racial equality").

51. *See id.* at 680–81; Sealing, *supra* note 47, at 194–95.

52. BUTLER, *supra* note 28, at 28 ("The association of African American men with criminality was calculated as a way to preserve white privilege after slavery ended.").

53. Stevenson, *supra* note 26, at 20 ("Our history has created a resistance to acknowledging the victimization of [B]lack people, and the explicit and implicit bias in this history can be seen in law enforcement and criminal justice policy throughout this nation."); Jin Hee Lee & Sherrilyn A. Ifill, *Do Black Lives Matter to the Courts?*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, *supra* note 26, at 255, 260 ("At the heart of this [systemic racial discrimination by law enforcement] is the automatic association between 'blackness' and criminality that is the product of the long-standing dehumanization of [B]lack people throughout American history.").

54. ALEXANDER, *supra* note 29, at 13.

55. *See id.* at 2.

56. Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 822 (2013) ("The racial disparities in our criminal justice system are extraordinary and well-documented . . . . The disparities exist at every step of the criminal process, from arrest through sentencing.").

57. *See* NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 4 (2016).

This long history created a nationally held belief—both explicit and implicit—in Black criminality: a host of deeply held racialized tropes and stereotypes that intersect with the criminal system in myriad ways.[58] These stereotypes invite moral exclusion, placing those stigmatized "outside the boundary in which moral values, rules, and considerations of fairness apply."[59] The dehumanization of people of color, particularly Black and Indigenous Americans, throughout our nation's history has enabled their inhumane treatment at the hands of both individuals and the State.[60] A full accounting of criminal law's racialization in this country exceeds this Article's scope.[61] However, this history is critical to understanding how the narratives and stock stories within the criminal system have always been racialized and, without an intentional disruption of the system's legacy of racialized justice, will continue to be so.

II. RACIALIZED STOCK STORIES AND NARRATIVES IN CRIMINAL TRIAL STORYTELLING

A. Stock Stories Are a Highly Persuasive Form of Narrative in Criminal Trials

Overstating the power of narrative in the criminal system is difficult.[62] Human beings use narrative to understand and seek meaning in the

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58. Stevenson, *supra* note 26, at 12 ("More enduring was the mythology of [B]lack criminality and the way America's criminal justice system adopted a racialized lens which menaced and victimized people of color, especially [B]lack men. The presumptive identity of [B]lack men as 'slaves' evolved into the presumptive identity of 'criminal,' and we have yet to fully recover from this historical frame.").

59. Bowman, *supra* note 2, at 367–68 (quoting Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams, Matthew Christian Jackson, & John F. Dovidio, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCH. 292, 293 (2008)).

60. Mario L. Barnes, *Criminal Justice for Those (Still) at the Margins—Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 U.C. IRVINE L. REV. 711, 733 (2015) ("[H]istorical racial violence and modern stereotypes have coalesced to render certain marginal people—[B]lack men in particular—unworthy of the due process and humane treatment that all are constitutionally required to receive within the U.S. criminal justice system.").

61. For a fairly comprehensive compilation of studies demonstrating the systemic racism pervading policing and the criminal system, see Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ ("[T]he term 'systemic racism,' is often wrongly interpreted as an accusation that everyone in the system is racist. In fact, systemic racism means almost the opposite. It means that we have systems and institutions that produce racially disparate outcomes, regardless of the intentions of the people who work within them.").

62. *See* John H. Blume, Sheri L. Johnson, & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1086 (2007) ("Empirical studies have shown that—more than legal standards, definitions or instructions—narrative plays a key role in the juror decision-making process."); Keene, *supra* note 8, at 849 ("Social scientists who study jury decision-making have more recently expressed the belief that jurors make decisions in large part by considering competing stories and then determining which story is most persuasive."); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991) (finding that the "central cognitive process in jury decision making is *story construction*").

world.[63] The story model of juror decision-making shows that jurors "use story construction to understand and interpret the information they receive throughout a criminal trial."[64] Trial attorneys recognize the power of stories to persuade factfinders[65] and use them to great effect.[66]

Narrative scholars argue that stock stories are among the most persuasive of the narrative forms.[67] Stock stories are the schemas by which we increase or enhance our understanding of what is happening in the world around us.[68] Stock stories from the listener's own life experience and worldview create the backdrop against which they contextualize new information.[69] Stock stories play an integral part in decision-making—the primary function of a trial factfinder—by providing the background information that factfinders use to determine what could happen in a given situation.[70] Most jurors make decisions as follows: they listen to evi-

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63. *See* Lopez, *supra* note 1, at 3 ("Human beings think about social interaction in story form. We see and understand the world through 'stock stories.' These stories . . . help us carry out the routine activities of life without constantly having to analyze or question what we are doing."); Lisa Kern Griffin, *Narrative, Truth and Trial*, 101 GEO. L.J. 281, 285 (2013) ("As a matter of both cognitive psychology and advocacy within the adversarial system, stories are unavoidable.").

64. Bowman, *supra* note 2, at 336–37 ("According to the story model, the key cognitive task for jurors deciding a case is not the mathematical estimation of probabilities about what occurred, but instead is the construction of stories to explain the evidence. To do so, jurors use a three-step process: (1) they evaluate evidence through the construction of multiple stories that could explain the evidence; (2) they learn about the legal standards for the various verdicts they could reach; and (3) they decide on the appropriate verdicts by classifying the most likely story into the best-fitting verdict option."); Griffin, *supra* note 63, at 293 ("Experimental research has yielded the insight that jurors do not, by and large, estimate probabilities when determining the events that transpired in a case; rather, they draw conclusions based on whether information assembles into plausible narratives.").

65. *See* Paskey, *supra* note 1, at 53 ("Many trial lawyers and law professors have long understood that stories are valuable . . . as a way to help jurors organize and understand the vast amounts of information presented to them during a trial."); Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRS. 63, 63–64 (2010) (noting the myriad studies that show the ability of narrative to change minds and revealing a sense of unease among legal writing scholars that stories may be too powerful, or inappropriately powerful).

66. *See* Jennifer Sheppard, *What if the Big Bad Wolf in all Those Fairy Tales was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories that are Harmful to Your Client's Case*, 34 HASTINGS COMMC'NS & ENT. L.J. 187, 188–89 (2012) ("[A] lawyer who relies only on analytical reasoning will not be as effective in persuading a legal audience as the lawyer who incorporates stories into his or her strategy. Lawyers are trained to value logical argumentation; laypersons are not. Consequently, narrative is a powerful tool for persuasion."); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 57–58, 66 (2008); *see also* Griffin, *supra* note 63, at 285 ("[T]here are points at which particular types of stories can override doubts, even though those doubts, considered dispassionately, have a stronger basis in the evidence . . . .").

67. *See* Sheppard, *supra* note 66, at 200 ("When a story fits with what the audience knows of the world from stock stories, it has narrative correspondence, which makes the story more plausible and persuasive.").

68. *Id.* at 191 ("Schemas are cognitive frameworks that contain and organize an individual's expectations and understanding of the world.").

69. *Id.* at 199 ("The audience's sense of what happens in the world is based on stock stories and the course of events that are inherently associated with them."); *see also* Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2082 (1989).

70. Sheppard, *supra* note 66, at 199; *see also* Scheppele, *supra* note 69, at 2082 ("How people interpret what they see (or what people see in the first place) depends to a very large extent on prior

dence, consider whether it comports with their understanding of reality, and make credibility determinations based on those understandings.[71] In choosing between two competing stories (for example, the prosecution and defense narratives), jurors will look beyond the information learned during the trial and draw on their own prior experiences and stock stories to help them assess which story is more likely true.[72]

Narrative theory breaks this process out into three types of "consistency" checks: narrative coherence, narrative fidelity, and narrative correspondence.[73] Narrative coherence refers to a story that is both complete and internally consistent.[74] Narrative fidelity is whether the story's narrative accurately portrays reality and meets the audience's expectations of how it should play out.[75] Narrative correspondence refers to the structural elements of the story and degree to which they match up with the structural elements of a stock story.[76] Again, stock stories have an outsized influence on this decision-making process that people use to determine credibility. Neuroscience research reveals that stock stories are not simply a thought process but also a physical process.[77] The repetition of certain narrative rhetoric creates connections in the brain's neural synapses,[78] resulting in the stories becoming "a permanent part of the brain's structure."[79] When a trial narrative appeals to or triggers one of these deeply embedded narratives, it is more likely to stimulate an emotional response from the factfinder and, therefore, resonate as true.[80] Trial attorneys routinely rely on stock stories for precisely this reason: they operate unconsciously in factfinders' minds to support and enhance belief in the narrative without the conscious consideration that could lead factfinders to reject them as misleading.[81]

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experiences, on the ways in which people have organized their own sense-making and observation, on the patterns that have emerged in the past for them as meaningful in living daily life.").

71. *See* Sheppard, *supra* note 66, at 199–200 (noting that jurors do not generally make empirical assessments of evidence). Many trial attorneys are aware of this phenomenon, even if they are unfamiliar with narrative theory. Attorneys may ask jurors to consider "whether the opposing counsel's story holds water," encourage them "not to leave their common sense at the door," or ask jurors to view the evidence through the factors of "consistency, corroboration and common sense." Jury instructions similarly encourage jurors to rely on aspects of their own lives to make decisions. *See* Keene, *supra* note 8, at 850 (explaining that during their decision-making process, "jurors may look beyond the facts of the case" to their own background knowledge, i.e., stock stories).

72. Griffin, *supra* note 63, at 294.

73. *See* Sheppard, *supra* note 66, at 196–201.

74. *Id.* at 197–98.

75. *Id.* at 200–01.

76. *Id.* at 199.

77. *See* Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 673–74 (2017).

78. *See id.* at 674; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1203 (1995).

79. Jewel, *supra* note 77, at 674.

80. *Id.* at 671–73.

81. *See* Sheppard, *supra* note 66, at 193–94. This is particularly true for racialized stock stories, which may be at odds with a person's consciously-held beliefs. *See* Jewel, *supra* note 77, at

Stock stories also affect how listeners interpret new information. In criminal trials, this may lead jurors away from a neutral or rational perception of new facts.[82] This occurs when the new narrative is at odds with the jurors' previous understanding of how the world works, creating a sense of cognitive dissonance that jurors may try to avoid by either rejecting or modifying the new information.[83] This sense of unease with the presented evidence "unconsciously leads fact-finders away from one perception of the facts presented in a case, to another that is more familiar."[84] Trial attorneys can capitalize on this phenomenon by increasing the cognitive dissonance between the factfinders' expectations and the narrative used by the opposing side.

Take, for example, an assault case in which the defendant is a cisgender woman. Because the prevailing cultural stock story is that women are less violent than men,[85] the defense attorney may seek to play up the stereotypically feminine traits of the defendant. They may encourage her to wear highly feminine clothes to the trial and paint a picture of the defendant that highlights stereotypically feminine attributes—motherhood, passivity, politeness, etc.[86] This stock story of femininity could increase the jurors' cognitive dissonance between the prosecutor's narrative of the defendant as an aggressor (a stereotypically male trait) and the defense attorney's picture of the defendant as highly feminine. At the same time, the prosecutor may highlight the defendant's masculine traits to decrease cognitive dissonance for the jurors. While some stock stories simply help jurors orient themselves with a familiar narrative, others involve harmful or degrading stock stories that may decrease juror compassion and invite the defendant's dehumanization. For the reasons outlined in Part I, this creates potentially disparate outcomes for criminal defendants. In this example, the race of the defendant could significantly alter the impact of the prosecutor's approach. Highlighting the masculine traits of a white, female defendant would not tap into the same line of historically dehumanizing stereotypes as for a female defendant of color, given that

664 ("Neuroscience explains why and how racially coded categories are so efficient: they create neural pathways that, upon continued use, become collectively entrenched . . . . Coded categories are harmful because they encourage rapid unconscious thinking that has the effect of hardwiring stereotypes into the pathways of the brain.").

82. *See* Lopez, *supra* note 1, at 3 ("When we face choices in life, stock stories help us understand and decide; they also may disguise and distort.").

83. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 239 (2012).

84. *Id.*

85. Hal Arkowitz & Scott O. Lilienfeld, *Are Men the More Belligerent Sex? Men Are More Dangerous, but Women Can Be Just as Aggressive*, SCI. AM. (May 1, 2010), https://www.scientificamerican.com/article/are-men-the-more-belligerent-sex/ (describing the social belief that men are more aggressive, more prone to anger, and more violent than women as so commonly and unquestioningly accepted as to have achieved the status of "psychological shibboleth").

86. *See* HAMAD, *supra* note 30, at 13 (recognizing that the treatment of women depends on how well they conform to gender stereotypes and characterizing passivity and helplessness as stereotypical "feminine" traits).

defeminizing women of color was a consistent way to justify their inhumane treatment throughout American history.[87]

B. The Use of Negative Stereotypes in Criminal Trials Poses Harm to Parties, the Criminal System, and Society

The use of dehumanizing stereotypes in criminal trials, particularly anti-Black stereotypes, poses harm to the parties, the criminal system, and society as a whole. Rhetorical dehumanization can have effects that jurors may not be consciously aware of but that decrease their sense of empathy for, and duty toward, the stigmatized individual.[88] Racial stereotypes, in particular, invite dehumanization because of the historical dehumanizing rhetoric used to justify the inhumane treatment of Black and Indigenous people by the State.[89] Although the harms posed by these narratives are interrelated, they generally fall into three categories: harm to the parties directly involved in the matter; harm to the system and its perceived and actual legitimacy; and harm to society—meaning both the immediate community affected by the case and the broader American public.[90]

1. Harm to the Parties

Trial attorneys regularly use stock stories and other narrative tactics to persuade factfinders.[91] One highly persuasive method is "out-grouping," in which the attorney invokes a stock story that casts a party or witness as an outsider while defining the attorney and the jury as insiders.[92] By placing the party or witness "outside the boundary in which moral values, rules, and considerations of fairness apply,"[93] the attorney may convince the jurors that the party is not entitled to the same judicial protections as an in-group member.[94] When attorneys successfully cast someone as a member of an out-group, it gives permission to factfinders to depersonalize that individual, allowing them to do things they otherwise would not.[95] For example, casting the complainant as an out-

87. *Id.* at 15 (arguing that women of color are not seen as measuring up to the prototypical image of a femininity: "what is common about the experiences of women of color is an unspoken assumption that we always lack a defining feature of womanhood that white women have by default"). Hamad goes on to describe the female minstrel caricature "Sapphire" of the Jim Crow South as "grotesquely masculine." *Id.* at 49.

88. *See* Alford, *supra* note 2, at 353; *see also* Bowman, *supra* note 2, at 364.

89. *See supra* Part I.

90. *See* Griffin, *supra* note 63, at 290–91 ("Legal processes not only reflect, but also create, familiar narratives.").

91. *See* Paskey, *supra* note 1, at 78–82; Sheppard, *supra* note 66, at 231–32.

92. Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1557–59 (2012).

93. Bowman, *supra* note 2, at 368 (internal quotations omitted) (quoting Goff et al., *supra* note 59, at 293).

94. *See, e.g.*, Karin S. Portlock, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404, 1407–08 (2007).

95. Bowman, *supra* note 2, at 331.

sider can decrease the jury's sense of responsibility to deliver them justice and may decrease juror perceptions of the complainant's credibility.

Prosecutors regularly use dehumanizing rhetoric to decrease juror sympathy toward defendants in an attempt to give jurors permission to convict despite the presumption of innocence and high burden of proof.[96] If the prosecutor successfully "out-groups" the defendant, the jurors may feel that the defendant is not entitled to the same legal or constitutional protections that an insider would be.[97] For example, the jurors may unconsciously lower the burden of proof.[98] Casting the defendant as a community outsider against whom the jury must protect themselves and society can be an especially effective persuasion tactic,[99] as "[a]ny doubts in the case will be resolved against the accused because he is not a member of the group."[100] Prosecutors have historically used this tactic to seek convictions of Black defendants by all or nearly all-white juries.[101]

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96. *Id.* at 367 ("Prosecutors systematically depersonalize criminal defendants in a variety of ways."); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 323–24 (2001) (chronicling the myriad of impermissible appeals that prosecutors have made to jurors' "fears, passions, and prejudices" to cast the defendant as an outsider).

97. *See* Charles L. Cantrell, *Prosecutorial Misconduct: Recognizing Errors in Closing Argument*, 26 AM. J. TRIAL ADVOC. 535, 560–61 (2003) ("Typically, the prosecutor identifies the accused with an unpopular group . . . . In addition, the State will either attempt to connect some undesirable trait with the group, or will ask the jurors to view the accused from the perspective of a biased viewpoint . . . . [T]he State attempts to demonstrate that the jury is representative of a group of commonsense, truthful and law abiding persons who share the same values. An appeal is then made for these values to be enforced in this case."). It is important to distinguish this form of out[-]grouping from the out[-]group/in[-]group terminology used in Critical Race Theory. In that literature, out[-]group may be defined as "any group whose consciousness is other than that of the dominant one." Delgado, *supra* note 1, at 2412 n.8. Although societal in-groups and out-groups may be mirrored in juries and criminal trial arguments, trial attorneys can also draw careful and deliberate lines to include jurors and themselves while excluding defendants or complainants. These lines may not map directly onto traditionally understood in-groups and out-groups. However, they are clearly most injurious to the parties, the factfinders, and the public when they map closely and therefore replicate or reiterate social oppressions.

98. *See* Bowman, *supra* note 2, at 327.

99. *See* Ann M. Roan, *Building the Persuasive Case for Innocence*, 35 CHAMPION 18, 19 (2011) ("Effective prosecutors prepare their cases by figuring out ways to make the defendant the outlier, the other, the odd man out."); *see also* Paul Butler, *Locking Up My Own: Reflections of a Black (Recovering) Prosecutor*, 107 CALIF. L. REV. 1983, 1984–85 (2019) (discussing his ability, as a Black, male prosecutor, to cast himself and the jurors as members of an in-group and Black male defendants as out-group members).

100. Bowman, *supra* note 2, at 327 (quoting Cantrell, *supra* note 97, at 562). It is worth noting that this is an inversion of the presumption of innocence and the government's burden of proof.

101. *See* Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 327–29 (2001) (describing the cases in which prosecutors appeal to bias as "shocking" and providing the concluding line of the prosecutor's closing argument in a case where a Black defendant was accused of robbing a white complainant: "[Y]ou decide whether to protect your streets, your community from [the defendant]." (internal quotations omitted) (quoting People v. Johnson, 581 N.E.2d 118, 126 (Ill. App. Ct. 1991))); *see also* Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 970 (2006) ("Where an African-American woman is concerned, prosecutors then and now receive the benefit of the taint of criminality fostered by racial stereotypes.").

When a prosecutor invokes a racialized trope or stereotype against the defendant, the harm caused is a direct violation of the defendant's constitutional right to a fair trial and impartial jury.[102] Additionally, it invites factfinders to impermissibly supplant or supplement the admitted evidence with information or conclusions drawn from the stereotype.[103] The potential harm such statements pose to the defendant—explicit or implicit, deliberate or unintentional—is immense.[104] This type of depersonalization may cause jurors to see the defendant as less than fully human, resulting in an abridgement of the defendant's rights.[105]

2. Harm to the System

The U.S. Supreme Court has held that racial prejudice in "the jury [system] damages both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State."[106] As one scholar explained: "[T]he Supreme Court is clear that there is no place for race, ethnicity, or gender prejudice in the criminal justice system. The credibility of the justice system is on the line . . . ."[107] In addition to the harm posed to individual parties, the use of racial stereotypes undermines the legitimacy of the criminal system as a whole.[108] The pub-

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102. *See, e.g.*, Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (holding that extreme juror bias abridges the right to a jury trial); *see also* Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1218 (1992) ("The critical question for analysis of constitutional violations is whether a prosecutor's conduct or activities has had a detrimental effect on the defendant's right to an impartial jury or to equal protection. The due process or equal protection violation may occur whether the argument was deliberate or unintentional, whether the defendant is conclusively guilty or arguably innocent." (footnotes omitted)).

103. The factfinder may not create "facts" out of any stereotype within which the defendant is believed to fit. *See* Barnes, *supra* note 101, at 968 ("Although the law is allowed to craft a story about a defendant, it must do so with facts, not inferences related to identity and the presumed social capital it confers.").

104. Lyon, *supra* note 101, at 325 ("[W]hile it is difficult to weigh the impact of racial remarks, their harm may be extreme."); *see* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309 (2010) ("Biased Evidence Hypothesis posits that when racial stereotypes are activated, jurors automatically and unintentionally evaluate ambiguous trial evidence in racially biased ways.").

105. *See* Bowman, *supra* note 2, at 342.

106. Powers v. Ohio, 499 U.S. 400, 411 (1991) (citing Batson v. Kentucky, 476 U.S. 79, 86 (1986)); *cf.* Aldridge v. United States, 283 U.S. 308, 315 (1931) (presuming that the race of the defendant is a relevant inquiry in determining whether voir dire of racial prejudice is appropriate); Buck v. Davis, 137 S. Ct. 759, 777–78 (2017) (holding it inappropriate for the Court to consider the defendant's race in determining future dangerousness even if the factor of race is raised by the defense).

107. Lyon, *supra* note 101, at 335 (first citing *Batson*, 476 U.S. at 84–85; and then citing McCleskey v. Kemp, 481 U.S. 279, 310 (1987)). The question of whether the U.S. criminal system has ever *been* legitimate or without bias is certainly open for debate. Yet what seems clear is that it cannot exist with any degree of legitimacy with its present rates of disparity based on race and ethnicity. *See, e.g.*, Barnes, *supra* note 60, at 720 ("[I]t is systemic outcomes that demonstrate which lives truly matter, and to ignore this is to abandon any real hope for justice."). For an analysis of the difference between the Supreme Court's proclamations about bias in the criminal system and its jurisprudence, see *infra* Section IV.B.

108. *See* BAZELON, *supra* note 24, at 289 ("A lot of prosecutors don't want to hear that there should be additional oversight, but for me it comes back to the perception that people are not treated

lic's perception of the system's legitimacy suffers tremendous harm when a prosecutor relies on racial stereotypes at trial.[109] This causes community members to view prosecutors as State agents who advance bias rather than seek justice.[110] Protestors have repeatedly flooded the streets of U.S. cities and towns when prosecutorial decisions or court verdicts expose the illegitimacy of a criminal system that determines who is worthy of protection and who is worthy of condemnation based on the color of their skin.[111]

This damage to the perceived and actual legitimacy of the system decreases compliance with criminal laws and harms the desire of community members to participate in the criminal legal process.[112] Studies increasingly show that disbelief in the fairness of the criminal system increases lawlessness,[113] whereas the perception of a fair system increases law-abiding behavior.[114] If crime reduction is truly a shared societal goal, creating a legitimate means of addressing harmful behavior should be a priority.[115]

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fairly in our criminal justice system. Our system depends on people believing that it is fair and just." (quoting Eric Gonzalez, Brooklyn District Attorney)).

109. Sheri Lynn Johnson, Buck v. Davis *from the Left*, 15 OHIO ST. J. CRIM. L. 247, 267 (2017) ("[C]ertainly 'public confidence' is more eroded *by the State's reliance on race* than it is by the defense's reference to it." (emphasis in original)); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 287 (2003) (documenting a series of legitimacy studies that confirm that the perception of an unfair process undermines the legitimacy of a system); Bowman, *supra* note 2, at 335 ("Prosecutorial trial misconduct is also very public, usually occurs in front of juries, and may affect the jurors' perceptions of the criminal justice system, whether consciously or not. In fact, the public nature of these actions can undermine public respect for law enforcement and even the law itself.").

110. *See* Howard, *supra* note 2, at 373 ("Public perception of the fairness and trustworthiness of the prosecutorial process is critical to a healthy criminal justice system."); Bowman, *supra* note 2, at 334 ("Prosecutorial misconduct 'undermines the due process afforded to the accused,' which in turn may make defendants think that they can never get a fair trial." (first quoting Joy, *supra* note 11, at 407; and then citing Bennett L. Gershman, *"Hard Strikes and Foul Blows:"* Berger v. United States *75 Years After*, 42 LOY. U. CHI. L.J. 177, 181 (2010))).

111. *See* Olwyn Conway, *"How Can I Reconcile with You When Your Foot is on My Neck?": The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 MICH. ST. L. REV. 1349, 1385–86 (2018); Barnes, *supra* note 60, at 718–19 ("[I]nhabiting a minority identity that may be marked by multiple disadvantaging categories, with regard to race, gender, sexuality, class, etc., results in there being overlapping and reinforcing bases upon which to assign winners and losers in the worlds of crime and punishment.").

112. *See* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 841 (2008) (describing experiments conducted by Janice Nadler which showed that participant willingness to break the law increased after exposure to instances of legal injustice).

113. *Id.*

114. *Id.* at 837 ("[P]erceptions of legitimacy play a critical role in inducing compliance with the law, and conversely, that perceptions of illegitimacy induce non-compliance.").

115. *See* BAZELON, *supra* note 24, at 298 ("Public safety depends on our collective faith in fairness and our view of the law as legitimate.").

3. Harm to Society

Because trials are incredibly infrequent in the criminal system, the extent of harm posed by prosecutorial trial arguments may seem limited.[116] Yet, criminal trials play an outsized role in shaping public perception about crime and society.[117] "The legal system plays a centrally important role in shaping the ideological foundation of the United States. It is, after all, the institution that is most directly entrusted with enforcing and adjudicating the morality of social actors."[118] In other words, it is not only that public opinion shapes the legal system but the legal system also shapes public opinion.[119]

When the State uses racialized stock stories at trial, it legitimizes and advances those stories in the public eye. While some members of society may perceive a particular verdict or narrative as unjust and therefore illegitimate, others may view it as supporting evidence for their own prejudices. It may also resonate with the implicit or unconscious public biases in a way that cements those biases and further entrenches them in the American psyche. Some may take the tacit or explicit approval of such biases by the State as license to act in accordance with these biases.[120] Because the prosecutor acts on behalf of the government, the public assumes that the State condones prosecutorial actions.[121]

Additionally, the communicative power of prosecutorial decisions is considerable.[122] Because prosecutors are representatives of the State and

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116. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

117. *See* BENNETT L. GERSHMAN, PROSECUTION STORIES 53 (2017) ("A criminal trial is the main event in American law.").

118. Jonathan Markovitz, *"A Spectacle of Slavery Unwilling to Die": Curbing Reliance on Racial Stereotyping in Self-Defense Cases*, 5 U.C. IRVINE L. REV. 873, 875–76 (2015).

119. *See* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1308 (1995) (discussing Regina Austin's work finding evidence of spillover resulting in hysteria surrounding Black men in public spaces and arguing "Inevitably . . . spillover occurs between the legal and social spheres of identity . . . . The repetition of race-talk pushes racially subordinate images outside the criminal courthouse into the mainstream of popular culture and society."); Griffin, *supra* note 63, at 290–91 ("Legal processes not only reflect, but also create, familiar narratives.").

120. *See* GERSHMAN, *supra* note 117, at 65 ("Prosecutors know that juries usually view them as 'champions of justice,' trust their judgment, and believe that the prosecutor would not bring a case to trial unless the prosecutor is confident that the defendant is guilty and has the evidence to prove it.").

121. Earle, *supra* note 102, at 1217 ("'[T]he prosecutor's opinion carries with it the imprimatur of the Government' . . . ." (quoting United States v. Young, 470 U.S. 1, 18 (1985))).

122. Markovitz, *supra* note 118, at 894 ("[T]he initial decision not to arrest or prosecute Zimmerman was understood to mean that the legal system was sanctioning his fears and actions, thereby endorsing the very stereotypes that Zimmerman relied upon and sending a message that devalued Black life."). This communicates to the community that oppressed minority groups are less safe and their lives are of less value than the lives of nonminority citizens. For example, the decision not to prosecute cases under controversial "Stand Your Ground" laws has been criticized as granting citizens a "license to kill" even if their fear is racially motivated. *See, e.g.*, Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Aspects of Recent Innovation in Self-Defense Laws*, 83 FORDHAM L. REV. 3179, 3192–96 (2015).

because they wield so much power and discretion, their ability to communicate messages to the public vastly outweighs that of defense attorneys.[123] The mere fact that the prosecution presents a particular narrative makes jurors more likely to believe it.[124] When a prosecutor, who most jurors already credit as a reliable source of information, invokes or relies on a racial stereotype at trial, the result is not only an increased likelihood of conviction but also an endorsement of the stereotype.[125] In this way, appeals to racial stereotypes at trial impact not only the trial but also the pursuit of justice more broadly.[126] Prosecutors who engage in racial or ethnic stereotyping perpetuate a history of subordination of oppressed groups by both society and the State. Regardless of whether these arguments result in convictions, they are injurious and, for this reason, prosecutors should avoid their use.

III. CONSTRAINTS ON NARRATIVES IN CRIMINAL TRIAL

Criminal defendants in the United States have a constitutional right to present a defense at trial.[127] The Supreme Court has repeatedly held that the foundational tenets of our adversarial justice system—including the rules of evidence and rules of criminal procedure—should yield to that fundamental right.[128] Despite the robustness of this protection, courts and legislatures have restricted certain defense trial narratives based on the harms they pose.[129] Consider, for example, rape shield laws[130] and recent proposals to ban so-called panic defenses.[131] These constraints

123. *See* Lyon, *supra* note 101, at 335 ("Because of [their] unique position, juries invest the prosecutor with authority beyond that of an advocate, and the prosecutor must be accountable for that authority.").

124. *See* GERSHMAN, *supra* note 117, at 75 ("There are rules of engagement that all lawyers are supposed to follow, especially prosecutors who, given their power and prestige with juries, probably wield more influence and persuasive power in a courtroom than any other lawyer."); Bowman, *supra* note 2, at 322–23.

125. Markovitz, *supra* note 118, at 875–76 (noting that the use of racist stereotypes in legal decision-making "imbues them with the force of law").

126. *See id.*; Alford, *supra* note 2, at 364.

127. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (finding a denial of due process where hearsay rules prevented defendant from presenting third-party confession to the crime defendant was accused of committing); *see also* J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 556 (1980) (describing the defendant's constitutional right to present a defense through the Sixth Amendment rights to cross-examine witnesses against them and to present their own witnesses).

128. *See, e.g.*, Cool v. United States, 409 U.S. 100, 104 (1972); Rock v. Arkansas, 483 U.S. 44, 52 (1987); Taylor v. Illinois, 484 U.S. 400, 409–11 (1988). However, the right to present a defense is not absolute, and the Supreme Court has upheld certain limitations on the right.

129. *See* Tanford & Bocchino, *supra* note 127, at 563 ("When the state demonstrates a compelling interest, the scope of the defendant's right will be more limited than in those situations in which the state has no real interest.").

130. *E.g.*, Privacy Protection for Rape Victims Act, Pub. L. No. 95-540, 92 Stat. 2046 (1978) (enacted as FED. R. EVID. 412). Note that all states have some version of a rape shield law in their rules of evidence or other statutory provisions, albeit all with varying exceptions and conditions. This is particularly important to note given that federal prosecutions for rape are exceedingly rare. *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 768 n.17 (1986).

131. See *infra* Section III.A.2, for definition of a panic defense.

infringe on the defendant's right to present a defense, yet have passed constitutional muster because the concerns underlying them are so substantial.[132] This Part considers the constraints on defense trial arguments and their justifications as well as the academic debate over defense attorneys' duty to restrict their own trial narratives—despite their duty to their client—to advance larger societal goals. This Part then reviews the four primary ways prosecutors can invoke or trigger racialized stock stories and narratives at trial. It then considers both the failures of external regulation and the potential for internal regulation to address these concerns.

A. Restraints on Defense Storytelling

Courts and legislatures have acted to constrain defense trial narratives over three primary concerns: (1) that appeals to stereotypes pose harm to the parties; (2) that the inclusion of stereotypes or negative stock stories harms the public perception of the system's legitimacy; and (3) that the use of stereotypes in public criminal trials legitimizes and perpetuates those stereotypes, thereby creating harm both to stigmatized individuals and the broader public.[133]

1. Rape Shield Laws

Rape shield laws "generally prohibit the introduction of evidence of a woman's prior sexual history at trial."[134] This prohibition prevents a defense attorney in a sexual assault case from essentially trying the complainant based on her[135] past sexual conduct.[136] In passing the federal rule, Congress cited concerns about how victim blaming pervaded defense narratives in sexual assault cases.[137] The comments to the Federal Rules of Evidence clarify that Congress was specifically concerned about

132. Am. Bar Ass'n House of Delegates, Res. 113A, at 13 n.103 (Aug. 12–13, 2013). ("Although the Constitution guarantees a criminal defendant the right to present a full defense, *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), courts and legislatures are free to eliminate or narrow criminal defenses."); *see also* Galvin, *supra* note 130, at 768, 768 n.17 ("By 1980, almost every state had passed some form of rape-reform legislation. The overall purpose of reform legislation was to remove sexist biases from existing rape law . . . .").

133. In presenting the proposed act to ban gay and trans panic defenses, Senator Markey argued that the defenses reflect irrational bigotry toward the LGBTQ community, rely on stereotypes that cast LGBTQ individuals as sexual predators, erode the legitimacy of federal prosecutions, and send the message that the lives of LGBTQ individuals are worth less than others. *See* Press Release, Ed Markey, U.S. Sen. for Massachusetts, Kennedy & Markey Introduce Legislation to Ban Use of Gay and Trans Panic Defense (June 5, 2019), https://www.markey.senate.gov/news/press-releases/kennedy-and-markey-introduce-legislation-to-ban-use-of-gay-and-trans-panic-defense.

134. Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1462 (2012).

135. I use female pronouns deliberately in this Section because the rule of admissibility of a complainant's prior sexual conduct only applied to female complainants. *See* Tanford & Bocchino, *supra* note 127, at 546; *see also* Kaela R. Dunn, *Lessons from #MeToo and #BlackLivesMatter: Changing Narratives in the Courtroom*, 100 B.U. L. REV. 2367, 2371–76 (2020).

136. *See id.* There are two primary arguments advanced: (1) that the complainant's lack of chastity was a character trait that was relevant to the determination of whether or not the complainant consented to the sexual act at issue; and (2) that extramarital sexual activity was immoral and therefore probative of the complainant's lack of credibility—in other words, that promiscuity indicates dishonesty. *See id.*; Galvin, *supra* note 130, at 807.

137. *See* FED. R. EVID. 412.

the power and harm of sexual stereotyping.[138] The committee notes repeatedly refer to "stereotypical thinking" and the committee's intent to safeguard complainants from both the power and harm of such stereotypes.[139] Additionally, lawmakers articulated a concern that the treatment of complainants in sexual assault trials effectively deterred victims of sexual assault from coming forward with their accusation out of fear of how the system would treat them.[140]

These concerns drove the creation of an evidentiary rule with a uniquely broad and drastic effect.[141] "Most exclusionary rules premised on a comparison of prejudice and probative value only forbid a specific purpose . . . . Rape shield rules, such as Federal Rule of Evidence 412, follow a much more restrictive structure, flatly barring the category of evidence of past sexual behavior . . . ."[142] Given that Rule 412 applies almost exclusively to defense arguments, this complete ban on a particular kind of defense narrative exists in tension with the constitutional right to present a defense.[143]

Arguably, rape shield laws should have been unnecessary.[144] Evidence of a complainant's past sexual behavior is generally not probative of whether she consented to a specific sexual act.[145] It is, however, highly prejudicial, as jurors have tended to view promiscuity as grounds to exclude and discredit a complainant.[146] Yet judges, influenced by the same biases as jurors, regularly allowed evidence and argument regarding the

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138. *Id.* ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.").

139. *See id.*

140. *Id.*

141. *See* Tanford & Bocchino, *supra* note 127, at 545 (describing the state and federal Rape Shield Rules as establishing "a new rule in some cases as extreme as the old one").

142. Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOY. L.A. L. REV. 757, 762 (1992) (footnotes omitted).

143. *See* Tanford & Bocchino, *supra* note 127, at 564 ("[A] defendant is specifically guaranteed an impartial jury and the general due process right to a fair trial; when these rights conflict with freedom of the press, however, the dispute must be resolved by a balancing of rights." (footnote omitted)).

144. *See* Althouse, *supra* note 142, at 760–61.

145. *See id.* ("When evidence hurts the factfinding process more than it helps—when 'the probative value is substantially outweighed by the danger of unfair prejudice'—the judge should exclude it. Thus, it seems apparent that judges should have excluded most evidence of past sexual behavior even without a rape shield rule." (quoting FED. R. EVID. 403)).

146. *See* discussion *supra* Section II.B.1; *see also* Tanford & Bocchino, *supra* note 127, at 569 ("Traditional evidence law recognizes that otherwise relevant evidence may be inadmissible because it would have the effect of disrupting the trial or sidetracking the search for truth."). Tanford and Bocchino go on to note that one of four primary reasons for excluding probative evidence is the danger that the evidence permitted may invoke feelings of prejudice or hostility in the factfinder. *Id.* While Tanford and Bocchino ultimately find the Federal Rape Shield Rule to be unconstitutional as a violation of the defendant's Sixth Amendment rights, their analysis seems to dismiss the degree to which allegations or evidence of promiscuity can cause a factfinder to conclude that the complainant was simply "asking for it." *See id.* at 545. They do, however, note that judges should be the ones to make this determination under the same balancing test they employ for all such questions of relevance—determining whether the evidence is more probative than prejudicial. *Id.* at 571.

complainant's alleged promiscuity to pervade sexual assault trials.[147] Facing limited options to alter judicial behavior, lawmakers instead curtailed defense narratives to prevent the perpetuation of harmful gender stereotypes and the harm that such stereotypes pose to not only individual parties but also to society.[148]

2. Gay and Transgender Panic Defense Bans

A panic defense is one used to defend a person accused of assaulting or killing a complainant who is—or allegedly is—gay or transgender.[149] The panic defense typically relies on one of three arguments: (1) that a perceived same-sex come-on made the defendant momentarily insane or diminished their capacity for rational response, thereby reducing culpability;[150] (2) that a perceived same-sex come-on or the discovery of the complainant's genitalia after a sexual act served as provocation;[151] or (3) that a perceived same-sex come-on prompted the defendant to act in self-defense.[152] These defenses rely on harmful negative stereotypes about LGBTQ individuals, yet most states still permit them.[153] Their use may occur "as part of a formal defense strategy" or may manifest "informally in the language used by the defense team" to describe the complainant.[154] This raises the possibility that defense attorneys may be intentionally invoking these stereotypes to persuade factfinders as well as unintentionally relying on them due to their own biases.

In 2013, the American Bar Association (ABA) passed a Resolution urging legislative action to curtail the use of these defenses.[155] The ABA focused primarily on three concerns: (1) that such defenses invite jurors

147. *See* Althouse, *supra* note 142, at 761. ("If the same misconceptions that impair the jury impair the judge, the judge cannot screen out evidence that jurors will misuse.").

148. *See* Fed. R. Evid. 412.

149. Wodda & Panfil, *supra* note 15, at 932–33 ("In the courtroom, defendants have attempted to legitimize lethal violence against trans women with claims of 'trans* panic' and, thus, the cultural norm of transphobia has been displayed in legal settings in addition to society at large.").

150. Am. Bar Ass'n House of Delegates, Res. 113A, *supra* note 132, at 6.

151. *Id.* at 1, 7.

152. *See* Wodda & Panfil, *supra* note 15, at 933 ("[C]laims of gay panic or trans* panic are typically presented within the context of an existing criminal law defense, such as temporary insanity, provocation, or self-defense.").

153. *See id.* at 942 n.73 ("The California State Assembly bill analysis of the Gwen Araujo Justice for Victims Act states: 'Experts estimate that nationally, similar panic strategies have been used in over 45 cases, often with success.'" (quoting Senate Rules Committee, Bill Analysis, Assemb. 1160, 2005-2006 Reg. Sess. (Cal. 206))). Gay and trans panic defenses function separately, but for the purpose of this Article there are sufficient similarities in relevant areas to discuss them jointly.

154. *Id.* at 942. This parallels the various ways prosecutors can appeal to racial stereotypes. *See* discussion *infra* Section III.B.

155. Am. Bar Ass'n House of Delegates, Res. 113A, *supra* note 132, at 1 ("[T]he American Bar Association urges federal, tribal, state, local and territorial governments to take legislative action to curtail the availability and effectiveness of the 'gay panic' and 'trans panic' defenses, which seek to partially or completely excuse crimes such as murder and assault on the grounds that the victim's sexual orientation or gender identity is to blame for the defendant's violent reaction.").

to mischaracterize the evidence presented, potentially affecting case outcome; (2) that they appeal to juror biases and therefore diminish the legitimacy of the court system; and (3) that they legitimize and perpetuate negative stereotypes about LGBTQ individuals in the public sphere.[156] Panic defenses, the ABA reasoned, communicate to the broader public that the lives of LGBTQ citizens are simply worth less.[157]

Several state and federal lawmakers have passed or introduced legislation to ban panic defenses based on these same concerns.[158] These restrictions on defense narratives are moving forward despite the defendant's right to present a defense. Again, the defendant's right to a defense is a foundational right in American criminal law.[159] However, the competing concerns provide strong reason to eliminate these defenses:

> [A]n alternative to providing a mitigation defense to people who kill because of unacknowledged homophobic or heterosexist belief systems is to deny such a defense, and instead send the message that people are responsible for wrestling with and refusing to act upon beliefs that society as a whole, as reflected in our legal institutions, has decided are unacceptable bases for violence.[160]

The same concerns driving these restrictions on defense narratives underlie this Article's proposal to eliminate racialized trial narratives by the prosecution: the harm posed to the parties and a just verdict, the harm posed to the system when bias is invited into deliberations, and the harm posed to society by reinforcing racial stereotypes. This proposal should

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156. *See id.* at 1–2, 4, 7–9.

157. *Id.* at 1 ("They characterize sexual orientation and gender identity as objectively reasonable excuses for loss of self-control, and thereby mitigate a perpetrator's culpability for harm done to LGBT individuals. By fully or partially excusing the perpetrators of crimes against LGBT victims, these defenses enshrine in the law the notion that LGBT lives are worth less than others.").

158. *LGBTQ+ "Panic" Defense*, THE LGBT BAR, https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/ (last visited Mar. 22, 2021); *see also* Daliah Singer, *Colorado Joins 10 Other States in Banning the Gay Panic Defense*, 5280 MAG. (July 2, 2020), https://www.5280.com/2020/07/colorado-joins-10-other-states-in-banning-the-gay-panic-defense/ ("This was an issue of fairness. You shouldn't be able to get away with a crime based on the victim's sexual or gender identity." (quoting Colorado state Rep. Matt Soper)). The following jurisdictions have banned the LGBTQ+ panic defense: California, Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, New York, New Jersey, Washington, Colorado, and the District of Colombia. *LGBTQ+ "Panic" Defense*, *supra*. Legislation has been introduced in Minnesota, Pennsylvania, Texas, Massachusetts, New Mexico, Wisconsin, Iowa, Virginia, Maryland, Nebraska, and Florida. *Id.* Senator Markey and Congressman Kennedy introduced the Gay and Trans Panic Defense Prohibition Act of 2018 to ban the use of gay and trans panic defenses in federal court. In June of 2019, this bill was reintroduced into the House and Senate. Press Release, *supra* note 133. In presenting the Act, Senator Markey stated that "[o]ur courtrooms are supposed to be chambers of justice, not hate. So-called gay and trans panic legal defenses perpetuate bigotry and violence toward the LGBTQ community and should be banned. They corrode the legitimacy of federal prosecutions." *Id.* Senator Markey also lamented that such defenses—which are premised on stereotypes casting LGBTQ individuals as sexual predators—are dangerous to perpetuate as they send the message that the lives of LGBTQ individuals are worth less than others. *Id.*

159. *See* Davis v. Alaska, 415 U.S. 308, 315 (1974); Washington v. Texas, 388 U.S. 14, 19, 23 (1967) (describing the right to establish a defense as "a fundamental element of due process of law").

160. Markovitz, *supra* note 118, at 905 n.176.

be less controversial than either rape shield laws or bans on panic defense for two reasons. One, it seeks to curtail the prosecution's narrative and, therefore, does not compete with the defendant's fundamental right to present a defense. Two, it aims to eliminate racial bias, which the Supreme Court has identified as the most odious form of bias in the criminal system.[161] There is a significant difference in how the Supreme Court views racial animus in comparison to other forms of bias.[162] This view extends to the legal system in general and to prosecutors in particular.[163] Given these differences, the criminal system should have more tolerance for the restrictions proposed in this Article than those imposed on defense narratives.

3. Proposals for Ethical Considerations and Constraints

In addition to the legal restrictions placed on courtroom narratives, scholars have proposed that certain ethical and moral considerations should also constrain trial storytelling. Because the narratives told in court are constructed rather than predetermined,[164] they are choices "subject to moral and ethical scrutiny."[165] Accordingly, scholars have criticized the use of racialized stories, out-grouping or "othering,"[166] and subordination narratives in criminal trials.[167] Many of these proposals focus on defense trial narratives. Several scholars have argued that defense attorneys should refuse to mount defenses involving subordination narratives or theories, despite the potential impact on client outcome.[168] To preserve the attorney–client relationship, one scholar suggests "lawyers should engage their clients in a meaningful discussion of the potential negative consequences to others of their specific narrative choices."[169]

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161. *See, e.g.*, Buck v. Davis, 137 S. Ct. 759, 778 (2017); Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

162. *See* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 897 (2018) ("[T]his exception is a narrow one indeed, a point the Court made by deed, if not by words, when it more recently declined to disturb the verdict in a case involving juror antigay animus rather than anti-Hispanic animus. As such, absent the transparent use of race as evidence, what happens in the jury room is likely to stay in the jury room." (footnote omitted)). But see *infra* Section IV.B.1, for a critique of the difference between the Court's words and its actions when it comes to racial bias.

163. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6 (AM. BAR ASS'N 2017).

164. Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 117, 122 (2002).

165. *Id.*

166. Stabile, *supra* note 14, at 382 ("'Othering' refers to a process by which individuals and society view and label people who are different in a way that devalues them.").

167. Subordination narratives are those that employ stereotypes about individuals within traditionally subordinate groups in society—people of color, women, and LGBTQ individuals or communities. *See* Ahmad, *supra* note 164, at 118, 120 (referring to defense narratives such as "crying rape" and "crack whore" stock stories as subordinating narratives).

168. Alfieri, *supra* note 119, at 1303 n.18, 1306 (arguing that defense attorneys should refuse to mount subordination theory-based defenses such as that used in the Bernie Goetz trial).

169. Ahmad, *supra* note 164, at 125–26 (acknowledging that although individual cases will not resolve "the systemic oppression of poor people by the criminal justice system," lawyers still have a duty to avoid racist, sexist, and homophobic narratives).

The tension of such a proposal is readily apparent. A defense attorney "knows but one person in all the world, and that person is [their] client."[170] Defense attorneys generally recognize that the duty of zealous advocacy demands that they put the needs of their client above all others.[171] Attorneys have been held in contempt, threatened with jail, and faced public opprobrium for upholding their duty to protect the unpopular and reviled.[172] Individual criminal defense attorneys may struggle with the morality of their role in helping those who may have committed harm, but the legal and ethical role of the defense attorney is quite clear.[173] Moreover, in a time when the criminal system is defined by mass incarceration, limited resources for indigent defendants, and rampant racial disparities that all imperil the fair treatment of criminal defendants, the suggestion that it is defense attorneys who owe society an equal or competing moral duty has prompted at least one criminal-defense scholar to ask: "[W]hy us?"[174] Clearly, there are actors in the criminal system with more power to effect systemic change and with fewer ethical duties that directly contradict their ability or responsibility to do so.[175]

The intricacies of this debate exceed the scope of this Article. However, the discussion highlights the significant difference between imposing an ethical or moral framework on prosecutors compared with defense attorneys. The suggestion that attorneys consult with their clients about the impact of the trial narrative—attempting, perhaps, to talk a client out of presenting a subordination narrative as a defense—is predicated on having a client with whom one can consult. This is necessarily limited to defense attorneys, as prosecutors do not have an individual client with whom they can or should consult in making trial decisions.[176]

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170. Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213, 1215 (2006) (quoting 2 THE TRIAL OF QUEEN CAROLINE 3 (1821)).

171. *See* Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 327 (2010).

172. *See, e.g.*, Mark Hansen, *The Toughest Call*, ABA J. (Aug. 1, 2007, 8:34 AM), https://www.abajournal.com/magazine/article/the_toughest_call (discussing attorney Frank Armani and *People v. Belge*, often referred to in law school courses as "The Buried Bodies Case").

173. *See id.*; People v. Belge, 372 N.Y.S.2d 798, 800–02 (Onondaga Cnty. Ct. 1975).

174. Smith, *supra* note 16, at 1587 ("[T]he most difficult aspect of Alfieri's work is the suggestion that it is the *criminal defense lawyer* who is responsible for the persistence of racism and racial stereotypes in the criminal justice system and larger American society. Of all the political and institutional actors upon whom Alfieri might focus, why us?" (footnote omitted)). Alfieri does not limit his arguments to the work of defense attorneys; he also calls for increased attention to the ways in which prosecutors argue race.

175. For example, prosecutors. *See, e.g.*, Erica McWhorter & David LaBahn, *Confronting the Elephants in the Courtroom Through Prosecutor Led Diversion Efforts*, 79 ALB. L. REV. 1221, 1221 (2015); Gershman, *supra* note 96, at 314–15.

176. While prosecutors should consult with the complainants in their cases, particularly in jurisdictions that have passed victim's rights laws such as Marsy's Law, complainants or victims of criminal offenses are not the clients of the prosecutor. There is no attorney–client relationship in the prosecutor's role. *See* Joe, *supra* note 18, at 888.

Yet prosecutors do make decisions about the stories they tell. Like a defense attorney, a prosecutor bases their trial narrative on a series of "choices . . . as to what to include and what to exclude."[177] The prosecutor's presentation of evidence does not come in the form of a dry recitation of facts.[178] It is a narrative constructed by the prosecutor to serve a particular aim—typically a conviction.[179] Unlike defense attorneys, however, prosecutors have no competing interest in presenting their narratives. They have no duty to advocate zealously on behalf of any particular individual because they serve no particular client.[180] Their only duty is to seek justice.[181] Again, for this reason, institutional tolerance of rules restricting prosecutorial speech should be at least as high, if not higher, than that for rules restricting defense speech.

Prosecutorial narratives that intentionally or unintentionally invoke racialized stock stories trigger the same three concerns underlying rape shield laws and panic defense bans: (1) they invite jurors to substitute evidence with stereotypes—posing harm to the parties; (2) they invite racial bias into the legal system, thereby diminishing its legitimacy; and (3) they legitimize and perpetuate negative stereotypes of people of color in society. These considerable harms should weigh heavily in favor of restricting such narratives.

B. Broadening the Critique: Prosecutorial Narratives and Language

Prosecutors may invoke racialized stock stories and stereotypes in one of four ways: (1) intentional and explicit invocation of a racial or ethnic stereotype, (2) intentional but veiled allusion to a racial stereotype or stock story, (3) unintentional racialized stereotyping based on the prosecutor's own implicit biases, or (4) unintentional triggering of racialized stock stories due to the trial narrative and the defendant's race or

177. Ahmad, *supra* note 164, at 122.

178. *See* Bowman, *supra* note 2, at 320 ("In closing arguments, the prosecutor has the chance to sum up the evidence within a narrative framework to help the jury understand and interpret the evidence. During closing arguments, prosecutors can properly sum up the evidence, offer reasonable deductions from it, and respond to arguments of opposing counsel. While reviewing courts often formally treat closing arguments as just being about a logical summation of the evidence, advocates and advocacy experts go beyond that narrow formulation to use rhetorical devices to move the jury, emotionally, toward a favorable decision." (footnotes omitted)).

179. *See* Alford, *supra* note 2, at 330 ("Historically, courts have used a legal fiction to forestall an adequate assessment of the dangers inherent in racist prosecutorial argumentation: that closing arguments merely restate the evidence in a logical and sequential manner. This fiction ignores the fact that closing argument is customarily used to persuade the jury and to *move* them—emotionally—to take action."); GERSHMAN, *supra* note 117, at 75 ("There are rules of engagement that all lawyers are supposed to follow, especially prosecutors who, given their power and prestige with juries, probably wield more influence and persuasive power in a courtroom than any other lawyer. Although all lawyers violate the rules on occasion, prosecutors seem to violate the rules most often and with impunity, and often without any significant oversight or accountability.").

180. *See* Joe, *supra* note 18, at 900.

181. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

ethnicity. Historically, most scholars have addressed the first two categories, and increasingly, reforms have focused on the third.[182] This Article contributes a new perspective to the dialogue by focusing primarily on the fourth category of prosecutorial storytelling. This Part will briefly describe each of the four categories and detail how the dangers of dehumanization and depersonalization can manifest as strongly in the fourth category as they do in the first.

1. Explicit Appeals to Racial Bias

There is no doubt that appeals in the first category still exist: even twenty-first-century prosecutors intentionally invoke racial stereotypes to obtain convictions,[183] often without consequence.[184] One of the most common types of prohibited emotional appeals to the jury found in appellate cases is "pandering to the jurors' biases and prejudices."[185] Prosecutors make these arguments despite their prohibition because they know that doing so will often secure a conviction.[186] By triggering the deeply embedded stock story of Black criminality in the minds of jurors, prosecutors may increase the likelihood that jurors forego a true appraisal of the State's evidence.[187] Jurors may fill in gaps in the State's evidence—what might otherwise be reasonable doubt—with their understanding of

182. *See* Thompson, *supra* note 2, at 1247–48 ("Many legal scholars have focused their research on enlightening the legal community about the prevalence of implicit bias and offering solutions for how the justice system can reduce or eliminate the impact of implicit bias."); Earle, *supra* note 102, at 1213–15, 1233.

183. *See, e.g.*, Alvarez v. Warden, San Quentin State Prison, No. 2:97-cv-1895 KJM KJN P, 2019 WL 1471311, at *29 (E.D. Cal. Apr. 3, 2019) ("The Ninth Circuit noted that the prosecutor's explanation relied on a 'group-based presupposition[ ] applicable in all criminal trials to residents of poor, predominantly [B]lack neighborhoods' and 'both reflected and conveyed deeply ingrained and pernicious stereotypes.'" (quoting United States v. Bishop, 959 F.2d 820, 825 (9th Cir. 1992), *overruled by* United States v. Nevils, 598 F.3d 1158 (9th Cir. 2010))).

184. Professor Sheri Lynn Johnson's work examining criminal cases from the first decade of the twenty-first century found three capital cases where prosecutors used a racial epithet to describe the defendant. Johnson, *supra* note 4, at 1775. Arguing that racial epithets in particular are a narrow category within the larger category of explicit reference to race, Johnson concludes that the findings likely underestimate explicit racial references in criminal proceedings. *Id.* This leads her to conclude that express references to race are hardly "extraordinary." *Id.* ("[W]hether we are talking about irrelevant or relevant but prejudicial evidence, to the extent appellate cases reflect the world of trials, protection from evidence or insinuation of evidence with racial imagery is sporadic at best. The informed prosecutor will know that asking a question invoking nonsexual racial imagery will probably be costless."); *see also* Johnson, *supra* note 109, at 265.

185. Cicchini, *supra* note 2, at 909 (noting that the three most common categories of impermissible arguments appealing to emotion are "invoking sympathy for the alleged victim, instilling fear of the consequences for failing to convict, and pandering to jurors' biases and prejudices").

186. *See* GERSHMAN, *supra* note 117, at 80–85 ("Prosecutors have incited juries to substitute racial stereotypes for evidence and racial prejudice for reason. Prosecutors often tried to inflame a jury's racial fears and stereotypes with predictions of bloodshed, terror, and violence unless the jury convicted the accused [B]lack man.").

187. Earle, *supra* note 102, at 1216 ("By appealing to racism, the prosecutor implies that a given immutable characteristic makes this defendant more worthy of incarceration and the moral opprobrium of criminal conviction. The prosecutor, in soliciting a judgment based on status, thus goes beyond the evidence and the relevant issue of the defendant's conduct.").

a particular stereotype.[188] As argued in Part II, such arguments may also cause jurors to unconsciously lower their standard for the burden of proof.[189]

This type of appeal might involve a racial epithet[190] or a direct appeal to jurors to judge someone's actions based on that person's race.[191] A recent example is the case of Alejandro Martinez-Arias,[192] whom a jury convicted of child molestation, aggravated child molestation, and aggravated sexual battery.[193] At trial, the prosecution called the complainant's school counselor to testify.[194] Her testimony included her personal beliefs that machismo and forced submission of women and girls characterize Latinx culture.[195] The defense appealed, arguing that the testimony encouraged the jury to weigh the defendant's ethnicity in their consideration of guilt.[196] The appellate court denied the appeal, finding that the prosecutor had permissibly elicited such testimony as an explanation for the delayed disclosure by the complainant.[197]

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188. Thompson, *supra* note 2, at 1267 ("Legal scholars have argued that where holes exist in the prosecution's case, jurors tend to fill in the gaps or 'complete the story' by turning to racial stereotypes. In fact, where the prosecution's case is especially weak, jurors are more likely to rely on their life experiences, including their racial biases, to make their decisions." (footnotes omitted)).

189. Alford, *supra* note 2, at 353 (describing the result of "othering" defendants through appeals to stereotype as making jurors "less likely to view the defendant as deserving of sympathy, or of the benefit of the doubt that is crucial to the proper determination of guilt under the reasonable doubt standard").

190. *See* Johnson, *supra* note 109, at 265.

191. *See, e.g.*, Calhoun v. United States, 568 U.S. 1206, 1206 (2013); *see also* Thompson, *supra* note 2, at 1243, 1254–58. Here, the Supreme Court failed to overturn a conviction despite the fact that during the trial the prosecutor argued that the defendant must have known a drug deal was taking place because African-Americans and Hispanics were present in a hotel room with a bag full of money. *Calhoun*, 568 U.S. at 1206. Justice Sotomayor published a statement along with the denial of certiorari, stating "[b]y suggesting that race should play a role in establishing a defendant's criminal intent, the prosecutor here tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation." *Id.* She specifically condemned the prosecutor's attempt to use racial stereotypes as a substitute for evidence. *Id.*

192. Martinez-Arias v. State, 846 S.E.2d 448, 450–51 (Ga. Ct. App. 2020).

193. *Id.* at 450.

194. *Id.*

195. *Id.* at 451.

196. *Id.* at 450–51.

197. *Id.* at 451. Note that the available evidence in the case included a disclosure witness (the complainant's brother) and a cell phone recording of the abuse taking place. *Id.* at 450. Note also the availability of testimony from any childhood sexual assault expert that delayed disclosure is common and not inconsistent with abuse.

2. Implicit Appeals to Racial Bias

The second category is more common in modern courtrooms.[198] Here, the prosecutor seeks to appeal to the jury's biases without any explicit mention of race.[199] Given the long history of coded language used to address race in the United States,[200] prosecutors are often able to invoke racial stereotypes without any overt reference to race.[201] For example, in the capital trial of Wanda Jean Allen, a Black woman charged with murder,[202] the prosecutor held up a greeting card with a picture of an ape on it and told the jury, "that's Wanda Jean Allen in a nutshell."[203] The contents of the card went to motive, but the front of the card that the prosecutor displayed to the jury was irrelevant and clearly prejudicial.[204] Despite this assessment, the appellate court denied Ms. Allen's appeal from her death sentence because the prosecutor made no explicit appeal to race.[205]

198. Earle, *supra* note 102, at 1232 ("The approaches to identifying prosecutorial racism employed by courts have largely ignored the trend of modern racism, and have instead generated a ban on an unabashed type of racism that has become increasingly anachronistic. The intent-based inquiry suffers from imprecision. By focusing on the willfulness of a prosecutor's remark, this approach fails to consider the more latent racism that may permeate a prosecutor's oratory." (footnotes omitted)); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324–25 (1987); Thompson, *supra* note 2, at 1261 ("Many prosecutors have abandoned explicit race-based credibility arguments in light of appellate courts' disfavor for such arguments.").

199. Thompson, *supra* note 2, at 1254, 1257–58.

200. *See supra* Part I; *see also* Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 622–23 (2000).

201. *See supra* Part II; Thompson, *supra* note 2, at 1257–58 (discussing the case of *State v. Henderson*, 620 N.W.2d 688 (Minn. 2001), in which the prosecution argued: "[T]he people that are involved in this world are not people from your world. Their experiences, their lifestyles are totally foreign to all of you. These are not your world. These are the Defendant's people. They are his friends"). The Minnesota Supreme Court did not find the comment sufficiently prejudicial to overturn the conviction, nor did it find that the statement constituted misconduct. *Id.* at 1258.

202. *See* Letter from Diann Rust-Tierney, Joann Bell & Matt Coles, Am. C.L. Union, to Pardon & Parole Board (Jan. 11, 2001) [hereinafter Allen Clemency Letter] (on file with American Civil Liberties Union) (describing the trial as "a trial permeated with stereotypes of lesbians and African American women," where the prosecutor repeatedly invoked Allen's sexual orientation to paint her as "an aggressive, dominant, 'male' type figure" to paint her as capable of murder); *see also supra* Section II.B.1 (earlier description of out-grouping and casting a female defendant as masculine).

203. Alford, *supra* note 2, at 342 (internal quotations omitted) (quoting Allen v. State, 871 P.2d 79, 97 (Okla. Ct. App. 1994)).

204. *Id.* Despite the clear implication that the prosecutor was drawing—pointing to a picture of a gorilla and calling it by the defendant's name—the appeal was denied because the appellate court found no racist intent on the part of the prosecutor. *Id.*; *see* Brent Staples, *The Racist Trope That Won't Die*, N.Y. TIMES (June 17, 2018), https://www.nytimes.com/2018/06/17/opinion/roseanne-racism-blacks-apes.html (citing the work of Jennifer Eberhardt and Phillip Atiba Goff and noting that: "[i]n six studies published with collaborators a decade ago, Mr. Goff and Ms. Eberhardt found that even younger study participants who were born since the civil rights revolution and claimed to know nothing of the ape caricature of [B]lackness were swayed by it when making judgments about [B]lack people.").

205. Alford, *supra* note 2, at 342. The case has been criticized as a failure of the criminal justice system as it permitted "bias based on race, class and sexual orientation" to enter the courtroom. Allen Clemency Letter, *supra* note 202.

3. Implicit Bias of Prosecutors Informing Trial Argument

Both prosecutorial appeals described above involve intentional appeals to bias—whether explicit or implicit. The third category of racialized narratives focuses on the more common implicit bias that can unintentionally inform prosecutorial argument.[206] Even well-intentioned prosecutors are subject to the effects of implicit bias.[207] As discussed in Part I, the history of racial discrimination in the United States "has created deep-seated associations of race and dangerousness in the American psyche"[208] that has effectively created an "automatic association between '[B]lackness' and criminality."[209] Americans are inundated with images of people of color as dangerous criminals, and this repeated exposure builds on and reinforces Americans' implicit biases of Black criminality and dangerousness.[210] These stereotypes of Black criminality can unconsciously inform decision-making.[211] For prosecutors in particular, racially motivated policing reinforces these stereotypes and creates confirmation bias for this narrative.[212] Prosecutors—even those who hold no conscious racial bias or animus—may act on these implicit biases in making

206. *See* Richardson & Goff, *supra* note 25, at 120.

207. Bowman, *supra* note 2, at 319 (arguing the importance of addressing the issue of bias assuming good intent "not because all prosecutors are well intentioned, but because suggesting that only bad-intentioned prosecutors are at risk of poor decision making is simply too easy" (quoting Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1614 (2006))).

208. Conway, *supra* note 111, at 1379 (citing Lee & Ifill, *supra* note 53, at 260); *see also* Staples, *supra* note 204 (citing the work of Jennifer Eberhardt and Phillip Atiba Goff and arguing that "[t]his process of dehumanization often leads Americans to view African–American men as larger and more fearsome than they are").

209. Lee & Ifill, *supra* note 53, at 260; *see also* Barnes, *supra* note 101, at 958 ("Historically, within American society, criminality has been associated with race.").

210. Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 L. & CONTEMP. PROBS. 93, 97 (2008) ("In the context of crime coverage, there is considerable evidence that media portray [B]lacks and Latinos as criminal and violent.").

211. *See* Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014), https://www.motherjones.com/politics/2014/12/science-of-racism-prejudice/.

212. *See* Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 69, 79–80 (2019) (describing the phenomenon of confirmation bias that encourages increasingly punitive responses from prosecutors because they only see the failures of their leniency and never the successes). Gajwani and Lesser note:

> If prosecutors have racial malice or assume that poor people, people of color, or those who live in certain areas are more likely to be criminals, then being a prosecutor and observing a steady flow of arrests of people who fit those racist stereotypes will undoubtedly lead to confirmation bias.

Id. at 80 n.83. Gajwani and Lesser go on to note that even for prosecutors without such animus, the salience effect of repeated exposure to certain events—such as prosecuting people of color—can encourage "cynical thinking." *Id*.; *see also* Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 NOTRE DAME L. REV. 1085, 1121 (2007); D. Kim Rossmo & Joycelyn M. Pollock, *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, 11 NE. U. L. REV. 790, 818–829 (2019).

charging decisions and plea offers and may unconsciously invoke them in trial narratives.[213]

Professor of Sociology Nicole Gonzalez Van Cleve gives an example of the third category, in which a prosecutor's implicit bias conjures a racial trope, from her time as an intern with the Cook County Prosecutors' Office.[214] Gonzalez Van Cleve recounts a conversation with her supervising attorney about a defendant charged with infanticide. She describes the attorney's narrative as follows: "She explained that the defendant had four children from four different fathers. When the defendant gave birth to her fifth child, she decided that she could not keep it."[215] The mother allegedly smothered her newborn.[216] Gonzalez Van Cleve notes that this description of the defendant, a Black mother, invoked the trope of a Black welfare queen—"a sexually insatiable Jezebel who not only had too many children but was promiscuous enough to have them with four different men."[217] The paternity of her children had nothing to do with the allegations, yet it was an integral part of the prosecutor's internal narrative of the case.[218] Thus, the defendant's crime was not only the infanticide but also her embodiment of the stereotype.[219] The prosecutor used no racial epithets to talk about the defendant, and her argument included no explicit references to race. In fact, she seemed sympathetic to the woman's act of desperation. Yet her own implicit bias informed her perception of the defendant and her alleged offense, creating a dehumanizing narrative that turned a person into a trope.[220]

4. Trial Narratives that Invoke Racial Stock Stories Despite Prosecutor Mitigation

The fourth category is the focus of this Article. In these cases, a prosecutor's narrative elicits a racialized stock story or stereotype irre-

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213. Richardson & Goff, *supra* note 25, at 121 ("[I]mplicit biases explain the tendency to unconsciously associate [B]lacks with danger and criminality . . . . This unconscious racial profiling is automatic and unrelated to individuals' explicit racial attitudes.").

214. GONZALEZ VAN CLEVE, *supra* note 57, at 128.

215. *Id.*

216. *Id.*

217. *Id.* at 129; *see* HAMAD, *supra* note 30, at 23 (describing the hypersexualization of Black women as a means to justify systemic rape during the period of American enslavement and defining the Jezebel stereotype as "a sensual, animalistic creature governed by her physical sensations and carnal desires").

218. In trial preparation or strategy this distilling of the essential facts of a case is referred to as the Barstool or Headline Method. *See, e.g.*, MARILENA DAVID-MARTIN, MICH. STATE APP. DEF. OFF., DEVELOPING A THEORY OF APPEAL 3 (2019), http://www.ospd.ms.gov/2019%20Spring%20PD%20Conference/Develop%20a%20Case%20Theory%20and%20Persuasive%20Argument_Handout.pdf.

219. *See* GONZALEZ VAN CLEVE, *supra* note 57, at 129.

220. *See* Barnes, *supra* note 101, at 958, 972–73 (describing the "questionable biographical information" that accompanied his Black grandmother's probation report that was irrelevant to the proceedings yet painted a disparaging picture of her as a welfare-dependent, bad-mother, Jezebel trope). Barnes goes on to detail the ways in which this stereotype of his grandmother was used to coerce her into a guilty plea. *Id.* at 973–74.

spective of the prosecutor's intention, or even when the prosecutor consciously attempts to secure a verdict free from racial bias. Here, the salience of race in American society causes jurors to hear racial appeals even where a prosecutor is not making them.[221] Common understanding of rhetorical arguments presumes the persuasive use of stereotypes or stock stories requires both priming and salience.[222] However, in American society, race is such a salient characteristic that it may require no priming to affect the thinking of the listener.[223] When the defendant in a criminal case is Black, the only priming that may be required for a stock story of Black criminality to affect decision-making is the allegation of the crime itself.[224] In these cases, the attempt to mitigate racial bias may not be enough.

Consider again the two case examples from the Introduction. In the first case, the assault, the prosecutor may have concerns that the brute narrative could affect trial outcome.[225] The prosecutor could choose not to comment on the defendant's size or race, but the defendant's presence in the courtroom would make both his race and his size apparent for the jury. In that scenario, his presence could trigger the stereotype without the prosecutor addressing it.[226] More concernedly, this would happen

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221. *See* Cantrell, *supra* note 97, at 560; Richardson & Goff, *supra* note 25, at 149 ("A central tenet of critical race theory is that racism has become normalized within institutions and systems and, thus, does not require individual or collective racial animus to support subordination."). Salience can be defined as the phenomenon that occurs:

> [W]hen recent or vivid events inordinately hold a person's attention and become more readily accessible in that person's cognition than other events . . . . Over time, salient events are subconsciously weighted more strongly than others, and they influence what a person expects to happen in the future—changing behavior in the present.

Gajwani & Lesser, *supra* note 212, at 79–80 (footnotes omitted).

222. Levinson & Young, *supra* note 104, at 309 n.7, 326–27 ("Priming describes 'the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situation context.' . . . Priming research demonstrates first, that stereotypes are activated easily, automatically, and often unconsciously, and second, that once people have been primed, it affects the way they make decisions in racially stereotyped ways." (quoting John A. Bargh, Mark Chen, & Lara Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCH. 230, 230 (1996))).

223. *See* Johnson, *supra* note 4, at 1743; Capers, *supra* note 162, at 869 ("[L]itigators know that quite possibly the most powerful evidence in the case will be the defendant's race. In a very real sense, 'race itself is evidence.'" (footnote omitted) (quoting Montré D. Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High-Profile Cases*, 75 U. PITT. L. REV. 679, 679, 681 (2014))).

224. *See* Johnson, *supra* note 109, at 268–69 (noting that the high salience of race in the United States means that the crime with which the defendant is accused may be the only prime necessary to trigger a racial stereotype in the minds of the jurors).

225. It would be difficult, if not impossible, for the prosecutor not to comment on the defendant's size in a self-defense case. *See, e.g.*, Rodriguez v. State, 641 S.W.2d 669, 682 (Tex. Ct. App. 1982) (holding that the relative weight, size, and strength of a defendant claiming self-defense compared with that of his victim are relevant to determining the reasonableness of the defendant's actions).

226. Capers, *supra* note 162, at 887 ("Race, even when unsaid, is still seen. Race, even when unacknowledged, is still present. Indeed, the defendant's race will likely be the first thing the jurors learn about a defendant, even before they learn [their] name. Before the first witness is called to the stand, before any opening statements, even before jury selection starts, jurors will see the race of the

unconsciously rather than consciously, meaning the factfinders would be less likely to subject the stock story to scrutiny.

In the second case, the disorderly conduct charge, the prosecutor could forego playing the video in order to avoid triggering the stereotype of the angry Black woman.[227] Yet, even without the video, the charge of disorderly conduct, the officer's testimony, and the defendant's race alone could trigger the angry Black woman stereotype.[228] In that case, the State would still be in the position of advancing a racialized trial narrative, a position that is antithetical to the pursuit of justice.[229]

5. All Four Narrative Types Raise Risk of Depersonalization

Most proposals to address prosecutorial misconduct in trial argument understandably focus on the first three categories of arguments.[230] Yet all four categories pose the same harms of depersonalization and dehumanization.[231] There are two primary ways to frame prosecutor depersonalization of criminal defendants: (1) prosecutors engage in rhetorical dehumanization of defendants to persuade factfinders and increase the likelihood of a conviction;[232] and (2) prosecutors engage in emotional depersonalization of criminal defendants to cope with their work—similar to the coping mechanism of medical professionals.[233] Section II.A explored this first phenomena, rhetorical dehumanization. As argued in Section II.A, prosecutors have a strong incentive to engage in rhetorical dehumanization of the defendant, particularly given that most prosecu-

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defendant sitting at the defense table, and will be unable to not see race. And jurors, even the most well-meaning, will likely use that race as evidence.").

227. *See* Prasad, *supra* note 9. Note, however, that most prosecutors would deem the video evidence necessary to prove intoxication beyond a reasonable doubt. Intoxication was an element of the disorderly conduct offense.

228. *See* Johnson, *supra* note 4, at 1768.

229. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 867–68 (2017) ("This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments . . . . Time and again, this Court has been called [to] enforce the Constitution's guarantee *against state-sponsored racial discrimination in the jury system* . . . . Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" (emphasis added) (quoting Powers v. Ohio, 499 U.S. 400, 411 (1991))).

230. *See* Earle, *supra* note 102, at 1222 (noting that the major approaches to prosecutorial appeals to race traditionally focused on explicit, intentional appeals and failed to adapt to more modern, facially-neutral forms of racial appeals); Thompson, *supra* note 2, at 1247–48 (noting that legal scholars have tended to focus on exploring implicit bias in the criminal system).

231. *See* Bowman, *supra* note 2, at 367 ("[C]ourts should be particularly concerned about the potential effects of misconduct that involves depersonalization . . . . [R]esearch into moral disengagement suggests that depersonalization is a powerful tool that allows actors to reach decisions that they otherwise would not reach."); *see also id.* at 319 ("[T]he more we learn about human behavior, the less confident we should be about whether motivations are malicious, intentional, or even wholly conscious." (quoting Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 7 (2008))).

232. *See* discussion *supra* Sections II.A, II.B.1.

233. *See* Dora Capozza, Rossella Falvo, Jessica Boin, & Daiana Colledani, *Dehumanization in Medical Contexts: An Expanding Research Field*, 23 TESTING, PSYCHOMETRICS, METHODOLOGY APPLIED PSYCH. 545, 545–46 (2016).

tion offices base promotions and other status increases on conviction rates.[234] The second phenomena, referred to here as emotional dehumanization, is perhaps even more insidious and difficult to address.

On a personal level, prosecutors may engage in emotional depersonalization or dehumanization to create distance between themselves and the defendants they prosecute.[235] This is a common and recognized phenomenon among medical professionals seeking to distance themselves from patients and protect their continued ability to work.[236] The high caseloads of most line prosecutors[237] increase stress and decrease capacity for empathy in ways that mirror medical professionals who rely on dehumanization to manage stress and avoid burnout.[238] Researchers refer to this practice or response as defensive dehumanization: out-grouping or othering as a defense mechanism to justify one's actions and continue to do one's work.[239] Prosecutors may unconsciously engage in this type of self-defense to preserve their ability to work in a system that prioritizes assessing guilt and penalizing the guilty.[240]

While all actors in the criminal system are vulnerable to using dehumanization as a coping mechanism, research shows that those in power are more likely to dehumanize others to downplay the pain and suffering that they can cause to those over whom they exert power.[241] Based on these findings, it seems prosecutors, with their tremendous discretion and authority, would be particularly at risk for this type of behavior. Finally, this individual behavior can assume a group dynamic, and the culture of many prosecutor offices can include disparaging the lives of people involved in the criminal system.[242] Even prosecutors who begin with the

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234. *See* FAIR & JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 14 (2018).

235. *See* Omar Sultan Haque & Adam Waytz, *Dehumanization in Medicine: Causes, Solutions, and Functions*, 7 PERSPS. ON PSYCH. SCI. 176, 186 (2012) (finding that dehumanization is common in medical practice due to six major causes, which include among them mechanization, empathy reduction, and moral disengagement).

236. *See id.* at 182.

237. Gajwani & Lesser, *supra* note 212, at 70 n.2 ("'Line prosecutor' is an informal term for an attorney who regularly prosecutes cases in court, rather than supervising attorneys who are rarely themselves in court.").

238. Capozza et al., *supra* note 233, at 545. Note that the authors identify this as a dysfunctional strategy.

239. *See* < *You 2.0: The Empathy Gym*, NPR (July 29, 2019, 3:00 PM), https://www.npr.org/transcripts/744195502 (explaining that defensive dehumanization is primarily seen in research of health care professionals who "feel like they sometimes have to turn off their empathy and stop seeing their patients as people just so they can go on being people").

240. *See* Devon W. Carbado & L. Song. Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1979–80 (2018) (reviewing James Forman, Jr.'s *Locking Up Our Own: Crime and Punishment in Black America* and describing a similar phenomenon among police officers).

241. *See, e.g.*, Joris Lammers & Diederik A. Stapel, *Power Increases Dehumanization*, 14 GRP. PROCESSES & INTERGROUP RELS. 113, 115 (2011).

242. *See* GONZALEZ VAN CLEVE, *supra* note 57, at 57–65 (documenting prosecutors regularly referring to criminal defendants as "scum," "piece[s] of shit," "bad guys," "banana suits," and "mopes"); *see also* Butler, *supra* note 99 at 1984–85 (describing prosecutorial culture of referring to criminal defendants as "cretins," "bad guys," and "douchebags").

ability to empathize with defendants are vulnerable to this culture of cynicism and may find themselves making decisions that differ from their personal beliefs or values.[243] The next Section explores this outsized impact of office culture on individual prosecutor decision-making.

C. Internal Regulation Is Most Likely to Affect Prosecutorial Conduct

1. The Failure of External Regulation

Prosecutors theoretically face numerous possible sanctions for trial misconduct: admonishment or mistrial at the trial court level, reversal by the appellate court, civil suit from harmed parties, criminal charges, sanctions from the attorney disciplinary board, and discipline from supervising attorneys. Yet prosecutors rarely suffer any of these sanctions for appealing to racial bias at trial.[244] Appellate courts rarely overturn convictions even where prosecutorial misconduct is evident and intentional.[245] The Supreme Court shut the door to civil liability in *Imbler v. Pachtman*,[246] holding that individual prosecutors enjoy absolute immunity from suit for their misconduct.[247] The Court then further insulated prosecutors from accountability in *Connick v. Thompson*,[248] largely precluding suit against prosecutor offices for violations of defendant rights.[249] In other words, courts have failed to hold prosecutors responsible for their trial misconduct and have precluded individual claimants from attempting to do so. Prosecutors are also rarely subject to criminal charges—despite the Supreme Court resting its *Pachtman* decision on the potential for the criminal system to regulate prosecutor behavior.[250] Nor are prosecutors regularly held accountable by attorney disciplinary boards or professional associations.[251] Finally, due to the office culture

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243. *See* GONZALEZ VAN CLEVE, *supra* note 57, at 57–65; *see also* Medwed, *supra* note 3, at 53–55 ("Studies show that individuals within the same profession or organization frequently respect the decisions of their cohorts due to the power of 'conformity effects,' a desire to act in line with a peer."); Gajwani & Lesser, *supra* note 212, at 79–80.

244. GERSHMAN, *supra* note 117, at 75 ("Although all lawyers violate the rules on occasion, prosecutors seem to violate the rules most often and with impunity, and often without any significant oversight or accountability."); *see also* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §14:12 (2d ed. 2020) (finding that bar associations and supervising prosecutors take almost no measures against this type of trial misconduct); BAZELON, *supra* note 24, at 260 ("The evidence overwhelmingly shows that the Supreme Court's faith in professional discipline is misplaced.").

245. Lyon, *supra* note 101, at 332–33 ("Cases where courts have failed to overturn convictions in the face of prosecutorial misconduct based on racial bias vastly outnumber cases where convictions have been overturned."); *see also* Thompson, *supra* note 2, at 1257.

246. 424 U.S. 409 (1976).

247. *Id.* at 431.

248. 563 U.S. 51 (2011).

249. *See id.* at 54.

250. *Pachtman*, 424 U.S. at 428–29; *see* BAZELON, *supra* note 24, at 256 ("'Who exactly is going to prosecute prosecutors?' . . . The answer, almost always, has been no one." (quoting former federal appeals court judge Alex Kozinski)).

251. *See* BAZELON, *supra* note 24, at 259 ("A 2006 study of almost thirteen hundred accusations of misconduct showed that none resulted in professional discipline. The Northern California Innocence Project identified sixty-seven prosecutors whom judges found more than once suppressed evidence or committed other misconduct. Only six were publicly disciplined.").

described in Section III.B.5, misconduct rarely results in sanctions from office supervisors.[252]

One body that has held prosecutors accountable in the past decade is the electorate.[253] For that reason, the following Section explores the possibility of internally regulating prosecutorial trial narratives, assuming an electorate that continues to elect candidates who run on anti-racist platforms that seek to acknowledge and proactively address the racial bias that pervades the criminal system. This proposal also considers the possibility of internal regulation because the targeted conduct—trial storytelling—is infinitely more difficult to externally regulate than concrete, measurable actions such as charging decisions, jury selection, plea bargaining, and other more easily quantifiable prosecutorial conduct.[254]

2. The Potential for Internal Regulation

Evidence suggests that it is more effective to reform prosecutor offices through internal guidelines and cultural changes than through external or top-down directives.[255] The near-absolute discretion of prosecutors allows them to circumvent externally imposed rules or regulations aimed at modifying their behavior.[256] Several studies have pointed to the difficulty of regulating prosecutorial behavior through judicial oversight or legislative action.[257] However, "[e]vidence from a few American cities

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252. *See id.* at 289 ("ProPublica . . . looked at ten years of appeals, identifying thirty cases in which judges found that New York City prosecutors committed misconduct serious enough to require a new trial. Only one of these prosecutors was dismissed, demoted, or sanctioned in any way. Several got raises and promotions."). Bearing in mind how incredibly infrequent it is for prosecutorial misconduct to result in an overturned verdict and a new trial in the first place, these numbers seem especially dismal.

253. *See* David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 647–48 (2017) (chronicling a series of District Attorney races in which incumbents lost to progressive challengers who emphasized police accountability and alternatives to incarceration in their platforms).

254. *See* Johansen, *supra* note 65, at 86 (arguing that when it comes to trial argument we have to rely on "less definite standards that necessarily depend on self-regulating by individual lawyers").

255. Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 326–27 (2017) ("[I]t has been argued that the best way to achieve change in the criminal justice process is to change internal office culture, rather than imposing external legal requirements."); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128 (2008). However, such reforms rarely take place without significant public or external pressure. I am seeking to distinguish in this Section external regulation of prosecutors from bodies such as courts or disciplinary boards from external pressure on prosecutor offices from the public to change practices in accordance with community interests and well-being.

256. Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform? Given Their Autonomy—Only if They Want to be.*, ATLANTIC (May 18, 2016), https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/ ("'There is some evidence that DAs will, in the presence of reform laws, try to figure out ways' around those reforms . . . . 'They often have the ability to find ways to circumvent efforts at reform if they really want to.'" (quoting Fordham University criminal law professor John Pfaff)).

257. In a fairly unique study conducted by Marc L. Miller and Ronald F. Wright, the authors noted that the demand for judicial regulation of prosecutorial charging and plea-bargaining decisions did not result in any change in prosecutorial behavior. Miller & Wright, *supra* note 255, at 128 ("The

suggests that prosecutors can use their power of internal regulation to identify and respond positively to race and class disparities."[258] The few studies conducted in this area provide two important takeaways: (1) that office culture substantially affects how line prosecutors operate, and (2) that office expectations often define what it means to be a prosecutor.[259] Because prosecutorial office culture guides decision-making on an individual level, there seems to be some promise in electing progressive district attorneys who commit to instilling an anti-racist culture in their offices.[260]

Most attorneys go into prosecution believing they are principled and fair-minded.[261] They do not wish to be seen as prejudiced or discriminatory, nor do most consciously want or plan to discriminate.[262] This self-image gives chief prosecutors an opportunity to shape a positive office culture that encourages a race-conscious approach.[263] For example,

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judicial oversight project . . . has failed, even for the subset of prosecutor decisions that are based on improper bias.").

258. *Id.* at 161–62 ("[I]nternal regulation allows us to broaden the frame of reference and ask about systemic bias. The key virtue of shifting the frame from the individual to the system is that intent, blame, and causation all drop out of the picture.").

259. *See id.* at 131 (acknowledging that individual prosecutors may not be providing the true reasons for the decision to decline or indict, the possibility that biases or other factors could inform those choices, and that prosecutors later seek to sanitize their reasoning when asked to justify their decisions); *see also id.* at 154 (explaining that after reviewing the internal data collected by the New Orleans District Attorney Office documenting stated reasons for prosecutorial declinations, the authors found that the policy priorities of supervisors, social norms, and group expectations of the office heavily factored into individual prosecutor decision-making). *But see* BAZELON, *supra* note 24, at 263–66 (describing impediments to cultural change in prosecution offices).

260. Note that this is a momentous project far beyond the proposal outlined in this Article. This Article seeks to provide one piece of the decision-making framework that prosecution offices committed to a just criminal system would need to employ to meet those goals. *But see* BAZELON, *supra* note 24, at 149 ("Line prosecutors and their supervisors held the trajectory of a person's life in their hands every day. As the boss, you could sweep into office with lofty statements of principle, but changing the judgment calls made in court and redefining what it meant to get it right was not so easy.").

261. *See* Murray, *supra* note 92, at 1541 ("Prosecutors, like most Americans, view the criminal-justice system as fundamentally race neutral.").

262. *See* GONZALEZ VAN CLEVE, *supra* note 57, at 13 ("Many prosecutors express a desire (and capacity) for race-neutral justice—even creating boundaries between themselves and police officers when overt bigotry becomes apparent in the system. Prosecutors identify what I describe as a 'thin blue line of bigotry,' and locate racial bias as adjacent to (rather than within) their professional culture.").

263. *See* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2106 (2010) ("[I]t is likely to be easier to transform the culture within a prosecutor's office. The offices already have internal hierarchies and organizational command structures that 'are designed precisely to produce coherent group action.' And because the relevant employees are lawyers, they are trained to value 'a commitment to consistency and the justification of general rules in terms of public values rather than personal convenience.' Thus, if high-level officials within a prosecutor's office seek to change the norms within it, line prosecutors are likely to be highly susceptible to making the shift. That norm shifting could, in turn, go a long way toward mitigating violations." (footnotes omitted) (quoting Miller & Wright, *supra* note 255, at 179–80)). *But see* Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson, & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1173 (2012) ("Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-

a chief prosecutor can choose to define *fair-minded* as race-conscious rather than race-neutral and use factors other than convictions to measure success.[264] This should encourage line prosecutors to frame their decision-making around these goals and values.[265] This outsized influence of office culture on prosecutorial decision-making highlights the potential of the progressive prosecution movement to change how individual prosecutors operate.[266] While the progressive prosecution movement clearly faces significant barriers, it is equally clear that political pressure and community organizing can shift the priorities of local prosecutor offices.[267] Perhaps the most practical acknowledgement is simply that, in the current system, external or top-down directives executed without significant transformation of the culture of prosecution will meet tremendous resistance.[268] Unlike external regulation through bodies such as disciplinary boards and courts, electing district attorneys committed to eliminating racial bias and reducing the harm caused by criminal prosecution gives citizens a direct and immediate means to create change.

A proposal that asks prosecutors to police their own behavior is clearly subject to criticism from abolitionists and those seeking transformative change.[269] Again, this proposal intends to be part of a larger overall agenda. The decision-making model laid out in Part IV outlines a principled framework to use prosecutorial discretion to decrease the criminal system through declinations, dismissals, and alternatives to the adversarial system. In this way, the proposal seeks to function in parallel with the decarceration movement by suggesting that community resources and organizations are a better way to address much antisocial

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conception. Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes [themselves] to be objective, such belief licenses [them] to act on [their] biases.").

264. *See* BAZELON, *supra* note 24, at 297 ("Prosecutors have to commit themselves to performance measures like reducing incarceration, racial disparity, the rate of reoffending, and findings of misconduct.").

265. *See* Miller & Wright, *supra* note 255, at 178 (explaining there is evidence to suggest that individual prosecutors are affected by "the expectations that flow from courtroom working groups and from expectations within the office about what it means to act like a prosecutor"); *see also* Bowman, *supra* note 2, at 330 ("Professor Lawton Cummings argues that one moral disengagement mechanism that allows [line] prosecutors to commit misconduct without believing that they are doing anything wrong is an excessive focus on obtaining convictions, without any counterbalancing emphasis on following ethical rules.").

266. *See* Miller & Wright, *supra* note 255, at 129 ("[T]hat internal regulation can deliver even more than advocates of external regulation could hope to achieve."); Griffin & Yaroshefsky, *supra* note 255, at 304.

267. *See, e.g.*, Sklansky, *supra* note 253, at 647–48.

268. *See* Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1119–33 (2012) ("[B]ureaucratic life gives an employee plenty of ways to evade the commands of the boss.").

269. Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 756–58 (2018); *see also* Kate Levine, *We Cannot Prosecute Our Way to Making Black Lives Matter*, LAW & POL. ECON. PROJECT (June 10, 2020), https://lpeproject.org/blog/prosecuting-police-wont-make-black-lives-matter/.

conduct than the criminal system.[270] The more narrow question this Article seeks to answer is simply who is best positioned to mitigate or eliminate the impact of racialized trial narratives; this Article identifies prosecutors as the most fitting and effective actors.

IV. PROSECUTORS HAVE AN ETHICAL DUTY TO USE A COLOR-CONSCIOUS APPROACH TO COMBAT RACIAL INJUSTICE IN THE CRIMINAL SYSTEM

This Part lays out the various duties of prosecutors requiring that they avoid putting forth racialized narratives at trial. It then discusses the current "colorblind" jurisprudence that characterizes the legal system and most prosecution offices and argues that prosecutors have an affirmative duty to reject this myth and employ a color-conscious approach to prosecution. This Part articulates a color-conscious decision-making framework for prosecutors to address racialized trial narratives and proposes ways that prosecutorial discretion can correct the racial disparities of the criminal system through this framework.[271] This framework relies heavily on the concept of harm, which draws from both restorative justice practices and from scholars, such as Professor Irene Oritseweyinmi Joe, who have called for prosecutors to consider harm-reduction strategies in the exercise of prosecutorial discretion.[272] This Part raises and considers likely critiques of the framework and seats the proposal within the larger context of affirmatively dismantling the systemic racism pervading the criminal system by using a race-conscious approach in the prosecutorial gatekeeping function.[273]

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270. *See* BAZELON, *supra* note 24, at 201 ("Collecting data from 264 cities over twenty years, [NYU Sociologist Patrick] Sharkey found that each addition of a community-based nonprofit group accounted for a drop of approximately 1 percent in the murder rate.").

271. *See* Griffin & Yaroshefsky, *supra* note 255, at 316 ("The prosecutor's role as gatekeeper also carries the power to worsen or mitigate the influence of racial, social, and political inequality on criminal justice outcomes.").

272. *See* Joe, *supra* note 18, at 911–13.

273. Note that this proposal is not intended to place prosecutors at the forefront of institutional change, but rather to create a principled approach to decreasing their role and reach, focusing their work on cases that require the adjudicatory process to identify and address sources and causes of harm rather than antisocial behavior or weaponizing the criminal system to further enable white supremacy. For a recent critique of overreliance on prosecutors to solve issues facing the Black community and police brutality in particular, see Levine, *supra* note 269 ("We cannot rely on the criminal legal system to cannibalize itself."). But see Vida B. Johnson, *Prosecutors who Police the Police are Good People*, 87 FORDHAM L. REV. ONLINE 13, 16 (2018), arguing that "[t]he failure to police the police undermines the community's trust in law enforcement and other criminal justice institutions, especially in light of the vigor with which prosecutors prosecute the most vulnerable in our society."

A. Prosecutors Have an Ethical Duty to Avoid Racialized Trial Narratives

While the legal prohibition on appeals to racial animus is explicit,[274] the duty to avoid racialized trial narratives is not. However, some prosecutorial duties specifically disallow racialized trial narratives: (1) prosecutors' duty to seek justice; (2) their duty to protect the rights of the defendant; and (3) their duty to eliminate bias in the criminal system—particularly "historically persistent biases like race."[275]

1. Prosecutors Have a Duty to Seek Justice, Not Merely Convictions

The prosecutor's dual role as advocate and minister of justice creates a different set of duties, responsibilities, and ethics for prosecutors than for other attorneys.[276] The minister of justice role is enshrined in the ABA Standards, relevant case law, and ethical codes of every state as well as the federal government.[277] This duty to the interests of justice creates an asymmetry between prosecutors and defense attorneys.[278] Prosecutors have no client and, thus, do not represent the interests of any particular individual—not the complainant, the police, or any other party or witness in the case.[279] Rather, the prosecutor represents the public.[280]

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274. *See* STANDARDS FOR THE PROSECUTION FUNCTION § 3-6.8(c) (AM. BAR ASS'N 2017) ("The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty."); Lyon, *supra* note 101, at 324 ("The Supreme Court has made it clear that racial prejudice should never influence jury decisions."); *see also* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 867–69 (2017).

275. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6 (AM. BAR ASS'N 2017) ("[S]trive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority."). The ABA goes even further, suggesting that prosecutors should be "proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work." *Id.*

276. *See* Howard, *supra* note 2, at 408 ("Not only is the ethical duty of the prosecutor weightier, but commentators have called for a 'moral standard' as well, given the immense, unregulated discretionary power of the prosecutor's office." (citing Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 514 (1993))); *see also id.* at 407 ("[T]he role of the prosecutor is qualitatively different than that of other lawyers.").

277. Griffin & Yaroshefsky, *supra* note 255, at 305 ("This fundamental concept is articulated in both case law and ethical codes in all jurisdictions.").

278. *See* Medwed, *supra* note 3, at 39 ("[T]he prosecutor's role in the adversarial system differs substantially from that of the defense attorney; the prosecutor is a quasi-judicial officer.").

279. *Id.* ("Prosecutors in the United States represent 'the people,' not individual victims or the interests of special groups."); Griffin & Yaroshefsky, *supra* note 255, at 304 ("As is well known, prosecutors in the United States have dual roles, both constitutionally and ethically: prosecutors are ministers of justice and advocates. The prosecutor's role as minister of justice is well recognized, although not clearly described or defined. But it is well accepted that the prosecutor is a fiduciary who represents the sovereign and must make decisions for society at large—not for any individual client." (footnotes omitted)); *see also* Joe, *supra* note 18, at 888 ("[T]he prosecutor does not have a 'client' in the traditional sense of the word.").

280. *See* STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS'N 2017) ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim.").

Prosecutors are neither required nor even permitted to use every tool in their arsenal to pursue a conviction.[281] They are constrained by duties that do not apply to other legal advocates, such as a heightened duty of candor[282] and the duty to protect the constitutional rights of the opposing party.[283] These constraints illustrate the way that the prosecutor's role as a minister of justice compels prosecutors to forego certain trial tactics or strategies that would benefit them in their roles as adversaries.[284]

The professional and constitutional duties of the prosecutor to act in the interests of justice and serve the public warrant orienting prosecutorial decision-making around a view of the community as the client.[285] When prosecutors use a decision-making framework that positions the community as the client, then the critical question in deciding how to exercise prosecutorial discretion should be whether their action helps or harms the community. Prosecutors should refrain from actions that cause harm to their communities. Professor Joe argues that much misdemeanor prosecution imposes harm on communities and that where the harm posed by prosecution is greater than the harm posed by the illegal conduct, prosecutors should use their discretion to decline to prosecute to avoid causing greater harm to the community than necessary.[286] This is more likely to be the case, she argues, when it comes to misdemeanors and other nonviolent conduct, because the harm posed by the conduct is minimal and the harm posed by prosecution is great.[287] Failure to refrain from such a practice is a violation of the prosecutor's duty to act in the best interest of their client—the community.[288]

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281. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

282. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.4 (AM. BAR ASS'N 2017).

283. *Id.* § 3-1.2(b).

284. *See* Howard, *supra* note 2, at 411. Note, this is not intended to indicate that modern prosecutors are currently following these rules or upholding their duties. In fact, the opposite is often true.

285. *See* STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS'N 2017) ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim."). Other possible contenders for the role of client of the prosecutor could be the victim, the police, the law, or the defendant, all of whom Professor Joe eliminates for a variety of reasons. *See* Joe, *supra* note 18, at 888 ("Despite the absence of an easily recognizable and traditional client, the prosecutor engages in [their] prosecutorial practice on behalf of either some person, some group of persons, or some entity. This is a fundamental requirement of the legal process—that an attorney represents a particular party's interests. It is within this essential framework that ethical and professional rules provide clear terms and boundaries for appropriate attorney behavior on behalf of a client.").

286. Joe, *supra* note 18, at 887.

287. *See id.*

288. *Id.* at 894–95.

2. Prosecutors Have a Duty to Safeguard the Constitutional Rights of the Defendant

The prosecutor's duty to seek justice includes a duty "to see that the defendant is accorded procedural justice."[289] Both the Model Rules of Professional Conduct and the ABA Standards for the Prosecution Function define this duty.[290] Model Rule 3.8 outlines the special responsibilities of a prosecutor, most of which concern the prosecutor's duty to the defendant.[291] They include the prosecutor's duty to refrain from prosecuting a defendant without probable cause, the duty to ensure adequate representation and not to take advantage of unrepresented persons, and the duty to disclose mitigating and exculpatory evidence.[292] This highlights the unusual role of the prosecutor and underscores the way that the prosecutor's role as an adversary or advocate is subordinate to their role as a minister of justice.[293] Similarly, the ABA Standards state that the prosecutor should "respect the constitutional and legal rights of all persons, including suspects and defendants."[294] At times, this duty may translate to a necessity to dismiss. For example, in a case where the police clearly violated the Fourth Amendment to obtain the only evidence against a defendant, to uphold the constitutional rights of the defendant the prosecutor should dismiss the matter, regardless of perceived guilt or innocence.[295]

Prosecutorial arguments that invoke or rely on racialized stock stories do not respect the constitutional rights of defendants, regardless of the prosecutor's intent. They impermissibly ask jurors to consider information outside of the court record[296] and risk convictions tainted by ra-

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289. Howard, *supra* note 2, at 407 (quoting MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983)).

290. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983); STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (AM. BAR ASS'N 2017).

291. *See* MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983).

292. *Id.* The recognition by prosecutors of the need to protect the rights of criminal defendants predates both the Model Rules and the ABA Standards.

293. *See* Cicchini, *supra* note 2, at 890 ("[A] prosecutor's duty, above being an advocate for the State, is to ensure that a defendant is afforded a fair trial." (internal quotations omitted) (quoting Claire Gagnon, *A Liar by Any Other Name? Iowa's Closing Argument Conundrum*, 55 DRAKE L. REV. 471, 478 (2007))); Joe, *supra* note 18, at 898 ("As Professor Bennett Gershman notes, the prosecutor has to maintain a delicate balance in her representative decisions because she owes allegiances to both the public to protect it from harm and the defendant to protect her constitutional rights." (citing Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 579 (2005))); *see also* Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 470–71 (2009) ("It was this recognition of a need for legal reform that served as the impetus for twenty-two attorneys general to file an amicus brief in support of Clarence Earl Gideon, in his request to obtain counsel.").

294. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017).

295. *See* Medwed, *supra* note 3, at 39 ("For over 150 years, courts and scholars have consistently urged for the image of the American prosecutor as a 'minister of justice,' a person who, in effect, never loses a case, whether conviction or acquittal, as long as the outcome is fair."). This duty will be explored further in a following Section discussing the legal system's acceptance of outcomes unrelated to guilt or innocence in favor of other competing societal interests and needs.

296. *See* STANDARDS FOR THE PROSECUTION FUNCTION § 3-6.9 (AM. BAR ASS'N 2017) ("The prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record."); Earle,

cial bias.[297] Allowing racial stereotypes or stock stories to impact juror decision-making violates the defendant's constitutional right to a fair trial and is inconsistent with the prosecutor's duty to safeguard that right.[298]

3. Prosecutors Have a Duty to Eliminate Bias

ABA Standard 3-1.6(b) states: "A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work."[299] The phrase "in all of its work" clearly includes the most outward-facing aspect of prosecution—the criminal trial.[300] Note that the language of the standard is not one of mitigation but of elimination—indicating that attempts to mitigate the effects of racial bias would be insufficient. The affirmative language of the standard—"proactive," "detect," "investigate"—highlights the active role prosecutors should take in this work.[301] The standard then goes even further, suggesting that prosecutors should be responsible not only for any biases they bring into the system but also for any disparate impacts their policies or actions may have on the communities in their jurisdiction.[302] This directly supports Professor Joe's argument that prosecutors should refrain from actions that cause harm to the community.[303] This focus on impact, rather than intent, is consistent with the framework proposed in this Article because it holds prosecutors responsible for the effect of a racialized narrative, even when the prosecutor does not intend to invoke a racialized stock story or stereotype.

Many organizations and individuals within the progressive prosecution movement have included a commitment to eliminate bias, particular-

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supra note 102, at 1216 ("The prosecutor, in soliciting judgment based on status, thus goes beyond the evidence and the relevant issue of the defendant's conduct.").

297. Lyon, *supra* note 101, at 324–25 ("[A]ppeals to either [race or nationality] threaten the fairness of a trial. This prosecutorial conduct . . . violates a defendant's due process and equal protection rights.").

298. *See* Joe, *supra* note 18, at 902–03 ("[T]he Constitution requires the prosecutor to consider the defendant in some of [their] decision making . . . . [P]rosecutors do not have as wide a latitude of pursuing their assigned objective with little regard for the opponent as attorneys in other justice contexts. Instead, the prosecutor must take the defendant's rights into account and ensure that the criminal process moves in a fair and just manner for the defendant.").

299. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6(b) (AM. BAR ASS'N 2017). Note that these standards are aspirational and nonbinding.

300. *Id.*

301. *See id.*

302. *Id.* ("A prosecutor's office should regularly assess the potential for biased or *unfairly disparate impacts* of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that cannot be properly justified." (emphasis added)).

303. *See* Joe, *supra* note 18, at 913 ("If an aggressive misdemeanor process prevents large swaths of the community from fully integrating in a healthy manner and undermines the community's ability, then the prosecutor must take that into account and amend [their] decisions accordingly.").

ly racial bias.[304] For example, Fair and Just Prosecution, an organization dedicated to bringing together newly elected progressive prosecutors to promote a fairer and more equitable criminal system, created a publication with the Brennan Center for Justice and the Justice Collaborative called *The 21 Principles for the 21st Century Prosecutor*.[305] While the majority of these proposals and platforms do not address trial narratives, Principle 21 implores prosecutors to "Employ the Language of Respect" by changing the narrative of crime and avoiding dehumanizing language and stock stories.[306] Avoiding these stock stories, of course, requires that prosecutors can identify racial stereotypes—both implicit and explicit—in the first place.[307]

B. Prosecutorial Discretion Gives Prosecutors Several Ways to Avoid Racialized Trial Narratives

The scope of prosecutorial discretion is vast. Prosecutors are not required to bring or pursue criminal charges, regardless of evidence of wrongdoing.[308] Prosecutors have the authority to decline to charge a matter, select which charges to pursue, refer a case to a diversion or alternative disposition program, or agree to dismiss or lower charges if the defendant meets certain conditions (i.e., compliance with drug treatment or payment of restitution).[309] In making these decisions, prosecutors typical-

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304. *See, e.g.*, Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations*., INTERCEPT (Mar. 20, 2018, 1:59 PM), https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/; District Attorney Rollins Releases Comprehensive Policy Memo, SUFFOLK CNTY. DIST. ATT'Y (Mar. 25, 2019), https://www.suffolkdistrictattorney.com/rachael-rollins-policy-memo ("[P]arts of [the memo] lay out office-wide goals to minimize the impact of the criminal justice system and reduce racial and socioeconomic disparities . . . .").

305. FAIR & JUST PROSECUTION, *supra* note 234, at 3.

306. *Id.* at 25.

307. Although articulation is beyond the scope of this Article, clearly this will require significant training of prosecutors on implicit bias, anti-racism, the history of the criminal system and the racial disparities between offending and arrest rates, as well as education on common racial stereotypes and tropes to avoid in trial. Yaroshefsky, *supra* note 21, at 36 ("A good prosecutor must acknowledge [their] role in creating mass incarceration, develop a deep understanding of the history and effects of racial discrimination, and implement remedial policies."); *see also* Murray, *supra* note 92, at 1541 ("Prosecutors should not only strive to acquire insight into how race operates in the criminal-justice system, but also to allow these insights to guide relevant aspects of their practice, including the ways in which they interact with police, charge crimes, negotiate plea agreements, and present their case to jurors."). Note that Murray's article focuses on charging decisions and plea bargains and less on trial narratives. This Article seeks to fill that gap.

308. *See* GERSHMAN, *supra* note 117, at 19 ("[T]he fact that a prosecutor has good cause to believe that somebody committed a crime does not mean that the prosecutor necessarily should charge that person . . . .").

309. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (AM. BAR ASS'N 2017) ("[T]he prosecutor is not obliged to file or maintain all criminal charges which the evidence might support."). The Standard articulates several nonexclusive factors to take into consideration in filing, declining, maintaining, and dismissing criminal charges. The list included in the text above is by no means exhaustive and is intended to illustrate simply how much leeway and ability prosecutors have to think and act creatively in addressing alleged criminal conduct. It is also not meant to overstate the power of prosecutors generally. While prosecutors have the most power, authority, and discretion at the charging decision, their power can also be seen as relational and contingent. *See* Daniel Fryer,

ly engage in some sort of decision-making to determine what they believe a fair outcome in the case would be.[310] Prosecutors can use their discretion as a tool to eliminate bias and racial injustice if during the charging decision prosecutors consider whether the charges they choose to bring "have them in a role of promoting justice."[311] While the charging decision is critical, prosecutors should ask themselves this question at each stage of decision-making to determine whether to maintain the charges and, if so, how to pursue them. This Section will lay out two possible options available to prosecutors in this position: (1) dismissals or declinations, and (2) referrals to restorative justice processes.

1. Declining and Dismissing Charges[312]

The single greatest power that the prosecutor has is the power to decline prosecution.[313] The charging decision is entirely discretionary[314] and largely unreviewable.[315] Even where sufficient probable cause exists to believe that a suspect has committed a crime, the prosecutor may decline to prosecute or dismiss the matter based on the consideration of

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Race, Reform, & Progressive Prosecution, 110 J. CRIM. L. & CRIMINOLOGY 769, 771 (2020) ("To the extent prosecutors have a lot of power, it is because other actors permit them to have it.").

310. Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1216–17 (2016) ("A prosecutor who exercises discretion to reduce the collateral consequence is similar to one who makes a sentence concession based on how the penalty will impact the defendant. In both cases, the prosecutor assesses whether the impact of the conviction—regardless of whether it is civil or criminal—serves the state's interest in punishment, or whether it creates too much harm.").

311. Podgor, *supra* note 293, at 469.

312. While I address declination and dismissal jointly, it is important to note that they generally function differently. Generally speaking, prosecutors have greater discretion and judges less oversight in declinations. *See, e.g.*, Commonwealth v. Webber, No. SJ-2019-0366, 2019 Mass. LEXIS 766, at *2–3 (Mass. Sept. 9, 2019); *SJC Sides with DA Rollins, Says Judge Cannot Force Prosecution of Those Arrested During 'Straight Pride Parade'*, WCVB (Sept. 9, 2019, 8:23 PM), https://www.wcvb.com/article/sjc-sides-with-da-rollins-says-judge-cannot-force-prosecution-of-those-arrested-during-straight-pride-parade/28968259. There is generally no judicial oversight for the initial charging decision. *See* STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.2(a) (AM. BAR ASS'N 2017) ("[T]he decision to institute formal criminal proceedings is the responsibility of the prosecutor."). The ABA Standards for the Prosecution Function require prosecutors to view the charging decision as an ongoing decision—in other words, as the circumstances or information changes during the life of a case, prosecutors must continually consider whether pursuing charges is still appropriate. Addressing the mechanics of the various state courts both in law and in practice on permitting prosecution dismissals is beyond the scope of this paper. *Id.* at § 3-4.3 ("After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.").

313. *See* Natapoff, *supra* note 24, at 1330; Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 23 (1998) ("The charging decision is one of the most important decisions a prosecutor makes.").

314. *See* Gershman, *supra* note 276, at 513 ("The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law.").

315. *See* Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMPAR. L. 532, 540 (1970) ("[T]he prosecutor's discretion in filing a lesser charge is not even in theory subject to any formal judicial control."); GERSHMAN, *supra* note 117, at 22 (describing the Fifth Circuit Court of Appeals holding that "a prosecutor's discretion not to sign or prosecute an indictment cannot be coerced or reviewed by the courts").

various factors.[316] Among the enumerated factors to consider in making this decision are "the extent or absence of harm caused by the offense," "the background and characteristics of the offender," and "unwarranted disparate treatment of similarly situated persons."[317]

The National District Attorney's Association Prosecution Standards also include a list of enumerated factors to consider in the charging decision, including "[u]ndue hardship that would be caused to the accused by the prosecution" and "[w]hether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction."[318] These standards articulate a harm-reduction framework for decision-making by discouraging prosecution that poses harm to the accused that is disproportionate to the alleged offense or prosecution of harmless conduct.[319] The commentary to these standards includes the following: "While the [charging] decision may be very easy at times, at others it will require an examination of the prosecutor's beliefs regarding the criminal justice system, the goals of prosecution, and a broad assortment of other factors."[320]

For example, "if an aggressive misdemeanor practice fractures the client's otherwise stable foundation, then a prosecutor seeking to abide by [their] ethical and professional obligations would need to reconsider [their] approach."[321] If we view the community as the prosecutor's client, and if a particular prosecutorial approach poses harm to the community, particularly harm that outweighs the benefit of prosecution, then prosecutors should eliminate that practice.

As argued in Section II.B, racialized stock stories and stereotypes pose significant harm to the community. Considering the community as the prosecutor's client provides a clear, articulable framework for the ethical exercise of prosecutorial discretion.[322] The prosecutor facing a decision of whether to maintain or dismiss charges would engage in a balancing test to determine if the harm posed to the community outweighs the necessity for or benefit of a conviction.[323] In such a balancing

316. Davis, *supra* note 313, at 21–22; STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (AM. BAR ASS'N 2017) ("In order to fully implement the prosecutor's functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not oblig[ated] to file or maintain all criminal charges which the evidence might support.").

317. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4(a)(iii), (v), (ix) (AM. BAR ASS'N 2017).

318. NATIONAL PROSECUTION STANDARDS § 4-1.3 (NAT'L DIST. ATT'YS ASS'N 2009).

319. *See id.*

320. *Id.* at § 4.1 cmt.

321. Joe, *supra* note 18, at 908 ("Depending on the client, the prosecutor may be required to refrain from pursuing certain practices lest it be a 'means' of achieving an 'objective' that the client would dismiss as too harmful upon adequate consultation.").

322. *See id.* at 900.

323. *See* Podgor, *supra* note 293, at 465–66 ("A declination is warranted when there is a 'good cause' for not prosecuting, and that good cause would be in accord with 'public interest' goals.").

test, misdemeanor offenses would be easier to justify dismissing.[324] Felony matters, or offenses alleging harm or violence to another, may be more difficult. Yet the harm posed by the racialized stock story or narrative is still present. In those cases, a different approach may be preferred.

2. Restorative Justice Options

When the prosecutor determines the State's narrative will raise or trigger a racialized stock story or stereotype but feels that the harm caused by the defendant was too grievous to dismiss the charges, restorative justice offers one potential alternative. Restorative justice practices used in lieu of the typical adjudicatory process could avoid the harm created by the racialized narrative while still providing a mechanism for accountability and restoration.[325] Several jurisdictions have used restorative justice practices with considerable success, as measured by both victim satisfaction and offender recidivism rates.[326] This remains true even in jurisdictions that have used restorative justice practices as an alternative to respond to violent felonies such as sexual assault and homicide.[327] "Established programs have demonstrated that restorative jus-

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324. *See* Griffin & Yaroshefsky, *supra* note 255, at 322 ("[T]o the extent that minor offenses remain in the criminal justice system because they are not decriminalized, greater discretion should exist for dismissals by prosecutors.").

325. Restorative justice is defined as "a process to involve, to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible." HOWARD ZEHR & ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 40 (2003). Restorative justice practices can take various forms, including victim-offender mediation, community circles, and survivor panels. An in-depth discussion of the practices and potential of restorative justice to address harm is beyond the scope of this Article, but it is clear from the organizations and jurisdictions holding such practices that they are a viable alternative to the formal adjudicatory system and may in fact be more appropriate in many criminal cases. Consider, for example, the abysmal rates of reporting, charging, and convictions in sexual assault cases in the adversarial criminal system. Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 322–23 (2020) (noting that "the conviction rate for rape and sexual assault remains notoriously low, estimated at approximately 12 percent in 2007, and less than one percent from 2010–2014"). The adjudicative process is so injurious to victims of sexual assault that the vast majority of sexual assaults go unreported.

326. *See* BAZELON, *supra* note 24, at 172 ("Danielle Sered's program in Brooklyn, Common Justice, was achieving results[,] . . . 90 percent of the victims who were invited to participate chose to participate and agreed to have the person who hurt them go through the program in place of a prison sentence. Less than 7 percent of the people who'd done the harm had to leave the program because of a new conviction.").

327. *See, e.g.*, Bazelon & Green, *supra* note 325, at 298 n.21 ("RESTORE, a federally funded pilot program in Pima County, Arizona . . . operated from 2004–2007. In all, 22 misdemeanor and felony sexual assault cases were referred by prosecutors to the program . . . . RESTORE's data found that two-thirds of felony-referred defendants and 91 percent of misdemeanor-referred defendants successfully completed the program and that 90 percent of all participants believed that 'justice was done.'"); *Common Justice Model*, COMMON JUST., https://www.commonjustice.org/common_justice_model (last visited Mar. 24, 2021); *Restorative Justice Project*, IMPACT JUST., https://impactjustice.org/impact/restorative-justice/ (last visited Mar. 24, 2021); *see also Victims Confront Offenders, Face to Face*, NPR (July 28, 2011, 1:00 PM), https://www.npr.org/2011/07/28/138791912/victims-confront-offenders-face-to-face; LAWRENCE W. SHERMAN & HEATHER STRANG, THE SMITH INST., RESTORATIVE JUSTICE: THE EVIDENCE 4 (2007) (making the following findings on restorative justice around the world, including the United Kingdom, Australia, and the United States: findings in at least two tests showed both victims and offenders had more satisfaction with restorative justice than the criminal system, restorative justice de-

tice, rigorously applied, is one such alternative even in cases involving extreme violence."[328]

Restorative justice practices still ask the involved parties to tell their story of what occurred,[329] but unlike the adversarial process, they do not set out to produce or identify a singular truth.[330] Rather, they seek to identify the cause of harm, give the harmed parties a full opportunity to tell their story and identify what they need to heal, and provide the individual who caused the harm an opportunity to restore both the harmed party and the community.[331] Because the process does not focus on fact-finding, it does not require the parties to shape their narratives into their most persuasive forms. Moreover, because restorative justice is more about the process of restoration than any particular outcome, there is more opportunity for nuanced and complex conversations that do not lend themselves as easily to stereotyping and other cognitive shortcuts that are inherently vulnerable to bias.[332] There is no cross-examination in restorative justice practices, and the rules of evidence and criminal procedure do not apply.[333] For all of these reasons, racialized stock stories

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creased crime victims' desire for violent revenge, restorative justice substantially reduced repeat offending for some offenders, and restorative justice reduced crime victims' post-traumatic stress symptoms and related costs). The criminal systems in Colorado and Vermont also regularly use restorative justice to address criminal behavior.

328. Bazelon & Green, *supra* note 325, at 329; *see also* Gajwani & Lesser, *supra* note 212, at 86–91 (citing the serious types of cases resolved by the Office of the Attorney General for the District of Columbia as including felony robbery cases, assaults with serious injuries, burglaries, carjacking, stabbing, and sexual assault cases).

329. Gajwani & Lesser, *supra* note 212, at 86 ("In a restorative justice conference, the person who committed the crime must recount what [they] did and why it was wrong to the person whom [they] hurt, in front of that person's family and supporters, and [their] own family and supporters. Then, [they] must listen as each person who was hurt describes how [they] w[ere] affected by the crime.").

330. *See* Scheppele, *supra* note 69, at 2080 (describing the court resolution process as one in which the court seeks to adopt a particular story in order to resolve a particular legal question).

331. *See* Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 351 (2005); Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 CARDOZO J. CONFLICT RESOL. 85, 90 (2006) (describing a two-hour restorative process as beginning with story sharing by the victim and offender—including their perspectives and feelings about the incident and its impact on their lives—the opportunity to ask questions of one another, and the discussion of a restitution plan for the offender to restore the victim and the community to wholeness).

332. *See* discussion *supra* Section II.A; Gajwani & Lesser, *supra* note 212, at 90 ("[T]he restorative justice conference is an antidote to the reductionism of the criminal justice system . . . ."); *see also* Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 313 (2003) ("The real goal of restorative justice is to achieve *reconciliation* between the offender and the victim . . . . When that goal is reached, we say that the offender and the victim have reconciled.").

333. *See* Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J.L. & POL'Y 301, 314 (2007) ("The procedural safeguards afforded by a formal court process, such as the rules of evidence, are rarely a part of restorative justice mediations and conferences."); Ann Skelton, *Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa*, 2007 ACTA JURIDICA 228, 234 (2007) ("There is also a tendency to allow discussions about the history of the case in order to understand its genesis, thus strict rules of evidence tend to be relaxed." (footnote omitted)).

and stereotypes may be less likely to appear and significantly less likely to affect the outcome.

C. Prosecutors Must Use a Color-Conscious, Rather Than a Colorblind, Approach to the Exercise of Prosecutorial Discretion

The colorblind rhetoric obscuring the deeply entrenched, pervasive, and systemic racism of the criminal system requires a race-conscious response.[334] System actors rely on the myth that the criminal system and its actors function in a race-neutral manner to "stymie efforts to reduce" the racial disparities of the system and achieve justice for communities and individuals of color.[335] For prosecutors to act in accordance with their ethical duty to seek justice, they must reject the myth of colorblindness and enact a color-conscious decision-making framework. This Section defines colorblindness and examines the ways it protects the structural racism and white supremacy of the criminal system. It then explores a framework for color-conscious prosecutorial decision-making.

1. The Myth of Colorblindness Impedes Reform

Some scholars trace the myth of a colorblind legal system back to 1896 and Justice Harlan's dissent in *Plessy*.[336] The Justice's embrace of the ideology allowed opponents of desegregation to use "the language of colorblindness, enshrouded with the moral raiment of the civil rights movement, [as] cover for reactionary opposition to race-conscious remedies."[337] Colorblindness remains the dominant framework through which the Supreme Court views and addresses racial inequality in the criminal system.[338] Sociologists Nicole Gonzalez Van Cleve and Lauren Mayes

334. *See* López, *supra* note 49, at 1006 (describing the civil rights cases of the 1960s and 1970s as signaling a growing recognition that achieving equality demanded going beyond proscribing openly discriminatory practices and to requiring race-conscious efforts capable of transforming embedded patterns and entrenched oppressions).

335. *See* L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 888 (2017) ("To the extent that courtroom actors engage in colorblindness, it will stymie efforts to reduce the effects of implicit racial bias on behaviors and judgments. In fact, in social science studies, colorblindness 'has been shown to generate greater individual expressions of racial bias on both explicit and implicit measures.'" (quoting Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190, 193 (2013))).

336. López, *supra* note 49, at 992–93 ("Contemporary proponents of reactionary colorblindness almost invariably draw a straight line from Harlan's 1896 *Plessy* dissent to their own impassioned advocacy for race blindness in all circumstances today."). Haney López goes on to note that nearly all contemporary citations ignore the preceding paragraph, in which Harlan acknowledges the supremacy of the white race and its ensured perpetuation through colorblindness in the law. *Id.* at 993. David Simson, however, traces the colorblind ideology back to the *Dred Scott* decision. *See* Simson, *supra* note 49, at 678–79.

337. López, *supra* note 49, at 989.

338. *See* Salvador Mendoza, Jr., *When Maria Speaks Spanish:* Hernandez*, the Ninth Circuit, and the Fallacy of Race Neutrality*, 18 CHICANO-LATINO L. REV. 193, 204 (1996) ("The first concern is the Court's colorblind analysis [in Hernandez v. New York, 500 U.S. 352, 359–60 (1991)]. This standard creates the illusion of protection while maintaining the central problem of modern racial discrimination—its covertness."); Barnes, *supra* note 60, at 731–32 ("[T]he U.S. criminal justice system purports to be blind to identity, but operates in a manner where identity-group mem-

identify colorblindness as the dominant racial ideology of the criminal system.[339] They note that this ideology operates to create the illusion of racial-neutrality while exacerbating racial disparities; they argue that "colorblind racism denies the historically rooted and persistent structural underpinnings of racial inequality . . . . This leads to a contemporary brand of racism that is subtle, deeply institutionalized, and appears non-racial."[340] The myth of colorblindness obscures the racial inequality of the criminal system, thereby insulating it from critique or change.[341]

Prosecutors tend to invoke colorblindness or race-neutrality when criticized about particular exercises of prosecutorial discretion that appear to benefit white defendants or cater to white complainants.[342]

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bership, especially in certain disfavored groups, strongly tracks disparate outcomes."); López, *supra* note 49, at 994–95 (discussing *Williams v. Mississippi*, in which the State of Mississippi conceded its intent to discriminate by race in its facially race-neutral voting restrictions: "Even where a state confessed its discriminatory intent, so long as it accomplished its malignant purpose in a manner that did not employ a racial classification, the Court found the Constitution satisfied"). David Simson characterizes colorblindness as intimately tied to the notion that race is solely skin color and has no independent meaning or social definition. He refers to this as part of a "whiteness as innocence" ideology. Simson, *supra* note 49, at 638–39.

339. Nicole Gonzalez Van Cleve & Lauren Mayes, *Criminal Justice Through "Colorblind" Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 LAW & SOC. INQUIRY 406, 407 (2015).

340. *Id.* at 412 (citations omitted).

341. *See* Simson, *supra* note 49, at 687. Simson describes Chief Justice Roberts's recent opinion in *Parents Involved* as an "extreme version of colorblindness" because:

> [H]e suggested that what had been wrong with racial segregation in schools was merely that it classified schoolchildren by race. This stance necessitates a view of race that is completely severed from social meaning and history because it treats the use of race as equally abhorrent in all circumstances. It forbids essentially all race-conscious remediation while turning a blind eye to practices that continue to subordinate communities of color so long as such practices do not explicitly classify by race.

Id.; *see also* Mendoza, Jr., *supra* note 338, at 196 ("[I]gnoring the fact that racism is still prevalent in our court system only perpetuates the problem of racial discrimination.").

342. *See* Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1143–44 (2003) ("Colorblind claims propound a prosecutorial stance of neutrality toward race and race cases . . . . The contemporary legacy of colorblind prosecution is color-coded pretext. Driven by mixed motives, the twin desires to stand presently unbiased and rectify past injustice, color-coded claims maintain a disinterested stance while surreptitiously evoking, and often exploiting, racial status and stereotypes."). Consider, for example, the *Jena Six* case. The prosecutor, Reed Walters, argued that his approach in the case was beyond critique because he acted in a colorblind manner. In brief, the high school the charged students attended had on its grounds what was referred to as "a white tree," because, by understood custom, only white students sat under it. The day after a Black student sat under the tree, three nooses were hung from it. Some days later, a group of Black male students assaulted a white male student. Following this incident, a white teen threatened a group of Black teens with a gun, and the group disarmed him. Only the Black teens were charged, and one was charged as an adult. The white teen was not charged with any offense. Walters's defense was that he was simply following the law with no consideration of race. He penned an op-ed to that effect. Angela J. Davis, *The Prosecution of Black Men*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, *supra* note 26, at 178, 189–92; *see also Race, Violence . . . Justice? Looking Back at Jena 6*, NPR (Aug. 30, 2011, 12:00 PM), https://www.npr.org/2011/08/30/140058680/race-violence-justice-looking-back-at-jena-6 ("Now, the professor said that justice played out in this case in Jena. Well, it played out because we came down there and marched. It was because of marching and coming together that the prosecutors had to re-examine how they were charging this case." (quoting talk radio host Warren Ballentine responding to Stanford Law Professor Richard Ford)). This is important to note in considering the

Whether the bias driving these decisions is implicit or explicit, the result is ultimately the same—disparate impacts based on race.[343] Not only is the prosecutor's claim of race neutrality almost certainly false,[344] it also "pervades long-standing prosecutorial norms and practice traditions permitting the colorblind, and alternatively color-coded, tolerance of post-bellum segregation to continue unabated."[345] Without a shift to a color-conscious approach to decision-making, prosecutors will continue to both exacerbate and perpetuate racial disparities in the criminal system.

2. The Alternative to Colorblindness Is Color-Consciousness

Accepting that a colorblind approach will replicate the structures of white supremacy that shape the criminal system warrants a radically different approach to the exercise of prosecutorial discretion.[346] "One of the most high-impact—but also complex and controversial—ways that prosecutors can contribute to racial justice is by creatively using their discretion to reshape the law according to the demands of racial justice."[347] In other words, the greatest tool prosecutors have to eliminate improper bias in the criminal system is the same one that often raises concerns about permitting bias to persist—broad prosecutorial discretion.[348] In the 1990s, Professor Paul Butler argued that because police deliberately target Black men for drug trafficking arrests, prosecutors should decline to prosecute these cases to avoid perpetuating racial disparities in the criminal system.[349] While Professor Butler's proposal raised objections, it also recognizes the degree to which prosecutorial discretion creates opportunities for change. "Broad prosecutorial discretion provides prosecutors with the ability to move beyond merely matching conduct with statutes. It allows prosecutors to correct bias within our legal system."[350] The following Section seeks to articulate a race-conscious decision-making framework for the exercise of prosecutorial discretion based not on specific types of charges but rather on cases where trial narratives would implicate or invoke racialized stock stories or stereotypes that pose harm to the defendant and the community.

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direct impact that communities can have on prosecutorial decision-making, which they typically do not have when it comes to influencing the courts.

343. *See* Davis, *supra* note 56, at 835–36 ("Most racial disparities are caused and/or exacerbated by prosecutors' race-neutral decisions which may be influenced by unconscious racism. These race-neutral decisions, even though unintentional, may have a racial impact.").

344. *See, e.g.*, Davis, *supra* note 342, at 189–92; *see also* Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1287 (2008) ("Locating race outside law and the criminal justice system artificially immunizes prosecutors from bias and insulates the adversary process from prejudice.").

345. Alfieri, *supra* note 344, at 1296 (footnote omitted).

346. *See* Butler, *supra* note 22, at 847 ("[H]istorical understanding that colorblindness will perpetuate the dominance of the white race is a powerful argument for affirmative action.").

347. Murray, *supra* note 92, at 1580 (citing Podgor, *supra* note 293, at 474).

348. *See* Podgor, *supra* note 293, at 474.

349. *See* Butler, *supra* note 22, at 844.

350. Podgor, *supra* note 293, at 474 (criticizing the *Jena Six* prosecution and the prosecutor's argument that he was simply matching conduct to the applicable criminal statutes).

a. Color-Conscious Prosecution in Cases Where the Racialized Trial Narrative Risks Harm to the Defendant

The prosecutor's duties to seek justice and protect the rights of the defendant require prosecutors to ensure that neither racial animus nor implicit bias play a part in convicting a person of criminal charges.[351] This Section outlines what fulfilling that duty might look like in practice using the first case from the Introduction—the assault charge. In that case, the defendant's size and race, along with the allegations of assault, risk triggering the brute stereotype at trial before a predominantly white jury.[352] Given the optics and the charge, it seems unlikely that a prosecutor could eliminate the possibility that the racialized stock story of "Black-male dangerousness" would influence juror decision-making.[353]

To avoid this outcome, the prosecutor assigned to the case would ask the following question: Does the need to address the alleged conduct outweigh the harm posed by a potentially biased verdict? The prosecutor would consider various factors in answering that question, including "the extent or absence of harm caused by the offense"; "the impact of prosecution or non-prosecution on the public welfare"; "the background and characteristics of the offender, including any . . . efforts at rehabilitation"; "the views and motives of the victim or complainant"; "unwarranted disparate treatment of similarly situated persons"; "whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies"; and others.[354] The chief prosecutor could outline additional factors for line prosecutors to consider, a step that several progressive prosecutors have taken after assuming office.[355]

Determining the presence or absence of these various factors would likely necessitate a conversation with the complainants and other witnesses regarding the presence and extent of any harm caused—a conversation that does not always take place early in the criminal process, if at all. If the complainants indicated that they were not harmed by the incident or felt that their own actions were equally at fault for the harm caused, the prosecutor might dismiss the charges.[356] Without a corresponding harm weighing in favor of prosecution, the potential harm of a

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351. *See* discussion *supra* Section IV.A.2.

352. Note that the jurisdiction in which this case was being tried guaranteed an all-white or nearly all-white jury.

353. *See* Dunn, *supra* note 135, at 2395 (quoting David Dante Troutt, Screws, Koon, *and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 116–17 (1999)).

354. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4(a) (AM. BAR ASS'N 2017).

355. *See* sources cited *supra* note 304.

356. In the actual case, this was in fact the position of the complainants. Both complainants were intoxicated at the time of the incident. One admitted to instigating the fight and agreed dismissal was appropriate.

verdict tainted by racial bias would necessitate avoiding trial and dismissing the charges.

If, on the other hand, the complainants were truly harmed, and the prosecutor believed that the harm posed to the complainants or community justified maintaining the charges irrespective of the harm posed by the trial narrative, then dismissal may be inappropriate. However, the prosecutor should still endeavor to avoid trial by using their discretion to design a disposition that avoids putting a racial stereotype into the public sphere while still seeking to hold the offender accountable. In less serious cases, that may be something like a conditional dismissal, where the prosecutor agrees to dismiss the charges if the defendant pays restitution or successfully completes a diversion program, classes (such as parenting or antitheft classes), or a course of treatment (such as a substance abuse or batterers intervention program).[357] In cases with more serious or lasting harm, a referral to a restorative process may be more appropriate.[358] In this case, if the incident harmed the complainants or the witnesses, referral to a restorative process would allow the parties to tell their stories, hold the defendant accountable, and jointly create a plan to make amends and restore the community.[359]

b. Color-Conscious Prosecution Where the Racialized Narrative Risks Harm to the Community

A more complex question arises when a racialized narrative poses harm to the wider community rather than (or in addition to) the defendant. Under this proposal, a prosecutor must weigh the need for prosecution of a particular case against the potential harm prosecuting that case poses to the community. Critics may perceive these considerations as immeasurable, and to some degree, they are. Yet so too are the considerations that prosecutors are currently entrusted to make every day.[360]

In the second case from the Introduction, recall that the video from the officer's bodycam showed the defendant, a Black woman, intoxicated in a public park. The white officer asked her several times to stop yelling. When she failed to do so, he placed her under arrest for disorderly conduct. Once in the back of the police car, the defendant began yelling

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357. *See* Thomas Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 CRIME & JUST. 381, 417 (1980).

358. *See* discussion *supra* Section IV.B.2. In general, restorative justice practices that include the cooperation of the harmed party can only be done with the voluntary consent of the harmed party. However, there are several restorative practices that do not require the presence of the complainant, including survivor panels and accountability circles.

359. *See* Gajwani & Lesser, *supra* note 212, at 89.

360. *See* Joe, *supra* note 18, at 888 ("Despite the absence of an easily recognizable and traditional client, the prosecutor engages in [their] prosecutorial practice on behalf of either some person, some group of persons, or some entity. This is a fundamental requirement of the legal process—that an attorney represents a particular party's interests. It is within this essential framework that ethical and professional rules provide clear terms and boundaries for appropriate attorney behavior on behalf of a client.").

about police brutality. From the bodycam footage available, the arresting officer appeared respectful and patient throughout the interaction.

Here, the stereotype of the angry Black woman poses a harm to the defendant[361] and the racialized stock story that Black Americans routinely exaggerate claims of police brutality poses harm to the community.[362] Similar to the case above, this first racial trope could cause jurors to fill in gaps in the State's evidence or resolve outstanding questions with biased conclusions based on the stereotype, rather than presuming the defendant's innocence and holding the State to its burden of proof beyond a reasonable doubt.[363] The potential harm of the second stock story is that it discredits the lived experiences of people of color, whose credibility is already subject to increased scrutiny in the criminal system.[364] Moreover, it has the dangerous, even deadly, potential effect of undermining efforts to reform policing by casting doubt on the desperate necessity of such reform.

In weighing how to proceed, the prosecutor would again engage in a balancing test. The prosecutor would first seek to identify the harm, if any, caused by the defendant's conduct. If the conduct was harmless, then the prosecutor should dismiss the case. If there was harm, then the prosecutor should consider whether the harm of the conduct outweighs the potential harm to the community. Again, the prosecutor would consider various factors in weighing this decision, including some more complicated than those outlined above. Is the potential community harm greater because the jury pool in that jurisdiction is predominantly white? Is the community already susceptible to devaluing claims of racially motivated police brutality? If the impact of the trial narrative is that it could

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361. *See supra* Section II.B.1; *see also* Joy, *supra* note 11, at 407.

362. *See, e.g.*, Jill Lepore, *Kent State and the War That Never Ended*, NEW YORKER (Apr. 27, 2020), https://www.newyorker.com/magazine/2020/05/04/kent-state-and-the-war-that-never-ended (describing the local news response to the string of police shootings on college campuses, including Kent State and Jackson State: "Police came and shot at the students, wounding three. The local press was not inclined to support the protestors. 'Did you hear about the new NAACP doll?' a columnist for the Jackson *Daily News* had asked. 'You wind it up and it screams, "police brutality."'"). This narrative has been addressed in the protests following the killings of Ahmaud Arbery, George Floyd, Breonna Taylor, and Tony McDade. It appears to be losing traction among white Americans but is nonetheless still present.

363. Despite the video footage painting a negative picture of the defendant, the case was legally a close one. The defendant's conduct *prior* to being arrested—the conduct for which she was placed under arrest—could be viewed by some jurors as failing to meet the language of the disorderly conduct statute because it was not until after the arrest that she began to behave in a visibly disorderly fashion on the video.

364. *See* Gonzalez Van Cleve & Mayes, *supra* note 339, at 426 ("[N]arratives of people of color, especially those who have been incarcerated, are not granted legitimacy as indicators of bias in the criminal justice system."); Scheppele, *supra* note 69, at 2080 ("This can happen on an individual level, where specific persons find their truths *not* to be inevitable, or on a collective level, where whole groups of persons find their truths to be dismissed."); *see also id.* at 2083–84 ("[T]he 'we' constructed in legal accounts has a distinctive selectivity, one that tends to adopt the stories of those who are white and privileged and male and lawyers, while casting aside the stories and experiences of people of color, of the poor, of women, of those who cannot describe their experiences in the language of the law.").

severely impair the community's understanding of racially motivated police brutality, the prosecutor should avoid trial. Myriad factors could be considered, and ultimately, the prosecutor would decide if the case is better served by dismissal or referral to an alternative dispute resolution process, such as a restorative process. In this case, a restorative justice conference could allow the officer, the defendant, and the community to have a broader, more nuanced, and more meaningful conversation about "race, distrust of law enforcement, and oppression" than what would occur during a criminal trial.[365]

D. Identifying and Addressing Likely Objections to the Color-Conscious Exercise of Prosecutorial Discretion

There are several possible critiques of this proposal: that it treats similarly situated defendants differently because of race,[366] that dismissal is too severe a response,[367] or that it may harm the wider racial justice movement by excluding counternarratives from the public sphere[368] or provoking backlash.[369] This Section attempts to respond briefly to these anticipated objections.

1. Disparate Treatment Based on Race

The first argument against such an approach is that it is fundamentally unfair to treat similarly situated defendants differently based on race.[370] However, the courts, the criminal system, and society presently tolerate significantly disparate treatment in the criminal system based on race.[371] The common prosecutorial response to evidence of racial disparities in prosecution is that they are simply "following the crime."[372] How-

365. Gajwani & Lesser, *supra* note 212, at 89 (describing several cases involving police officers as complainants going through the restorative process successfully and the depth of communication and healing that took place).

366. *See* Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 741 (1995) ("The principal objection to these color-conscious methods, however, is simply that they are color-conscious."); Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935, 950–53 (1999) (discussing the various forms of objections to race-conscious lawyering).

367. *See* Gajwani & Lesser, *supra* note 212, at 85–86 (explaining that "society insists [on] punishment through incarceration [as] the proper response to crime").

368. *See* Delgado, *supra* note 1, at 2414 ("The cure is storytelling (or as I shall sometimes call it, counterstorytelling) . . . .").

369. ALEXANDER, *supra* note 29, at 20.

370. *See* Simson, *supra* note 49, at 639 ("Equality as an abstract formal principle commands that 'likes should be treated alike' and 'things that are unalike should be treated unalike in proportion to their unalikeness.'" (quoting Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 (1982))); *see also* U.S. CONST. amend. XIV; Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 859 (2017).

371. *See* Kang et al., *supra* note 263, at 1136–50 (noting studies that revealed statistical evidence and regression analyses to find that racial minorities are charged more harshly by prosecutors than white defendants, more likely to be convicted by jurors because of race, and that Black defendants are sentenced more harshly than white defendants as well as disproportionately subjected to the death penalty); *see also* McCleskey v. Kemp, 481 U.S. 279, 352–54 (1987).

372. *See* Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 256 (2015) (noting the vast amount of economic and violent crime

ever, following the crime has always meant following the crimes committed by some and not by others.[373] Prosecutorial discretion upholds white supremacy by protecting and insulating white Americans from a system that is exceedingly harsh in its treatment of people of color.[374] When prosecutors allow racially motivated policing to guide their decision-making,[375] they abdicate their professional responsibility to provide a gatekeeping function through the charging decision and specifically to exclude racial bias from the criminal system.[376] While racial disparities enter the criminal system through myriad entry points, the exercise of prosecutorial discretion is one way to address these disparities.[377] Moreover, allowing some offenses to go unpunished in pursuit of the larger systemic and societal goals of legitimacy, fairness, and justice is already an accepted part of our criminal system.[378]

Finally, the historical racial disparities within the criminal system and the implicit biases that pervade American society make it inaccurate to characterize a white criminal defendant and a Black criminal defend-

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that goes uncharged and unprosecuted primarily because it is committed by wealthy white people while police and prosecutors pursue low-level charges against the poor and people of color).

373. *Id.*; *see also* I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 607 (2016); *see also supra* Part I.

374. *See, e.g.*, Sandra Gonzalez & Elizabeth Joseph, *District Attorney Who Didn't Prosecute Weinstein Will Be Investigated*, CNN (Mar. 19, 2018), https://www.cnn.com/2018/03/19/entertainment/times-up-cyrus-vance/index.html (outlining the persistent decision by Cyrus Vance not to prosecute Harvey Weinstein); Jane Musgrave, John Pacenti, & Lulu Ramadan, *Palm Beach Post Investigation: Jeffrey Epstein Case - The First Failure*, PALM BEACH POST (Oct. 21, 2020, 6:12 PM), https://www.palmbeachpost.com/epstein-case (outlining the failure of Florida State Attorney Barry Krischer to prosecute Jeffrey Epstein despite thirteen underage girls coming forward to allege abuse); Ashley Cole, *Missouri Attorney General wants Charges Dropped Against the McCloskeys*, KSDK (July 21, 2020, 11:39 AM), https://www.ksdk.com/article/news/local/mccloskeys-charged-missouri-attorney-general-files-brief/63-6a1c4b9f-f3e7-433b-ab89-900eb91d4c94 (outlining the pressure by Missouri Attorney General Eric Schmitt to drop charges against the white couple who brandished guns at protestors). Note the irony that it is often white Americans driving the harshness of the criminal system response to criminal conduct, directly in response to perceptions of the Blackness of criminal actors. *See* Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS PSYCH. SCI. 183, 185 (2018) ("Indeed, we found that when Whites were exposed to a 'Blacker' prison population, they became significantly more fearful of crime, which, in turn, increased their support of punitive crime policies.").

375. *See* Karakatsanis, *supra* note 372, at 260.

376. *See* STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.2(a) (AM. BAR ASS'N 2017).

377. *See* Davis, *supra* note 56, at 822; Kang et al., *supra* note 263, at 1135 (citing six stages of the criminal process in which implicit bias can have large impact: arrest, charging, judicial bail decisions, plea bargaining, trial, and sentencing); Butler, *supra* note 22, at 844 ("[B]ut for the fruits of slavery and entrenched racism, African Americans would not find themselves disproportionately represented in the criminal justice system. It is important for the law to recognize that there are so many African Americans in prison because white people have driven them there. Justice requires thoughtfulness about how race matters in the punishment of [B]lack people in the United States.").

378. Butler, *supra* note 22, at 884 n.164 ("[O]ther doctrinal elements of the criminal law that, at times, allow the guilty to go free . . . . include the burden of proof beyond a reasonable doubt, the exclusionary rule, and jury nullification. Each of these doctrines tolerates non-punishment of the guilty in the service of a higher ideal of justice.").

ant as similarly situated.[379] This is particularly true where a Black defendant faces a charge, such as a weapons offense or crime of violence, that is highly associated with a racial stereotype.[380] A white defendant facing the same charge would not be subject to that same stereotype and its attendant impact on trial outcome.[381] The presence of the racialized stock story could leave the Black defendant at greater risk of conviction even if the admissible evidence in the two cases was identical. In this way, it is impossible to say that these two defendants are truly similarly situated, and therefore, impossible to treat them identically while still treating them fairly.[382]

2. Mitigating Approaches Are Insufficient

Another anticipated objection to this proposal is that dismissal is too extreme of a response and that bench trials or lenient plea bargains would be a better alternative.[383] Because these alternatives are less public-facing, they arguably have less impact in the public sphere. Yet the narratives that play out in plea hearings and bench trials have a tremendous impact on not only the defendants, their families, and their communities[384] but also on the judges who hear racialized stock stories and ste-

379. *See* Kang et al., *supra* note 263, at 1136–48; *see also* Barnes, *supra* note 101, at 944–45 ("[T]hose who are 'raced' within criminal courts understand that minority identity can be punitive within that environment.").

380. *See* Levinson & Young, *supra* note 104, at 344 ("If jurors hold stronger implicit associations between members of stereotyped groups and one particular verdict category (such as intentional murder or drug dealing) relative to another (such as reckless homicide or drug possession), then implicit bias has the potential even to affect the way jurors interpret the verdict categories . . . . [S]ome studies have found that jurors hold strong race-specific stereotypes related to certain crimes.").

381. *See* Barnes, *supra* note 101, at 966 ("[C]ourts employ biased social constructions of minority identities, which arise out of, and are sustained through, essentialism's power to erase the individual and stereotype's power to reconstitute identity.").

382. The myth of colorblindness obscures this unequal treatment and insulates it from reform or redress. *See* Simson, *supra* note 49, at 651–52 (noting that the Supreme Court's adoption of colorblindness as jurisprudence "has been particularly powerful during historical moments when the existing racial hierarchy was under attack and legal justification was needed to preserve as much of the hierarchy as possible while preserving a seeming commitment to racial equality"); Butler, *supra* note 22, at 847 n.20 ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans." (quoting Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 2–3 (1991))); Barnes, *supra* note 101, at 945 ("This tendency to rely upon a legal subject's status rather than conduct, however, is rarely acknowledged by the legal actors who produce the formal doctrinal narratives of our legal interactions.").

383. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (AM. BAR ASS'N 2017) ("In order to fully implement the prosecutor's functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obligated to file or maintain all criminal charges which the evidence might support.").

384. *See* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 249–50 (1998) (describing the effect of police perjury and its particular impact on defendants and their communities).

reotypes repeated in their courtrooms, often without inquiry or challenge.[385]

Moreover, calls to mitigate rather than eliminate racialized stock stories in prosecutorial narratives fail to address the ethical problem presented by prosecutors advancing these narratives in any capacity.[386] It also presumes that the exercise of prosecutorial discretion is constrained to a narrow set of predetermined options.[387] Yet prosecutors have wide discretion to act creatively to address the underlying harm of criminal offenses outside of the adjudicative process, such as diversion programs, conditional dismissals, or referrals to restorative justice programs.[388]

Another mitigating approach would be to only use this decision-making framework in nonviolent cases, misdemeanors, or other less serious offenses where the conduct poses less harm to society. This mitigation approach is essentially what progressive district attorneys do when they commit to declining to prosecute certain types of misdemeanor cases that are notoriously subject to racially biased policing.[389] Yet the racism of the criminal system does not show up in only nonviolent or misdemeanor offenses. It shows up everywhere—in felonies, violent offenses, and capital cases.[390] It poses as much of a threat to the system's

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385. *See, e.g.*, Conway, *supra* note 111, at 1381–87 (discussing confirmation bias among judges and in particular the ways in which the judicial opinion issued in the case of Jason Stockley—the police officer who killed Anthony Lamar Smith—parroted common racial tropes invoked by police officers and prosecutors when litigating drug possession charges).

386. *See* GONZALEZ VAN CLEVE, *supra* note 57, at 11 ("[R]acism is even emboldened by institutional rules and laws. Rather than a kinder, gentler brand of racism that hides in enigmatic ways, 'doing colorblind racism' within institutions sanctifies racial abuse, as the immorality of one's racial category is confounded with one's criminal category.").

387. *See* Gajwani & Lesser, *supra* note 212, at 70 (noting that line prosecutors in a progressive office had a "strong fear of getting it wrong" (quoting Telephone Interview with Satana Deberry, Dist. Att'y, Durham Cnty., N.C (Sept. 9, 2019)).

388. For example, in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017), the prosecutor could have avoided putting the racialized narrative of the sexually aggressive Latinx male defendant in to the public sphere by resolving the case with a period of probation notwithstanding the verdict, dismissal or reduction of charges upon completion of sex offender therapy, a referral to a restorative justice program for sexual offenses, or any other set of conditions to address the underlying harm and prevent recidivism. Given that the defendant's sentence after trial was two years of probation, none of these alternative dispositions seem inappropriate.

389. *See, e.g.*, Tony Barboza & Jaclyn Cosgrove, *San Francisco's New D.A. Learned He Won the Job While Visiting His Dad in Prison*, L.A. TIMES (Nov. 10, 2019, 9:18 PM), https://www.latimes.com/california/story/2019-11-10/chesa-boudin-is-new-district-attorney-in-san-francisco ("In recent years, voters across the country have embraced candidates intent on reducing prison terms, reforming bail practices and being more judicious about bringing charges against defendants, according to the Vera Institute for Justice, a nonprofit criminal justice organization based in Brooklyn, N.Y.").

390. *See, e.g.*, Buck v. Davis, 137 S. Ct. 759, 768–69 (2017); *Peña-Rodriguez*, 137 S. Ct. at 862; *see also* ELIZABETH HINTON, LESHAE HENDERSON, & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 2 (2018) ("[These racial disparities] are compounded by the racial biases that research has shown to exist in individual actors across the criminal justice system—from police and prosecutors to judges and juries—that lead to disproportionate levels of stops, searches, arrests, and pretrial detention for [B]lack people, as well as harsher plea bargaining and sentencing outcomes compared to similarly situated white people.").

legitimacy, the defendant's constitutional rights, and the public in cases where the harm was great as it does in those where the harm was negligible. Weighing institutionalized racism against the seriousness of the charges or the strength of the evidence is the same pitfall that appellate courts have fallen into when dealing with racial appeals and epithets at trial.[391] While this may be understandable, it is not justifiable. The ethical duties of the prosecutor are the same regardless of the severity of the charge facing the defendant, and racial bias in the prosecution of serious felonies poses as much harm to society as bias in minor misdemeanors. As Emily Bazelon argues in her book *Charged*: "We won't get where the country needs to go . . . until we rethink the harder cases, too."[392]

3. Potential Harm to the Movement

A final potential objection is that this proposal poses danger to the broader Movement for Black Lives in a few ways: the inability to address racially motivated violence, the elimination of counterstories from the public sphere, and backlash.[393]

On the issue of hate crimes or racially motivated violence, the cases contemplated by this proposal are those in which the race of the defendant is salient but irrelevant. It also presumes that the racial stereotype or stock story is a subordinating narrative used against a person of color.[394] Hate crimes or offenses in which racial animus is an element of the offense would not trigger consideration under this decision-making framework. In those cases, race is specifically relevant to the jury's deliberations and findings of guilt or innocence.[395] The framework outlined in this proposal simply does not apply to cases or charges where racial animus is relevant to the determination of guilt.[396]

Critics may also argue that removing racialized narratives from criminal trials eliminates the opportunity for counterstories in the public

391. *See* Earle, *supra* note 102, at 1227 ("Most other courts . . . consistently seem to premise the evaluation of racism on the strength of the prosecutor's evidence.").

392. BAZELON, *supra* note 24, at 296; *see also* Levinson & Young, *supra* note 104, at 346 ("[N]arrowly focused bias-reduction strategies represent an inadequate and only temporary response to a culturally based problem."); Gajwani & Lesser, *supra* note 212, at 77 ("[E]xperts agree that in order to significantly reduce mass incarceration within our lifetimes, governments must not only consider alternatives to prosecuting low-level offenses, but also significantly reduce incarceration for violent offenses.").

393. Other critiques surely will surface, such as the problem of addressing individuals on the basis of group characteristics. *See* Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 681 (1998).

394. *See* Markovitz, *supra* note 118, at 924 (arguing that racial stereotypes are most dangerous and destructive when they are stereotypes that have "historically been used to enforce or maintain a system of racial subordination").

395. *See id.* at 931 ("If racist phobias explain a defendant's actions, a prosecutor ought to be able to present those phobias to the jury as evidence to better establish culpability, rather than to mitigate it.").

396. *See* Alfieri, *supra* note 119, at 1303.

sphere.[397] However, defense counterstories in criminal cases face two dilemmas: (1) even if the counterstory is successful, the prosecution has already caused harm,[398] and (2) the true, robust, and meaningful counterstory may not fit into a viable theory of defense.[399] Even before trial, involvement in the criminal system inflicts harm through arrest, pretrial detention or payment of bail, loss of work, financial hardship, degradation by the court system, childcare hardships, and more.[400] Once charged, the defendant has everything to lose and almost nothing to gain. In terms of the viability of a counterstory as a defense, taking on a deeply embedded cultural stereotype often exceeds a defense attorney's capabilities at trial.[401] Counteracting powerful racial stereotypes is so difficult that at-

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397. "Counterstory" is used to invoke its meaning both in narrative theory and in critical race theory. *See, e.g.*, Aja Y. Martinez, *A Plea for Critical Race Theory Counterstory: Stock Story versus Counterstory Dialogues Concerning Alejandra's "Fit" in the Academy*, 42 Composition Stud. 33, 33 (2014) ("As a narrative form, counterstory functions as a method for marginalized people to intervene in research methods that would form master narratives based on ignorance and on assumptions about minoritized peoples like Chican@s. Through the formation of counterstories, or those stories that document the persistence of racism and other forms of subordination, voices from the margins become the voices of authority in the researching and relating of our own experiences."); *see also* Sheppard, *supra* note 66, at 202 (noting that when facing a negative stock story, the attorney must tell a counterstory).

> Counterstories use techniques that short-circuit the inherent structure, understanding, and evaluation that is provided by the stock story. These techniques include moving from the initial view of the story to one that is more specific or more general, presenting contradictory information, taking facts out of context, or taking a contrarian view.

Id.; *see also* Delgado, *supra* note 1, at 2414 ("The cure is storytelling (or as I shall sometimes call it, counterstorytelling) . . . . Counterstories, which challenge the received wisdom . . . can open new windows into reality, showing us that there are possibilities for life other than the ones we live.").

398. Acquittal is by no means guaranteed. Counterstories are subject to rejection because they run counter to the pre-existing stock stories carried by the listener. As discussed in Part II, the strength of these stock stories can cause listeners to reject or alter new information to comport with their pre-existing stock stories. *See, e.g.*, Delgado, *supra* note 1, at 2440 n.87 ("The hearer of an unfamiliar counterstory may reject it, as well as the storyteller, precisely because the story unmasks hypocrisy and increases discomfort . . . . Or, the hearer may consciously or unconsciously reinterpret the new story, in light of the hearer's own belief system and inventory of stock stories, so as to blunt, or even reverse its meaning."); *see also* Barnes, *supra* note 101, at 976 ("[E]ven when the marginalized act 'against' stereotypical understandings of identity, the behavior may not provide them with any advantage."). Barnes goes on to describe the ways in which the evidence that indicated that the defendant, his grandmother, had cooperated with police and in fact contributed vitally to the capture and conviction of the actual doer were downplayed or ignored by the police, prosecutor, and judge: "The constructions reduced my grandmother to only the stereotypes related to her status as a poor black woman with a criminal record. The constructions were so powerful that negative associations attached to even those behaviors that undermined the constructed identity." *Id.* at 977–78.

399. *See, e.g.*, Paskey, *supra* note 1, at 80 (describing the challenge posed to attorneys in asylum cases based on the narrow stock story created by the asylum rules).

400. *See* Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 959 (2018) (noting that arrests can trigger collateral consequences such as deportation, eviction, and loss of work even without a trial or conviction); Besiki Luka Kutateladze & Victoria Z. Lawson, *How Bad Arrests Lead to Bad Prosecution: Exploring the Impact of Prior Arrests on Plea Bargaining*, 37 CARDOZO L. REV. 973, 990 (2016) (listing potential consequences of arrest as the following: deportation, loss of custody, loss of property, eviction, job loss, loss of employment eligibility, driver's license suspension, and health consequences); Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1475 (2019) ("Although criminal defendants are entitled to the presumption of innocence, a mere arrest carries significant penalties, such as fines, jail time, loss of work, or potential eviction from public housing, regardless of whether a criminal conviction is ultimately imposed.").

401. *See* discussion *supra* Sections III.A.1–2; *see also* Ahmad, *supra* note 164, at 126.

torneys often seek to establish their client's exceptionalism rather than attack the stereotype itself.[402] This leaves the stereotype intact and may even further cement it in the minds of the jurors. In contrast, as argued in Section IV.B.2, alternative forums such as restorative justice practices may provide a greater opportunity for more complex narratives to enter the public sphere and thus create a forum for counterstories to common majoritarian narratives to flourish.[403]

As to backlash, Professor Paul Butler addressed this question in 1997, and his words are equally apt now: "[I]f African[-]Americans adapted their political and self-help strategies so as not to raise the possibility of white backlash, they would scarcely advance at all."[404] Prior to that, Justice Brennan wrote in 1976: "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."[405] Finally, as Dean Mario Barnes has more recently argued, the fact "[t]hat the world is not ready for a particular proposal . . . is not a reason to forgo advancing it."[406]

CONCLUSION

This Article adds to the limited discourse on prosecutorial storytelling by considering the ways prosecutors can advance the cause of racial justice by avoiding racial stock stories and stereotypes in their trial narratives. Prosecutors have a duty to eliminate racial bias and disparities in the criminal system and eliminating racialized trial narratives is a vital component of that work. This Article proposes a principled approach to using prosecutorial discretion as a means of combating racial injustice. It considers the role that prosecutorial trial narratives play in the perpetuation of racial stereotypes and stock stories and the harm that such narratives pose to individuals, the criminal system, and society as a whole. It seeks to create a decision-making framework for prosecutors that considers the potential harm of such narratives when contemplating trial and proposes using declination, dismissal, or referral to alternative process-

402. *See* John M. Hagedorn & Bradley A. MacLean, *Breaking the Frame: Responding to Gang Stereotyping in Capital Cases*, 42 U. MEM. L. REV. 1027, 1052–53 (2012) (identifying sub-typing as the primary means through which defense attorneys challenge prosecution stock stories by seeking to show that their client is different from others in the stigmatized group—without challenging the stigma itself); Baynes, *supra* note 8, at 569 ("There is the prevailing stereotype that African American men are 'savage brutes.' The role of the defense counsel in representing an African American defendant is to acknowledge that stereotype may be operating and to try to combat it in some way. Sometimes this may be next to impossible.").

403. *See* Scheppele, *supra* note 69, at 2085 (noting that legal storytelling in practice is "constrained by rules of evidence and the demands of legal relevance").

404. Butler, *supra* note 22, at 856 n.69 (quoting Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 155 (1996)).

405. Franks v. Bowman Transp. Co., 424 U.S. 747, 775 (1976) (internal quotations omitted) (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971)).

406. Barnes, *supra* note 60, at 728.

es—such as restorative justice programs—to eliminate the harm posed by the racialized narrative. In order to enact this framework, prosecution offices must reject the myth of colorblindness and use a color-conscious approach to decision-making and the exercise of prosecutorial discretion.