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## **Ethics in Criminal Advocacy, Symposium, The "Darden Dilemma": Should African Americans Prosecute Crimes?**

### **Cover Page Footnote**

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# THE "DARDEN DILEMMA": SHOULD AFRICAN AMERICANS PROSECUTE CRIMES?

*Kenneth B. Nunn\**

W.E.B. Du Bois said that we were all of two worlds—part African and part American. It is only in the middle where we can be free to be both, to move in the world of American laws and culture without forsaking our African heritage.<sup>1</sup>

*Christopher Darden*

## INTRODUCTION

EVERYONE knows who Christopher Darden is. Even now, years after the O.J. Simpson murder trial made him a household name, he remains a recognizable public figure. While his involvement in the Simpson prosecution brought him fame, fortune, and professional opportunities, Darden asserts that serving as a visible African American prosecutor, who sought to convict a popular African American sports figure, had its costs as well.<sup>2</sup> According to Darden, at least some members of the African American community view him as a "sell-out"—one who allowed himself to be used to further white interests for personal gain at the expense of the broader African American community.<sup>3</sup>

In his account of the O.J. Simpson trial, Darden characterizes the criticism and cold reception he received from the Black community as misdirected racism.<sup>4</sup> From Darden's perspective, it was his dedication to his role as a prosecutor that opened him up to this form of criticism.<sup>5</sup> By fulfilling his professional obligation to prosecute crimes fairly, impartially, and without regard to race, Darden believes he

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1. Christopher A. Darden with Jess Walter, In Contempt 382 (1996).

2. See *id.* at 170-73.

3. See *id.* at 172.

4. See Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 Mich. L. Rev. 766, 781 (1997) [hereinafter Russell, *Beyond "Sellouts"*]. According to Russell, Darden "seems to view his dilemma as a dichotomous conflict of a Black prosecutor's loyalty to justice versus obeisance to antiwhite racism in Black communities." *Id.* at 780-81.

5. See Darden, *supra* note 1, at 173.

incurred the wrath of the African American community.<sup>6</sup>

Christopher Darden has come to epitomize the burdens that African American prosecutors face as they perform their professional tasks. Moreover, the "Darden Dilemma" has become a generic term for the anguish that these prosecutors endure as they negotiate between competing allegiances to the African American community and the State.<sup>7</sup>

Although Christopher Darden has lent this conflict his name, he is not the first to experience it.<sup>8</sup> Black prosecutors have long felt compelled to defend their career choices against allegations of their insensitivity to the needs of the African American community.<sup>9</sup> Much has been written about the sense of isolation that African American prosecutors feel, and the commitment, or lack thereof, of African American prosecutors to African American collective interests and goals, has long been a topic of discussion within the African American community.<sup>10</sup>

I can understand the hurt and isolation that Christopher Darden must have felt as he confronted the conflict between his role as a prosecutor and his obligations to the African American community. Like Darden, I too believe it is important for African American lawyers to "move in the world of American laws and culture without forsaking our African heritage."<sup>11</sup> But this belief leads me to a different conclusion than that reached by Darden. In my view, the best resolution of the "Darden Dilemma" is for African Americans to

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6. *See id.*

7. *See id.* at 383. According to Darden, the "Darden Dilemma" is a name some Black prosecutors have for "the pressure they feel from those in the community who criticize them for standing up and convicting [B]lack criminals." *Id.*

8. *See, e.g.,* Constance Johnson, *More Black Lawyers Work for the Prosecution Team*, Wall St. J., Oct. 17, 1995, at B1 [hereinafter Johnson, *More Black*] ("One frustration of [a Black prosecutor's] job is that some [B]lacks view him as a traitor. At a recent conference on youths and violence at a predominantly [B]lack community college, members of the audience berated [the prosecutor] and other panelists. One angry young man shouted: 'You guys aren't doing anything to help. You're part of an institution that is oppressing us.'"); Don Terry, *Prosecutor Steps Softly in His New Job in Bronx*, N.Y. Times, July 3, 1989, at 23 (quoting a Black district attorney who stated "I find when talking to minority law students that they don't feel that becoming assistant district attorneys is politically righteous. They feel that working for the prosecution is working against the community somehow.").

9. *See id.*

10. *See* Ellis Cose & Allison Samuels, *The Darden Dilemma*, Newsweek, Mar. 25, 1996, at 58; Benjamin A. Holden, *Trying Times: A Black Prosecutor is Judged as He Seeks Conviction of a Rap Star*, Wall St. J., Feb. 5, 1996, at A1; James Varney, *Few Black Lawyers Work for DA's Office*, Times-Picayune, Apr. 15, 1996, at A1; The "Darden Dilemma" has even spawned a book of the same name, dealing with the conflicts of African American prosecutors. *See The Darden Dilemma: 12 Black Writers on Justice, Race and Conflicting Loyalties* x (Ellis Cose ed., 1997) [hereinafter *Darden Dilemma*] (compiling twelve essays by "[B]lack thinkers" who "grapple with various aspects of the 'Darden Dilemma'").

11. Darden, *supra* note 1, at 382.

refrain from prosecuting crimes and to reject employment opportunities with prosecutors' offices. I argue this, not because Black prosecutors do not advantage society and the Black community in particular, but because the harm their presence in prosecutors' offices engenders outweighs any benefit.

I believe that the outcome I counsel here—that African Americans not prosecute crimes—is both moral and ethical. I will make the case for this finding below. First, however, it is important to examine the contours of the “Darden Dilemma” and the precise nature of the moral and ethical problems it presents.

Professor Margaret Russell has written a thoughtful and sensitive analysis of the “Darden Dilemma” phenomenon.<sup>12</sup> Professor Russell rejects the viewpoint that the “Darden Dilemma” is caused by an uninformed Black community that seeks to enforce lawless and potentially racist values against diligent African American prosecutors who are only doing their job, even when that job means incarcerating African American defendants.<sup>13</sup> The “Darden Dilemma,” Russell suggests, is better viewed as “an ongoing interplay of competing values within Black attorneys who are attempting to puzzle through the implications of their professional choices for the well-being of Black communities.”<sup>14</sup> Black prosecutors make these professional choices, Russell rightly points out, in a world that is not of their making.<sup>15</sup> Consequently, any discussion of the appropriateness of their professional conduct must also take into account the constraints within which they must operate.<sup>16</sup>

I agree, in part, with Russell's redefinition of the nature of the “Darden Dilemma.” Any discussion of the professional or ethical obligations of the African American prosecutor must recognize that Black prosecutors may face internal moral conflicts as they seek to negotiate a space between seemingly competing professional and community demands. Such a discussion must also be sensitive to the fact that this negotiation takes place in a shifting landscape, the parameters of which are not necessarily under the control of the African American prosecutor nor the African American community. “Darden Dilemmas” and their solutions are, admittedly, fluid, not

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12. See Russell, *Beyond “Sellouts,”* *supra* note 4, at 779-85.

13. See *id.* at 781.

14. *Id.* at 784.

15. See *id.* Russell states:

[T]he Black community did not create the Darden Dilemma, nor did Christopher Darden or Black prosecutors generally. Rather, it is an unavoidable structural component of a legal system originated and maintained under racial hierarchy. Armed with this revelation, Black attorneys can be empowered to *expand* their choices, rather than be relegated to them.

*Id.*

16. See *id.* at 788.

static. Whether a given prosecutor can be said to promote or retard the interests of the African American community, and whether the African American community has fairly or unfairly injected its interests in a given case, is a nuanced and complicated question. And it is one that cannot be reduced merely to a scorecard analysis that simply records the race of those charged.

Unlike Russell, I do not think that the ethical issue inherent in the "Darden Dilemma" can be reduced simply to a matter of the internal moral conflicts that African American prosecutors must face. For Russell, the most insidious aspect of the "Darden Dilemma" is that it limits the individual choice of the Black prosecutor.<sup>17</sup> She writes that "[s]tereotypical, externally imposed assumptions about the role and function of Black attorneys have the powerful effect of straitjacketing and asphyxiating Blacks in an already highly restrictive environment."<sup>18</sup> In Russell's view, Black prosecutors trapped within the "Darden Dilemma" can only choose between two equally unappealing alternatives: being branded a "sell-out," or being accused of recklessly "playing the race card."<sup>19</sup> The "Darden Dilemma," as she characterizes it, is the result of the "inner tension" occasioned by this limited choice.<sup>20</sup>

I think there is an external dimension to this debate. The dilemma faced by Black prosecutors is not a dilemma merely because of the individualized decisions that they must make. Those decisions pose a dilemma only because of the differing costs and benefits of one choice over the other, costs and benefits which must be assessed in a given contextual setting. Black prosecutors are only confronted with a dilemma if the African American community defines its interests in a

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17. See *id.* at 771-72. Russell argues that Black attorneys, unlike their white counterparts, "face an unduly restrictive set of choices, each of which carries impossible burdens." *Id.* at 771. This restrictive set of choices, of which the "Darden Dilemma" is exemplary, is what Russell finds problematic with the condition of Black attorneys in general. See *id.* at 771-72. In her view, "[t]he Black attorney generally is not accorded the respect, autonomy, or even anonymity enjoyed by her white colleagues, and she is therefore doubly disadvantaged by the imposition of careerist pigeonholes and expectations." *Id.* at 772.

18. *Id.*

19. *Id.* at 773.

20. *Id.* at 784. According to Russell, this "inner tension may be influenced, heightened, and at times . . . exacerbated by Black community critiques, but it is inherently and inevitably a result of a legal system that devalues all Black lives, including the token Black attorneys it ostensibly valorizes as the honored few." *Id.* In Russell's view, it is white society that creates the "Darden Dilemma" by restricting the ability of African American attorneys to respond to the needs of their communities. See *id.* at 781-82. She writes:

[I]t is my view that racism severely limits the public credibility and lawyering choices of Black attorneys not only in a vertical, ladder-climbing, "glass ceiling" career sense, but also in terms of the latitude and autonomy that they are accorded in juggling and reconciling competing obligations to Black communities and to the legal profession at large.

*Id.*

way that calls into question the ordinary professional expectations of prosecutors. In any moral debate in which the interests of the Black community are implicated, there must be a place for that community to express its point of view. The Black community has the right to determine the proper moral conduct of its members and to enforce that conduct as the price of membership. This is a matter of self-determination. To argue otherwise is to challenge the legitimacy of the African American community itself, a nonnegotiable position from an African American point of view.

Although questions of the ethical and moral dilemmas faced by African American prosecutors are indeed difficult, they are not impossible to resolve. For instance, Professor David Wilkins shows that even Professor Russell's nuanced construction of the "Darden Dilemma" does not prevent her from asking whether Christopher Darden's behavior in the Simpson case was acceptable on the merits.<sup>21</sup> As Professor Wilkins demonstrates, one's concern with avoiding totalizing positions and essentializing labels should not prevent one from asking important questions.<sup>22</sup> By framing the "Darden Dilemma" as a conflict caused by constraining individual choice, Russell evades the questions of whether the prosecution of crimes inflicts harm on the Black community and if so whether the Black community can consequently impose demands on African American prosecutors.

I think these questions are worth asking. Of course, in order to pose any important question, one must disclose one's assumptions and ground the question in an appropriate context. I would phrase the question posed by the "Darden Dilemma" in this way: at this moment in history, given current political realities, the social milieu in which people of African descent exist in the United States, and the limitations in which Black prosecutors must operate, should African Americans prosecute crimes?

Most commentaries on the "Darden Dilemma," including those by Russell and Wilkins, do not squarely treat this question.<sup>23</sup> They, like

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21. See David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 Mich. L. Rev. 795, 796 (1997) [hereinafter Wilkins, *Straightjacketing*]. Indeed, Wilkins goes on to question the conduct of Mr. Darden in the Simpson case. See *id.* at 807-19. Furthermore, he makes value judgments about Mr. Darden's conduct using the concepts Russell has provided. See *id.*

22. See *id.* at 796 (stating that evaluating Darden's conduct "on the merits" reduces the likelihood that an essentialist outcome will ensue).

23. See Russell, *Beyond "Sellouts," supra* note 4, at 782-83 (suggesting that claims that criminal prosecution, or other "career path[s] not typically associated with the pursuit of racial justice," are counter to the interests of the Black community and unnecessarily stereotype and pigeonhole African American attorneys who choose these forms of legal practice). Although Wilkins argues that the charge that Black prosecutors work against the cause of racial justice is "speculative" and "contingent," he too does not address my question. See Wilkins, *Straightjacketing, supra* note 21, at 803 n.38. Wilkins does contend, however, that the United States is not a regime like

others, assume that it is not a serious question and that any such demands that African American community members place on African American prosecutors as members of that community are illegitimate. Most often, this is so because the community pressure at the core of the "Darden Dilemma" is treated as a vulgar exercise of racial politics.<sup>24</sup> Insofar as professional ethics go, a "Darden Dilemma" so defined is no dilemma at all. There is no professional reason why prosecutors should follow the lawless demands of an uninformed and self-interested mob.

Many commentators insist on framing the discussion this way.<sup>25</sup> This is overly simplistic, and in the end, it is merely an inelegant attempt to justify and privilege conduct that favors the State and authoritarian values. Few would argue that African Americans should not prosecute other African Americans simply because of the affinities of race. But whether it is in the interest of the African American community for African Americans to prosecute crimes against African American defendants is a different question. In this context it is not simply the race of the actors which is important, but how the interests of the African American community are conceptualized and defined. To put it another way, whether African Americans should prosecute crimes is a political question and a moral issue, not simply a question of racial allegiance.

In this Article, I argue that African Americans should not prosecute crimes. I make this argument because I believe that when African Americans prosecute crimes, they do extensive and avoidable harm to the African American community. The contours of my argument are simple: (1) the criminal justice system is racist and oppressive to African American people; (2) prosecutors are a major source of the racism found in the criminal justice system; (3) African American prosecutors cannot eliminate the racism in the criminal justice system by themselves; and (4) African Americans should not contribute to the oppression of other African American people.

Part I of this Article evaluates the effects of the criminal justice system on the African American community.<sup>26</sup> Part II, discusses the role that prosecutors play in the overrepresentation of African

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Nazi Germany or apartheid South Africa where African Americans would have no moral obligation to honor professional norms. *See id.* at 799. This would imply that there would be no inherent moral barrier to representing the state as a prosecutor.

24. *See Russell, Beyond "Sellouts," supra* note 4, at 781 (describing the "hyperbolic and at times contemptuous public commentary that helped construct the Darden Dilemma: the brave, law-abiding Black prosecutor versus the Simpson-loving, lawless Black community").

25. *See generally id.*

26. I speak of African Americans because that is the community of which I am a member and of which I know best. I believe much of what I say is also relevant to Latino/as, Native Americans, Asians, and other people of color who are political minorities in United States, although I do not claim to speak for these groups.

Americans in the criminal justice system and the prosecutors' response to such overrepresentation. Furthermore, Part II evaluates the desirability of this response from an ethical standpoint. Part III considers the African American prosecutor's obligations to the Black community. Finally, Part IV suggests a resolution to the "Darden Dilemma."

# I. "DOING GOOD BY DOING VIOLENCE": THE NEGATIVE IMPACT OF THE CRIMINAL JUSTICE SYSTEM ON THE AFRICAN AMERICAN COMMUNITY

In my view, there is no doubt that the criminal justice system is racist.<sup>27</sup> Not only is it racist, but arguably it is one of the most racist

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27. The observation that the criminal justice system is racist has been made many times. See generally David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* 5 (1999) ("[O]ur criminal justice system . . . is in fact predicated on the exploitation of inequality."); Daniel Georges-Abeyie, *The Criminal Justice System and Minorities—A Review of the Literature in The Criminal Justice System and Blacks* 128 (Daniel Georges-Abeyie ed., 1984) (arguing that the criminal justice system is intentionally racist); Coramae Richey Mann, *Unequal Justice: A Question of Color* 23-24 (1993) (arguing that it is unreasonable to "deny that there is racism in the criminal justice system, a system that has always been oppressive and repressive toward minorities"); Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (1996) (rejecting the hypothesis that the American criminal justice system is uninfluenced by race); 2 Gunnar Myrdal, *An American Dilemma* (1964) (proposing that American society discriminates against Blacks in the administration of justice); *Race and Criminal Justice* (Michael J. Lynch & E. Britt Patterson eds., 1991) (describing an institutionalized bias in laws and policies to the detriment of the minority community); *Race, Crime, and Justice* (Barbara A. Hudson ed., 1996) (compiling a series of articles describing the American criminal justice system as racist); Katheryn K. Russell, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions* xiv (1998) [hereinafter Russell, *The Color of Crime*] (exploring the "images and realities of crime and race"); Michael Tonry, *Malign Neglect—Race, Crime, and Punishment in America* 3 (1995) (noting that "no one denies there is bias in the system"); U.S. National Minority Advisory Council on Criminal Justice, *The Inequality of Justice: A Report on Crime and the Administration of Justice in the Minority Community* (U.S. Dep't of Justice 1982) [hereinafter *National Minority*] (describing racism as a basic cause of conflict and disorder in the American criminal justice system); Samuel Walker et al., *The Color of Justice: Race, Ethnicity, and Crime in America* 2 (2d ed. 2000) ("In short, on both sides of the color line there is suspicion and fear: a sense of injustice on the part of racial minorities and fear of [B]lack crime on the part of whites."); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L.J.* 677 (1995) [hereinafter Butler, *Racially Based*] (arguing that Black jurors should emancipate non-violent Black law-breakers in order to lessen the negative effect of incarceration on the Black community); *Developments in the Law: Race and the Criminal Process*, 101 *Harv. L. Rev.* 1472 (1988) [hereinafter *Developments*] (examining "the constitutional problem of race discrimination in criminal justice institutions"); Chris Weaver & Will Purcell, Comment, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 *How. L.J.* 349 (1998) (contending that "the prison industrial complex is a continuation of the legacy of slavery").

institutions in the United States.<sup>28</sup> As such, it is one of the principal causes of racism elsewhere in society, since it provides legitimacy and cover to racist ideas and behaviors.<sup>29</sup> The criminal justice system is racist both in the treatment it affords to African Americans and in the attitudes of its participants. Sometimes, the racism of the criminal justice system is motivated by maliciousness<sup>30</sup> and sometimes by "benign neglect."<sup>31</sup> Sometimes, the racist attitudes of actors in the criminal justice system are wholly unconscious.<sup>32</sup> Whatever the motivation, the negative impact on the African American community is well-known and well-documented even as it goes, by and large,

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28. See Ali Khan, *Lessons From Malcolm X: Freedom By Any Means Necessary*, 38 How. L.J. 79, 91-110 (1994) (describing how domination and control of the legal system "provides a legal framework to institute even the most extreme forms of subjugation").

29. The criminal justice system is the source of powerful stereotypes of Black dangerousness that define and shape how other individuals and institutions respond to people of African descent. See Miller, *supra* note 27, at 149 ("Replete with images of dark-skinned predators, crime has become a metaphor for race, hammered home nightly on TV news and exploitative crime shows."); Patricia J. Williams, *Meditations on Masculinity*, in *Constructing Masculinity* 242 (Maurice Berger et al. eds., 1995) ("[A]ny [B]lack criminal becomes all [B]lack men, and the fear of all [B]lack men becomes the rallying point for controlling all [B]lack people."); Joan W. Howarth, *Representing Black Male Innocence*, 1 J. Gender, Race & Just. 97, 106 (1997) ("[T]he deeply embedded idea of a frightening Black man has some influence on every person in America . . ."). Dorothy Roberts writes powerfully of the way that the presumed criminality of African Americans reinforces racial stereotypes and leads to the derogation of Black rights. Racial discrimination by the law enforcement community informs the broader society that "Blacks are presumed to be lawless and are entitled to fewer liberties." Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775, 810 (1999) (Supreme Court Review) [hereinafter Roberts, *Foreword*]. Speaking of the social consequences of police harassment of African Americans through "order-maintenance" or "quality of life" policing, Roberts makes this observation:

In addition to reinforcing racist norms of presumed criminality, order-maintenance policing intensifies racial inequalities in the protection of civil liberties. Distinguishing between citizens on the basis of presumed criminality permits the state to minimize the rights of presumably lawless citizens while expanding the authority of presumably law-abiding ones.

*Id.* at 811; see also Cole, *supra* note 27, at 177 ("That crime has a young [B]lack man's face in our culture has, tragically, made it easier to justify our collective failure to respond adequately to past and ongoing inequality within and beyond the criminal justice system.").

30. See Tonry, *supra* note 27, at 104 (suggesting Reagan advisors cynically planned the war on drugs even though they knew the African American community would be adversely and disproportionately affected).

31. The term "benign neglect" was first used in the race relations context in a 1970 memorandum written by then Assistant Secretary of Labor Daniel Patrick Moynihan to President Nixon suggesting that the federal government adopt a "hands-off" policy toward the enforcement of civil rights laws. See Charles Sumner Stone, Jr., *Thucydides' Law of History, or from Kerner, 1968 to Hacker, 1992*, 71 N.C. L. Rev. 1711, 1719 (1993).

32. See generally Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 Cornell L. Rev. 1016 (1988) [hereinafter Johnson, *Unconscious*] (describing the "reality of unconscious racism").

unaddressed.<sup>33</sup>

The United States incarcerates a greater percentage of its population than any other nation.<sup>34</sup> A wildly disproportionate number of those imprisoned are African Americans.<sup>35</sup> African Americans are roughly twelve percent of the national population. Yet, African Americans constitute more than fifty percent of the inmates held in prisons and jails in the United States.<sup>36</sup> In some urban areas, more than one half of the Black male population is serving sentences in institutions, or are on probation or parole.<sup>37</sup> No country could long survive with such a high percentage of its population languishing behind bars. One can only imagine what the United States would be like if one half of the white male population was subject to such restraints.<sup>38</sup>

The effects of such a high rate of incarceration have been extremely debilitating to the African American community.<sup>39</sup> These effects include the loss of male role models and fathers for African American youths;<sup>40</sup> the loss of husbands and male companions for African American women;<sup>41</sup> the loss of earnings and wealth for the African

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33. See *supra* note 27 and accompanying text.

34. See Michael E. Tigar, Essay, *Defending*, 74 Tex. L. Rev. 101, 105 (1995).

35. See, e.g., Fox Butterfield, *Prison Population Growing Although Crime Rate Drops*, N.Y. Times, Aug. 9, 1998, at A18 (finding that in 1996 the incarceration rate for Black men was eight times the rate for white men).

36. See *id.* (reporting figures for 1996 that show that 526,200 African American men and 510,900 white men are in prison).

37. See *The Real War on Crime: The Report of the National Criminal Justice Commission* 102 (Steven R. Donziger ed., 1996) (finding that 56% of African American males ages 18-35 in Baltimore are under some form of criminal supervision (citing Jerome G. Miller, *Hobbling a Generation: Young African-American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland* (Sept. 1992))); see also Marc Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later*, *The Sentencing Project*, Oct. 1, 1995, at 1 (reporting that almost one quarter of African American males nationwide between the ages of 20 and 29 are incarcerated, on probation, or on parole).

38. Indeed, such a possibility would be unimaginable. See Cole, *supra* note 27, at 8 ("[I]t is unimaginable that our country's heavy reliance on incarceration would be tolerated if the [B]lack/white incarceration rates were reversed . . .").

39. See generally Marc Mauer, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*, *The Sentencing Project*, Jan. 1997, at 1 (suggesting the need to consider new approaches to fighting crime because of the "degree to which the criminal justice system now affects the African-American community"); Justin Brooks & Kimberly Bahna, *"It's a Family Affair"—The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. Rev. 271 (1994) (describing the "devastating" effects of incarceration on families); Anthony E. O. King, *The Impact of Incarceration on African American Families: Implications for Practice*, 74 *Families in Soc'y: J. Contemp. Hum. Servs.* 145 (1993) (same).

40. This is particularly damaging because prior incarceration of a parent is a strong predictor that the child will be incarcerated as an adult. See Brooks & Bahna, *supra* note 39, at 282.

41. See Paul Butler, *(Color) Blind Faith: The Tragedy of Race Crime, and the Law*, 111 Harv. L. Rev. 1270, 1280 (1998) (book review) [hereinafter Butler, *(Color)*].

American community;<sup>42</sup> the loss of membership of important African American organizations and institutions; the preclusion of the educational and the social development of the incarcerated; and the encouragement of the spread of AIDS.<sup>43</sup> Indeed, arguably, the incarceration of such large numbers of black prisoners is, in itself, an indication of genocide.

The disproportionate incarceration of African Americans can be traced to racial disparities existing at all levels of the criminal process.<sup>44</sup> African Americans are imprisoned at greater rates because they are subjected to disparate treatment at each stage of the prosecution, from detention and arrest to charging, plea bargaining, trial, and sentencing.<sup>45</sup> These disparities are part of an overall racist pattern, a pattern that is dependant on the racist beliefs and practices of a wide variety of actors in the criminal justice process—including legislators, police officers, prosecutors, and judges.<sup>46</sup>

### A. *Racial Bias in the Laws*

There are many laws in effect that disproportionately impact African American communities and lead to greater numbers of African Americans in the criminal justice system.<sup>47</sup> The most notorious example of this phenomenon is the federal sentencing scheme for the distribution of cocaine.<sup>48</sup> Although there is no physiological difference in the effects of cocaine, penalties for the distribution of crack cocaine are far harsher than penalties for the distribution of powder cocaine.<sup>49</sup> A person sentenced for possession with intent to distribute crack cocaine would need to possess one hundred times more powder cocaine to receive the same sentence.<sup>50</sup> Because African Americans are more likely to use crack cocaine than powder cocaine, disparity in sentencing leads to a disproportionate impact on the African American community.<sup>51</sup> One cannot speculate

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Blind].

42. *See id.*

43. *See Mann, supra* note 27, at 227-29.

44. *See* Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 Mich. L. Rev. 1660, 1675 (1996) (book review) [hereinafter Davis, *Benign*] ("There is . . . ample evidence that racism plays a role at every stage of the criminal process.").

45. *See Mann, supra* note 27, at 166-200.

46. *See id.*

47. *See id.* at 129 ("[I]t is reasonably argued not only that many American criminal laws were devised expressly for . . . minorities, but also that criminal laws not specifically addressed to them were more frequently applied to them.").

48. *See* 21 U.S.C. § 841(b)(1)(A) (1994) (describing penalties for possessing cocaine with intent to distribute).

49. *See* Nkechi Taifa, *Cracked Justice: A Critical Examination of Cocaine Sentencing*, 27 U. West. L.A. L. Rev. 109, 129-37 (1996).

50. *See id.* at 110, 118.

51. *See id.* at 121-28.

why this sentencing disparity was enacted initially.<sup>52</sup> There may be many competing reasons for structuring the law in this manner.<sup>53</sup> However, one can comment on the fact that the disparity was not corrected when the deleterious impact on the African American community was disclosed.<sup>54</sup>

More generally, the entire structure of criminal laws operates in a way that ensures a racially disproportionate impact. The criminal law, as a whole, is disproportionately directed at street crime while the crimes of the wealthy, or so-called "white-collar crimes," are virtually ignored.<sup>55</sup> Another way of putting this is that activities that African Americans are more likely to engage in are those that are more likely to be criminalized.<sup>56</sup> This relationship is far from accidental. Virtually everywhere, criminal law is used as a means of controlling subordinated populations.<sup>57</sup> In Europe, whence the American system

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52. One commentator, Randall Kennedy, points out that although the crack cocaine disparity is offered as evidence of racial discrimination in the administration of the law, no showing has been made that Congress intended to discriminate against African Americans in legislating the distinction between crack and powder cocaine. See Randall Kennedy, *Race, Crime, and the Law* 376 (1997) [hereinafter Kennedy, *Race*].

53. It could very well be that Congress believed, erroneously as it turns out, that crack cocaine was distinguishable from powder cocaine due to its potency, cost, or social impact. See Taifa, *supra* note 49, at 128-43. Eric Sterling, former counsel to the House Judiciary Subcommittee on Crime, testified before Congress in 1994 that the crack cocaine disparity was motivated in part by the mistaken belief that basketball star Len Bias died from a crack cocaine overdose. See *Proceedings and Debates on Criminal Sentencing*, 140 Cong. Rec. S12478-021, S12479 (1994) (statement of Sen. Simon). Sterling also testified that "the 100:1 cocaine to crack ratio . . . was originally a 50:1 ratio in the Crime Subcommittee's bill, H.R. 5394, and was arbitrarily doubled simply to symbolize redoubled congressional seriousness." Taifa, *supra* note 49, at 121 n.78.

54. See Taifa, *supra* note 49, at 111-17.

55. See Tonry, *supra* note 27, at 96.

56. Dorothy Roberts would take this observation one step further. She argues that criminal law is not only disproportionately directed at people of color, but that the very meaning of crime is racially determined:

Not only is race used in identifying criminals, it is also used in defining crime. In other words, race does more than predict a person's propensity for committing neutrally-defined offenses. Race is built into the normative foundation of the criminal law. Race becomes part of society's determination of which conduct to define as criminal. Crime is actually constructed [sic] according to race.

Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 Tul. L. Rev. 1945, 1954 (1993) [hereinafter Roberts, *Crime*] (citation omitted).

57. The reliance on criminal law as an instrumentality of control is an extension of the hierarchical character of most societies. Criminologists Chambliss and Seidman emphasize this point. They state:

In all societies, regardless of how the interests groups vary in number, those which are most likely to be effective are the ones that control the economic or political institutions of the society. The most influential groups will of course be those which control both. As a consequence, legislation typically favors the wealthier, the more politically active groups in the society.

William J. Chambliss and Robert B. Seidman, *Law, Order, and Power* 65 (1971); see

of criminal justice was derived, criminal laws were used to control the poor.<sup>58</sup> Likewise, in the United States, criminal laws developed mainly as a means to control the enslaved population, Native Americans and the poor.<sup>59</sup> That the pattern would continue into present times is not surprising, since "the dominant experience has been one in which the law acted as the vehicle by which the generalized racism in the society was made particular and converted into standards and policies of subjugation and social control."<sup>60</sup> According to the National Minority Advisory Council on Criminal Justice:

America stands as a distinctive example of ethnic, religious, and linguistic pluralism, but it is also a classic example of the heavy-handed use of state and private power to control minorities and suppress their continuing opposition to the influence of white racist ideology.<sup>61</sup>

Consequently, the selection of appropriate problems for the application of state violence focuses almost entirely on crimes that threaten the wealthy and powerful, and rarely on crimes that target the poor and the Black (other than crimes of physical violence that other poor or Black people are likely to commit).<sup>62</sup> Thus, bouncing a

also Joseph F. Sheley, America's "Crime Problem:" An Introduction to Criminology 67 (1985) (finding that what we consider as a crime "at any given time reflect[s] the work of various interest groups within society's current power structure"); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 Am. Crim. L. Rev. 743, 760 (1995) [hereinafter Nunn, *Trial as Text*] (describing the definition of crime as an end product of cultural struggle between competing groups).

58. See generally Douglas Hay, Property, Authority, and the Criminal Law in Albion's Fatal Tree: Crime and Society in Eighteenth-Century England 25-26 (Douglas Hay et al. eds., 1975) (describing the English criminal law as a social institution manipulated by the ruling classes and used to protect property and assert dominion over the "mass of unpropertied Englishmen"); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1204-05 (1985) ("[T]he criminal law is designed primarily for the nonaffluent; the affluent are kept in line, for the most part by tort law.").

59. See Mann, *supra* note 27, at 161, 165. For a discussion of how the criminal law was enlisted as a means to control Black populations following slavery, see Noel C. Richardson, *Is There A Current Incarceration Crisis in the Black Community? An Analysis of the Link Between Confinement, Capital, and Racism in the United States*, 23 New. Eng. J. on Crim. & Civ. Confinement 183, 199-211 (1997). Richardson notes that after Southern states passed laws "criminalizing hunting, fishing, and grazing of livestock to prevent [B]lacks from obtaining subsistence and to increase the likelihood of petty thievery," the percentage of African Americans in prison increased by a third. *Id.* at 210 n.213 and accompanying text.

60. Haywood Burns, *Black People and the Tyranny of American Law*, 407 Annals Am. Acad. Pol. & Soc. Sci. 156, 157 (1973).

61. National Minority, *supra* note 27, at xv.

62. The criminal justice system is simply the most efficacious means of preserving the power and pursuing the interests of dominant groups. Marxists have long argued that crime was the outgrowth of capitalistic exploitation, and criminal law the

check is a crime, whereas overcharging for retail goods is not, and although racial discrimination is widespread by any objective measure, there is no rush to criminalize discriminatory conduct, such as failing to rent an apartment to an otherwise qualified African American applicant.

The government's ill-advised "War on Drugs" demonstrates the carelessness with which state violence is wielded when African American interests are at stake. In the early 1980's, the Reagan administration began a concentrated effort to target the distribution and use of illegal drugs in the United States.<sup>63</sup> These efforts resulted in increased penalties for drug possession and sales, stepped-up interdiction efforts, harsher prosecution policies, and increased police searches and seizures.<sup>64</sup> These policies funneled more and more people into the criminal justice system.<sup>65</sup> Yet, ultimately this concentrated effort had little effect on the amount of drug use or the amount of drugs brought into the country.<sup>66</sup> The War on Drugs did result in many more African American males going to jail, greater violence as the transaction costs of the drug trade skyrocketed, and greater police repression, at least as a perceived phenomenon, in the Black community.<sup>67</sup> The sad part of this tale is that these consequences were entirely anticipated by policy makers in the Reagan administration.<sup>68</sup> It was well understood that the war on drugs

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expression of capitalist values and agendas. In Marxist ideology:

Criminal law is used by the state and the ruling class to secure the survival of the capitalist system, and, as capitalist society is further threatened by its own contradictions, criminal law will be increasingly used in the attempt to maintain domestic order. The underclass . . . will continue to be the object of crime control as long as the dominant class seeks to perpetuate itself, that is, as long as capitalism exists.

Mann, *supra* note 27, at 128 (quoting Richard Quinney, *Class, State and Crime* 86 (1977)). In response to this perspective, Mann makes the point that people of color are, for the most part, synonymous with the underclass in American society and thus are most often the targets of the criminal law. As she put it:

Since the American 'underclass' has always had a disproportionate share of racial minorities within its ranks, it is reasonably argued not only that many American criminal laws were devised expressly for these minorities, but also that criminal laws not specifically addressed to them were more frequently applied to them.

*Id.* at 129.

63. See Tonry, *supra* note 27, at 82-83. The Bush administration continued and expanded the Reagan-launched "War on Drugs." See *id.* at 83.

64. See Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 Yale L.J. 2593, 2611-13 (1994) (book review). See also Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. Pitt. L. Rev. 1, 4, 23 (1986) (arguing that the "War on Drugs" is eroding Fourth Amendment principles).

65. See Barnett, *supra* note 64, at 2611-13.

66. See Tonry, *supra* note 27, at 119-20.

67. See *id.* at 81-83.

68. See *id.* at 4, 104.

would have devastating effects on the African American community.<sup>69</sup> Still, the decision was made to go ahead, notwithstanding the consequences, because political advantage outweighed whatever harm the African American community might endure.<sup>70</sup>

### B. *Criminal Justice as Flawed Social Policy*

The criminal justice system uses violence more than anything else to solve the problems it encounters.<sup>71</sup> Seeking a solution to a problem through the use of criminal law involves a commitment to using violence.<sup>72</sup> We must commit to using violence in order to solve some problems, like drunk driving. When solving other problems, like everyday racism, we do not commit to using violence because we do not see the problem as that serious, or we think it is not so easily solved through such means.<sup>73</sup> The choice to use criminal law as the preferred societal means of problem-solving is a social policy choice that, for the most part, is not made by the African American community.<sup>74</sup> The particular mix of solutions that takes place within the system, including retribution or rehabilitation, involves choices that Blacks do not make.<sup>75</sup> Why is the white community exacting retribution against us in the first place when the blame for the condition is not ours?<sup>76</sup>

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69. *See id.*

70. *See id.* at 123.

71. *See* Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986) (arguing that judicial acts "signal and occasion the imposition of violence upon others").

72. *See id.*

73. *See* Jan Alan Neiger, *Campus Hate Speech on Trial By Timothy C. Shiell, United Press of Kansas, 1998*, 28 J.L. & Educ. 304, 306-07 (1999) (book review) (analogizing campus solutions to hate speech with solutions to racism).

74. As to the absence of Black input into social policy, Mann notes that "African American and other racial minorities lack adequate representation as lawmakers, and laws are made subsequently by persons who are not members of the groups directly involved . . ." Mann, *supra* note 27, at 161.

75. *See id.* It is not only true that African Americans are underrepresented in state and federal legislatures, but they are also underrepresented in the ranks of judges charged with the responsibility of pronouncing sentences. *See id.* at 161-62.

76. David Cole argues that the preoccupation with individual responsibility is a flaw that is inherent to our criminal justice system and grows out of the system's preference for "formal equality over any kind of substantive equality." David Cole, *What's Criminology Have To Do With It?*, 48 Stan. L. Rev. 1605, 1612 (1996). Cole notes:

If a [B]lack child growing up in Brooklyn's East New York has substantially fewer opportunities for escaping criminal activity than a white child raised on Manhattan's Upper East Side, is it fair to treat them identically? Shouldn't we say that the Upper East Side child who violates the law is more culpable than the East New York child? If they receive the same punishment for the same behavior, have they really been treated equally? But if we punish them differently, have we not departed from the formal equality that seems critical to the criminal justice system?

The more we understand about the particular background of an offender,

When faced with evidence of the disproportionate arrest of African Americans, defenders of the police point out that African Americans are involved in crime at greater rates than other sectors of the population.<sup>77</sup> This claim is overstated.<sup>78</sup> Mann points out that when one focuses on patterns of offending, African American criminality is no different from that exhibited by other populations.<sup>79</sup> To the extent that more African Americans do offend, that difference is offset by the greater numbers of African Americans that are arrested.<sup>80</sup> Even if African Americans do offend at higher rates one must ask why this is so. Why are so many African Americans involved in crime? Is it simply that African Americans are genetically or culturally different from whites? Or is it that the greater rate of offending is a consequence of the conditions that African Americans endure?

Poverty and marginalization lead to crime.<sup>81</sup> According to James

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the more we are likely to understand what "caused" him or her to commit a crime. However, the criminal law by and large does not take subjective individual circumstances into account, short of rather rare defenses like duress or insanity. Instead, responsibility is tied to acts, and offenders who commit such acts are, at least in theory, to be treated similarly. The recent trend toward guideline sentencing and mandatory minimums reflects a further effort to strip away all consideration of the individual offender, and to predicate punishment solely on conduct. But where individuals are not in fact similarly situated, treating them identically is not the same as treating them equally.

*Id.*

77. See, e.g., William Wilbanks, *The Myth of a Racist Criminal Justice System* at vii (1987) (proposing that evidence of racism in the criminal justice system is weak and contradictory).

78. Claims that African Americans engage in criminal activity at a greater proportional rate are usually grounded on statistics which purport to show that African Americans are arrested with more frequency than others. See Mann, *supra* note 27, at 37. But these figures may be inflated because of over-reporting of crimes committed by Blacks, the over-policing of Black communities, counting multiple charges against a single individual as multiple arrests, and undercounting the Black population so the per capita rate of crime appears to be higher. See *id.* at 32-35; see also Davis, *Benign*, *supra* note 44, at 1675-77 (tracing disproportionate arrest statistics to unwarranted police suspicion of Blacks).

79. See Mann, *supra* note 27, at 39. Mann notes that the difference between cross-race comparisons and intra-race comparisons is significant when examining whether African Americans are more likely to commit violent offenses. For example, although African Americans constituted 46.5% of persons arrested for violent crimes in 1986, these arrests totaled less than 8% of African American arrests. See *id.* The African American percentage of violent arrests is comparable to the percentages of other racial groups. See *id.* at 44-45. Consequently, although some believe African Americans disproportionately commit violent crimes, "the proportions of each type of crime do not vary substantially between minorities, or between minorities and whites." *Id.* at 45.

80. See *supra* notes 34-38 and accompanying text.

81. Indeed African Americans have gone "from an 'historical state of oppression' to one of uselessness. This increasing economic obsolescence has served as one of the primary sources of increased criminal activity and incarceration in the [B]lack community." See Richardson, *supra* note 59, at 195-96. Of course a rigorous analysis of the problem would ask why there is so much poverty in the African American

Vorenberger, Harvard law professor and former head of President Johnson's Crime Commission, "the most significant action that can be taken against crime is action designed to eliminate slums and ghettos, to improve education, to provide jobs, to make sure that every American is given the opportunities and freedoms that will enable him to assume his responsibilities."<sup>82</sup> This advice, however, has never been taken. The poor are the targets of the criminal justice system, and their behavior is criminalized. Poor people often do not have the social resources to live productive lives that keep them out of trouble.<sup>83</sup> For instance, the poor have fewer coping skills and fewer role models.<sup>84</sup>

Crime among the poor and the socially marginalized is not unexpected. Does it come as any surprise that people who have nothing steal and that people who are taught not to value their own lives do not value the lives of others like them?<sup>85</sup> The root cause of so much criminal behavior seems entirely predictable.<sup>86</sup> Yet nothing is done to eliminate the known social causes of crime. There is no serious attempt to eradicate poverty.<sup>87</sup> Job training, conflict resolution, self-esteem, and conscious-raising programs in impoverished communities are lacking. Instead, we have been offered a mythology of personal responsibility that simply serves to justify the use of state violence against the defenseless.<sup>88</sup> Society as a whole does

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community and why that community is so marginalized. One commentator answers the question bluntly. According to Professor Butler, "the best explanation of disproportionate [B]lack criminality is white racism." Butler, *(Color) Blind*, *supra* note 41, at 1281 (discussing Randall Kennedy, *Race, Crime and the Law* (1997)).

82. Miller, *supra* note 27, at 170 (quoting James Vorenburg).

83. See Nichola L. Marshall, *The Welfare Reform Act of 1996: Political Compromise or Panacea for Welfare Dependency?*, 4 *Geo. J. on Fighting Poverty* 333, 337 (1997) ("Poverty stems from both a lack of marketable skills and insufficient employment opportunities.").

84. *See id.* at 336-37.

85. Amos Wilson argues that Black-on-Black criminals imitate white racists and that African Americans who prey on their own community are "the supreme White racist[s] and White [S]upremacist[s]." Amos N. Wilson, *Black-on-Black Violence: The PsychoDynamics of Black Self-Annihilation in Service of White Domination* 73 (1990) (emphasis omitted).

86. *See* Joseph F. Sheley, *Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination*, 67 *Tul. L. Rev.* 2273, 2289 (1993) [hereinafter Sheley, *Structural*]. Sheley argues:

"[H]igh crime periods" seem generally correlated with economic hard times and with majority attempts to scapegoat minorities—economic "parasites"—as the source of the hard times. The criminal justice system is pressured to control those segments of the population behind, or those who are perceived as threatening because of, current economic woes.

*Id.*

87. *See id.* at 2291 (suggesting "that fundamental changes in income, welfare, employment, education, and health care policy are necessary" to reduce crime).

88. *See id.* ("[T]he ultimate causes of criminal behavior were not society's but the criminal's problem, and criminals would [reform] to the extent that we 'got tough' with them.").

nothing until a poor person commits a crime. Then, punitive strategies come into play, and this effect is exacerbated as policy-makers retreat further and further from rehabilitative goals.<sup>89</sup>

Reliance on the criminal justice system to manage problems caused by social inequities seems both inefficient and unfair. Such reliance is inefficient because it fails to address the source of the crime. Rather, a cycle of pain is established that simply sends new generations of oppressed people into the criminal process. The criminal justice system is also unfair. It is unfair to so-called criminals because they never get a chance to live wholesome, productive lives. It is unfair to the African American community because the system imposes policy decisions that fail to acknowledge and correct the community's subjugated status.

In addition, the human needs of the African American community are not met and it remains, by and large, the target of criminal activity by its members. Although slavery has ravaged the institutional structure of the Black community to such a degree that some sections of the Black community have yet to recover, society has yet to redress the effects of that period. Instead, society provides more prisons, more police, and tougher sanctions. For Black defendants in particular, criminal behavior is linked to the oppressed status of the community.<sup>90</sup>

### C. *Racist Police and African American Suspects*

Most African Americans interact with the criminal justice system through contact with the police. There is substantial evidence that police specifically target African Americans for special investigation and detention. David Harris observes:

Put in the simplest terms, the criminal justice system treats African Americans and Hispanic Americans differently than it does whites. This disparate treatment reaches . . . down to the first level of the criminal justice process, the points at which police decide who they will investigate, approach, stop, frisk, and ultimately arrest. Police

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89. See David Dolinko, *The Future of Punishment*, 46 UCLA L. Rev. 1719, 1719-20 (1999) (describing the retreat from rehabilitation during the 1970s and the embrace of retribution as "the leading philosophical justification" of punishment).

90. In fact, criminal behavior is an expected *and desired* outcome of the African American community's subjugated position in America. Echoing a claim that is often made by radical criminologists, Noel Richardson argues that an oppressed and crime-ridden African American community is useful to the dominant white society in many ways. According to Richardson:

Segments of these populations can be beneficial "economically [as social capital], politically as evidence of the need for state control systems, [and ideologically as] scapegoats for rising discontent." In other words, under certain conditions, capitalist societies "derive benefits from maintaining a number of visible and uncontrolled 'troublemakers' in their midst."

Richardson, *supra* note 59, at 197 (quoting Steven Spitzer, *Toward a Marxian Theory of Deviance*, 22 Soc. Probs. 643, 645 (1975)) (alteration in original).

are much more likely to stop African-American men than white men.<sup>91</sup>

In part, this is due to the fact that police officers, like many Americans, believe crime has a Black face.<sup>92</sup> In the minds of many police officers, if African Americans are stopped, detained, or arrested, then, by default, criminals, or at least potential criminals, are being stopped, detained, or arrested.<sup>93</sup> This belief in Black criminality causes police departments to over-police African American communities,<sup>94</sup> seek to contain African Americans within high crime areas, and disproportionately subject African Americans to so-called "quality of life" policing.<sup>95</sup>

Legally, police are able to detain individuals if they have reasonable suspicion that the individuals are involved in criminal activity.<sup>96</sup> Theoretically, the reasonable suspicion standard is not supposed to allow detentions on the basis of a raw suspicion or hunch.<sup>97</sup> Courts, however, frequently allow stops that are based on little else.<sup>98</sup> The reasonable suspicion standard is so loose that it permits detentions to be made with a great deal of discretion.<sup>99</sup> With the exercise of this discretion comes the possibility of abuse. Officers may stop Blacks because of their own biases or their own suspicions or hunches.<sup>100</sup> As

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91. David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 679-80 (1994) [hereinafter Harris, *Factors*]; see also David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 546 (1997) [hereinafter Harris, *Driving*] ("[I]f past practice is any indication, [police] will use the traffic code to stop a hugely disproportionate number of African-Americans and Hispanics."); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter? 26 Val. U. L. Rev. 243, 250-62 (1991) (generally describing pervasiveness and scope of excessive police stops of African American men).

92. According to Professor Sheri Johnson, "[t]here is substantial evidence that many police officers believe minority race indicates a general propensity to commit crime. The evidence further suggests the police weigh that belief in their decisions to detain." Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L.J. 214, 236 (1983) [hereinafter Johnson, *Race*].

93. See David H. Bayley & Harold Mendelsohn, *Minorities and the Police: Confrontation in America* 107 (1969) ("Policemen associate minority status with a high incidence of crime, especially crimes against the person, with bodily harm to police officers, and with a general lack of support for the police."); Harris, *Driving*, *supra* note 91, at 571 (arguing that law enforcement officers believe race is a proxy for a "higher probability of criminal activity").

94. See *infra* note 106 and accompanying text.

95. See *infra* notes 108-09 and accompanying text.

96. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

97. See *id.* at 27.

98. See Johnson, *Race*, *supra* note 92, at 218-22 (examining uneven treatment of cases in which courts have found reasonable suspicion to exist). The source of the problem can be traced to the fact that reasonable suspicion, the basis for a detention, remains an "elusive" concept. See *id.* at 216.

99. See *id.*

100. See *supra* note 90 and accompanying text.

Professor David Harris has demonstrated from his study of reasonable suspicion cases, being Black and poor means being stopped and frisked.<sup>101</sup> When not stopped because of their race, African Americans are stopped for reasons that are easy proxies for race or which have a disparate impact on Black citizens.<sup>102</sup>

Another troubling practice is the use of racial profiles by the police.<sup>103</sup> The explicit use of race factors to detain is unlawful.<sup>104</sup> Although the police deny reliance on racial categories to decide whom to stop, there is evidence that this is a common practice for police departments.<sup>105</sup>

Even without using racial profiles, a disproportionate number of African Americans may be stopped, detained, and ultimately arrested because police over-police Black neighborhoods.<sup>106</sup> Police also spend more time and resources in Black neighborhoods than circumstances warrant. This is not a matter of the police meeting the needs of the community and controlling crime. It is an instance of the police repressing the community by conducting more stops and intimidating and mistreating the residents of the community.<sup>107</sup> African Americans are kept in their communities by police patrols, and harassment ensues should they venture out of areas where the police think they belong. "Quality of life policing" involves over-policing in areas frequented by whites.<sup>108</sup> Arguably, however, the police conduct is directed at the homeless, young African American males, and other undesirables.

Police bias against African Americans results in far greater numbers of African Americans entering the criminal justice system and being subject to its restraints.<sup>109</sup> Detention and arrest by the police is the slippery slope that sends African Americans into the maws of a criminal justice system that treats them in a disparate fashion at every point where discretionary judgments can be made.<sup>110</sup>

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101. See Harris, *Factors*, *supra* note 91, at 679-80.

102. See Johnson, *Race*, *supra* note 92, at 237-41 (describing ways that officers may detain a suspect based on illegitimate proxies for race).

103. See Cole, *supra* note 27, at 47-52 (describing racial profiling).

104. See Johnson, *Race*, *supra* note 92, at 237.

105. Several notorious cases have brought the practice of racial profiling to the public eye, including well-publicized cases on Interstate 95 in Florida and Interstate 68 in Maryland. From the disclosures in these cases, it appears police detain large numbers of African Americans with little or no justification. For a discussion of these cases, see Cole, *supra* note 27, at 49-52; Harris, *Driving*, *supra* note 91, at 560-73.

106. See Maclin, *supra* note 91, at 250-52.

107. See *id.*

108. See Cole, *supra* note 27, at 44 (describing quality of life policing).

109. See Davis, *Benign*, *supra* note 44, at 1676.

110. See *id.* at 1675; Harris, *Factors*, *supra* note 91, at 679.

## II. PROSECUTORS AND THE OVERREPRESENTATION OF AFRICAN AMERICANS IN THE CRIMINAL JUSTICE SYSTEM

Prosecutors exercise significant discretion within the criminal justice system.<sup>111</sup> In fact, prosecutors may exercise more discretion than any other actor.<sup>112</sup> Prosecutors decide whom to charge,<sup>113</sup> what to charge them with,<sup>114</sup> and whether to strike a plea bargain.<sup>115</sup> Prosecutors also play some role in determining whether charges, once filed, are dropped or reduced<sup>116</sup> and whether defendants receive charge enhancements for particular crimes.<sup>117</sup> Prosecutors have the ability to recommend sentences that weigh strongly with judges and greatly influence determining the actual sentence imposed.<sup>118</sup> Prosecutors also influence the range of a potential sentence through selection of the charge.<sup>119</sup> With this significant discretion comes the potential for discrimination. In study after study, evidence that prosecutors discriminate against African Americans and other people of color has been mounting.<sup>120</sup> Whether this discrimination is conscious or unconscious does not matter. Arguably, the overrepresentation of African Americans in the criminal justice system is due largely to the actions of prosecutors.<sup>121</sup>

Prosecutorial bias is present at virtually every stage of the criminal justice system.<sup>122</sup> At the initial charging stage, prosecutors treat African Americans in racially disparate ways. Several researchers

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111. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 20 (1998) [hereinafter Davis, *Prosecution*].

112. See *id.* at 25.

113. See *id.* at 21-24.

114. See *id.* at 21-22.

115. See *id.* at 25.

116. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 749 & n.233 (1996).

117. See generally *id.* at 742 (discussing the trends toward enhanced prosecutorial power).

118. See Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 Colum. L. Rev. 1059, 1065-66 (1976). Where sentencing guidelines have been adopted, prosecutors exercise even more influence on the sentencing process. See Misner, *supra* note 116, at 757-59.

119. See Misner, *supra* note 116, at 756.

120. See Davis, *Benign*, *supra* note 44, at 1679 ("[E]mpirical studies consistently demonstrate that race does indeed affect prosecutorial decisions.").

121. See Davis, *Prosecution*, *supra* note 111, at 16-18, 25. Although Davis acknowledges the critical role that prosecutors play in the perpetration of racial discrimination in the criminal justice system, she does not call for African American prosecutors to refrain from working as prosecutors. Instead, she argues that African American prosecutors should use their discretionary power to eliminate racial disparities in charging and sentencing. See *id.* at 50-53. Paul Butler also acknowledges the role that prosecutors play in perpetuating racial injustice, but he also does not suggest that because of that role African Americans should refuse employment as prosecutors. See Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. Rev. 705, 708-14 (1999).

122. See Davis, *Prosecution*, *supra* note 111, at 16-17.

have found prosecutors press charges against African Americans more frequently than they do similarly situated whites.<sup>123</sup> In a 1987 study of charging decisions by Los Angeles prosecutors, researchers found that the prosecutors were significantly less likely to drop charges during the initial screening against Hispanic and Black defendants than against white defendants.<sup>124</sup> This was the case even though the authors of this study used multiple regression analysis to control for other, nonracial, factors that might have contributed to this result such as prior record, use of a weapon, and the seriousness of the charge.<sup>125</sup>

A 1985 study by Radelet and Pierce also found racial disparities in prosecutorial charging decisions.<sup>126</sup> Radelet and Pierce reviewed over one thousand homicide cases in Florida to determine whether prosecutors upgraded or downgraded the initial assessment of severity made by the police.<sup>127</sup> Radelet and Pierce found that charging decisions were affected by the race of both defendant and victim.<sup>128</sup> Crimes involving white victims and African American defendants were more likely to be upgraded by the prosecutor, while crimes involving African American victims and white defendants were much more likely to be downgraded.<sup>129</sup> Consequently, Radelet and Pierce found that Black defendants faced more serious charges, more vigorous prosecution, and higher sentences than similarly situated whites.<sup>130</sup>

Myers and Hagan also found discrepancies in prosecution decisions based on the race of the victim.<sup>131</sup> After reviewing 980 felony cases brought in Indianapolis, Indiana, Myers and Hagan found that prosecutors treated cases more seriously when the victim was white.<sup>132</sup> In such cases, Indianapolis prosecutors were more likely to charge and less likely to plea bargain than in cases involving non-white victims.<sup>133</sup>

In addition to the decision whether to charge, prosecutors also have significant discretion in determining *what* to charge. There is a vast

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123. See *Developments*, *supra* note 27, at 1520.

124. See *id.* at 1526 n.20.

125. See *id.*

126. See Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & Soc'y Rev. 587, 615-19 (1985).

127. See *id.* at 600.

128. See *id.* at 615-19.

129. See *id.* at 601.

130. See *id.* at 615-19.

131. See *Developments*, *supra* note 27, at 1525 (citing Myers & Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 Soc. Probs. 439, 441-47 (1979)).

132. See *id.*

133. See *id.* A 1980 study by LaFree reached conclusions similar to those found by Myers and Hagan. See *id.* at 1527. LaFree found that African American men who committed sexual assaults against white women were more likely to receive more severe sentences than other sexual assailants. See *id.* This study controlled for factors such as age and prior record. See *id.* at 1527 n.24.

array of criminal statutes from which to choose, and the same act can often result in very different punishment depending on the precise statute chosen. As stated above, there is evidence that prosecutors charge cases involving Black defendants more harshly than those involving white defendants.<sup>134</sup> That is, given a range of potential charges, prosecutors are more likely to choose more severe charges when a Black offender is involved.<sup>135</sup>

Another way a disproportionate number of African Americans enter into state control is through the juvenile justice system.<sup>136</sup> Prosecutors are more likely to charge African American youths with juvenile infractions,<sup>137</sup> more likely to treat these infractions more seriously,<sup>138</sup> and more likely to seek transfer of juvenile cases to adult court when the offender is Black.<sup>139</sup> In California, African American teens charged with crimes are over six times more likely to be tried as adults than are white youths.<sup>140</sup>

After the initial charging decision in a homicide case, one of the most significant ways that a prosecutor can enhance the charge is by seeking the death penalty. Here again, evidence shows racial discrimination on the part of prosecutors. Paternoster examined 300 murder cases involving an aggravated felony that prosecutors in South Carolina reviewed.<sup>141</sup> He concluded that race of the victim determined the outcome in the vast majority of cases.<sup>142</sup> Prosecutors were more likely to seek the death penalty for killers of white victims than for killers of Black victims.<sup>143</sup> In completing his research, Paternoster rejected the argument that the difference in the treatment of killers of white and Black victims is an artifact of the way their victims were killed.<sup>144</sup> Thus, "[t]he claim that the apparent effect of the victim's race actually reflects differences in the way whites and

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134. See *supra* notes 126-33 and accompanying text.

135. See *Developments, supra* note 27, at 1526.

136. See Simon I. Singer, *Youthful Offender Status and the Reproduction of Juvenile Justice Within Systems of Criminal Justice: The Case of William Shrubbsall*, 17 Buff. Pub. Interest L.J. 107, 117 (1998-99).

137. See *id.*

138. See *id.*

139. See Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. Crim. L. & Criminology 449, 453-54 (1996) (noting that a juvenile's race may influence judicial waiver decisions). Criminal and juvenile courts have concurrent jurisdiction over juvenile cases, and prosecutors have discretion to use waivers in determining the appropriate forum. See *id.* at 450 n.4.

140. See Michael A. Fletcher, *Calif. Minority Youth Treated More Harshly, Study Says; Racial Disparities in Sentencing Clear, Authors Report*, Wash. Post, Feb. 3, 2000, at A16.

141. See Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 Law & Soc'y Rev. 437, 471 (1984).

142. See *id.*

143. See *id.*

144. See *id.*

[B]lacks come to be killed appears unsupported.”<sup>145</sup>

Several studies have been conducted which examined racial disparities in sentencing.<sup>146</sup> A widely cited and respected sentencing study was the 1983 study of Georgia death sentences conducted by David C. Baldus, Charles Pulaski, and George Woodworth.<sup>147</sup> This study, which was called “the most comprehensive analysis to date,”<sup>148</sup> looked at over 133 death sentences imposed in Georgia over an eight year period.<sup>149</sup> After examining more than 230 factors that may have influenced these sentences, the researchers concluded that race of the victim was the determining factor in whether a sentence of death was imposed.<sup>150</sup> The Baldus study showed that defendants who killed white victims were 4.3 times more likely to receive a death sentence than defendants who killed non-whites.<sup>151</sup> African American defendants fared even worse: Black defendants who killed whites were eleven times more likely to receive the death penalty than white defendants who killed Blacks.<sup>152</sup>

A survey of Florida’s twenty judicial circuits showed that only two circuits were free of racial bias in the application of the state’s habitual offender law.<sup>153</sup> The survey found that an African American was fifty percent more likely to be prosecuted as a habitual offender than a white with a similar background.<sup>154</sup>

All of these studies sought to determine the influence of race as a determinate of charging decisions and sentencing outcomes when weighted against other factors.<sup>155</sup> As stated above, the researchers used multiple regression analysis to control for nonracial factors such as prior record, use of a weapon, character of offense, or the victim’s

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145. *Id.*

146. See Mann, *supra* note 27, 191-200 (describing sentencing studies and summarizing their findings).

147. See David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983) (analyzing the effect of race on the imposition of death sentences in Georgia).

148. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1396 (1988) [hereinafter Kennedy, *McCleskey*].

149. See Baldus et al., *supra* note 147, at 680.

150. See Kennedy, *McCleskey*, *supra* note 148, at 1397.

151. See *id.* at 1398.

152. See *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

153. See *Blacks Prosecuted More Often, Report Says*, Miami Herald, Sept. 3, 1992, at 2B.

154. See *id.*; John D. McKinnon, *Offender Law Carries Brand of Racial Bias*, Miami Herald, Sept. 23, 1992, at 1B. A University of Miami law professor, Jonathan Simon, found an even greater disparity of treatment between Black and white offenders. See Manny Garcia, *Study: Sentencing Law Favors Whites*, Miami Herald, May 25, 1994, at 2B. He found that African Americans were more than twice as likely to receive more severe prison sentences under the habitual offender statutes than a similarly situated white offender. See *id.*

155. See *Developments*, *supra* note 27, at 1525-29.

prosecution preference.<sup>156</sup> Yet, the studies all concluded that race—either race of the victim, race of the defendant, or both—mattered in the ultimate sentencing outcome.<sup>157</sup> Of course, objections could be raised as to the statistical validity of these studies: arguments that the multiple regression analysis was not complete enough, that not enough factors were considered, or that statistical errors were made in the calculations.<sup>158</sup> But these types of objections are, for the most part, hypothetical.<sup>159</sup> Detractors of these studies have not come forward with precise indications of statistical error.<sup>160</sup>

Additional evidence of racial discrimination exists in other aspects of the prosecution of crimes. Both Langan and Blumstein compared crime incidence data with incarceration rates and determined that far greater percentages of African Americans are convicted of crimes than are involved in the commission of criminal acts.<sup>161</sup> Blumstein compared arrest rates with imprisonment data.<sup>162</sup> In ten of eleven offense categories, Blumstein found that African Americans were imprisoned at a disproportionate ratio to arrest.<sup>163</sup> Using 1991 data, the disproportionality averaged twenty-four percent.<sup>164</sup> Put another way, of those arrested for the class of crimes reviewed, African Americans had a twenty-four percent higher rate of imprisonment than their white counterparts, an amount that is significantly greater than one would expect by chance.<sup>165</sup> Langan disclosed a similar disparity when he compared crime victims' survey data with

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156. See *id.* at 1529 n.31; *supra* note 124-25 and accompanying text. For a specific discussion of multiple regression analysis, see *Developments*, *supra* note 27, at 1529 & n.31.

157. See *Developments*, *supra* note 27, at 1525-29.

158. See *id.* at 1529-31.

159. See *id.* at 1531.

160. See *id.* ("Until such specific statistical criticisms are made, the results of the various studies essentially stand unchallenged."). Twenty-eight prominent studies of racial discrimination in capital sentencing were subjected to exhaustive review by the U.S. General Accounting Office ("GAO") in 1990. See U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (1990). The GAO found:

In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered [B]lacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. . . . Legally relevant variables, such as aggravating circumstances, were influential but did not explain fully the racial disparities researchers found.

*Id.* at 5-6 (footnotes omitted).

161. See Davis, *Benign*, *supra* note 44, at 1682-83 (reviewing the findings of both Langan's and Blumstein's study).

162. See Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. Colo. L. Rev. 743, 746-47 (1993).

163. See *id.* at 747.

164. See Davis, *Benign*, *supra* note 44, at 1683.

165. See Blumstein, *supra* note 162, at 748-49.

imprisonment rates.<sup>166</sup> Langan reviewed reported assaults committed in 1982 and found that twenty-two percent were committed by African Americans, whereas fifty percent of those sentenced for assaults in 1982 were African American.<sup>167</sup> Thus, the study revealed an unexplained disproportionate rate of incarceration of twenty percent.<sup>168</sup>

As Professor Angela Davis indicates, these rates of disproportionality are profound.<sup>169</sup> In 1994, there were 735,000 African Americans in prison.<sup>170</sup> Using twenty percent as the average unexplained disparity in rate of incarceration, Davis points out that in 1994 this would have resulted in 147,000 African Americans who may have been incarcerated due to racial bias in the criminal process.<sup>171</sup> As she states, this "is a staggering number."<sup>172</sup> Yet, the calculations of Langan and Blumstein have led to little reform in the criminal justice system or in the behavior of prosecutors.<sup>173</sup>

#### A. *The Reaction of Prosecutors to Evidence of Racial Inequity*

There is compelling, if not convincing, evidence of racial discrimination in the criminal justice system. Many Americans, white and Black, believe the criminal justice system is biased.<sup>174</sup> Given the prosecutor's duty to avoid the appearance of impropriety, prosecutors as a group should take steps to eliminate, or at least explain, the sources of perceived or actual bias in the criminal justice system. Insofar as the allegations point to racist or biased prosecutorial decisions, prosecutors should correct these sources of bias as quickly as possible.

For the most part, however, the response of prosecutors has been to wrap themselves in a blanket of denial. Recently, a locally elected

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166. See Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. Crim. L. & Criminology 666, 676-78 (1985). For a summary of the findings of the Langan study, see Davis, *Benign*, *supra* note 44, at 1683.

167. See Davis, *Benign*, *supra* note 44, at 1683.

168. See *id.*

169. See *id.*

170. See *id.* at 1683-84.

171. See *id.* at 1683.

172. *Id.*; see also Russell, *The Color of Crime*, *supra* note 27, at 31 (reviewing Blumstein study and concluding racial disparities found by Blumstein represent an "enormous social problem").

173. Indeed, Davis demonstrates in her article that criminologists tend to ignore these figures. See Davis, *Benign*, *supra* note 44, at 1683 (pointing out that Tonry views racial bias as a relatively small problem in the criminal justice system, despite an unexplained 20% disproportion between crimes committed and convictions for African American men).

174. An American Bar Association poll conducted in 1998 showed that 47% of respondents "strongly disagreed" with the statement that "the courts treat all ethnic and racial groups the same." *Many Perceive Racial Bias in Courts, Poll Indicates*, Fort Worth Star Telegram, Feb. 24, 1999, at 6.

prosecutor flatly stated to a panel at the University of Florida that there was no racial bias in prosecutorial decision making.<sup>175</sup> Though prosecutors assert that there is no racial bias in the exercise of prosecutorial discretion, they have done little to verify this belief, or dispel the concerns of others. Prosecutors have rarely commissioned studies, promulgated internal guidelines, or made attempts to keep voluntary statistics on prosecutorial racial bias.<sup>176</sup> Few prosecutors have taken it upon themselves to maintain a dialogue on these issues within their offices. There is little effort to sensitize prosecutors or provide diversity training.<sup>177</sup>

Even more disappointing than the lack of prosecutorial effort to determine the extent of racial bias in prosecutorial decision-making, is that prosecutors actively oppose the efforts of others to do so. Prosecutors have vehemently opposed legislative attempts to gather information regarding bias in the imposition of death sentencing and in automobile stops.<sup>178</sup>

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175. See State Attorney for the Eighth Jud. Dist. of Fla., Rod Smith, Address at the Fla. Law Found. Pub. Serv. Law Fellows Symposium, University of Florida College of Law (Feb. 2, 1995) (transcript on file with author).

176. In reaction to charges of racial bias, a few prosecutors' offices have conducted studies investigating such charges. Two Florida prosecutors conducted studies of their habitual sentencing records in response to allegations in a study commissioned by the state legislature that "[B]lack[s] were three times more likely than whites to get longer sentences under habitual-offenders laws." *Prosecutors Deny Bias in Sentencing: The State Attorneys Fault a Legislative Study for Giving the Wrong Impression of Habitual Offender Cases*, Orlando Sentinel, Apr. 13, 1993, at B5. One prosecutor's survey found no bias, while the other found Blacks were only twice as likely to receive habitual offender status. See *id.* Another prosecutor's office conducted a study in 1993, the results of which were highly criticized. See Ed Housewright, *DA's Study on Bias in Courts Angers FW Black Leaders*, Dallas Morning News, Jan. 21, 1994, at 21A. The study, commissioned by the Tarrant County Texas District Attorney's office, was prompted by "public outrage over the 10-year probationary sentence that avowed white supremacist Christopher Brosky received . . . for his part in the racially motivated slaying of a [B]lack man." *Id.* The study reviewed 2700 Tarrant County felony cases and concluded:

While there is evidence indicating that minorities and males are more likely to have prior records, to have legal status at the time of arrest, and to commit more severe crimes, there is little to suggest that race or gender influences the setting of bail, the likelihood of conviction, or the length of incarceration.

*Id.* (quoting report of study).

177. Only in the most serious cases do prosecutors seek sensitivity training. Tarrant County, Texas, prosecutors underwent sensitivity training only after protests and demonstrations across the county. See *id.* The community was angered by the lenient sentence of probation received by a former skin-head for his role in the hate killing. See Selwyn Crawford, *Tarrant DA, Staff to Undergo 'Sensitivity Training': Curry Responds to Concerns About Handling of Racial Slaying Case*, Dallas Morning News, Apr. 7, 1993, at 40A; see also Robin D. Barnes, *Blue by Day and White by [K]night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 Iowa L. Rev. 1079, 1091-98 (1996) (discussing "[t]he [d]angers [p]osed by Klan-[c]ops").

178. See, e.g., Tom Hester, *Del Tufo, Prosecutors Urge Reform*, The Star Ledger, June 18, 1991, at 11 (reporting prosecutors oppose "a state Supreme Court-sponsored

What prosecutors have done in response to the problem, if they recognize one at all, is to seek to hire more African American prosecutors.<sup>179</sup> This is an inadequate response to the problem. There are two potential rationales for the selection of African American prosecutors as a solution to real or perceived racial discrimination in the criminal justice system. One is that the presence of African American prosecutors could operate as a check against conscious or unconscious bias in the system. To the extent that African American prosecutors make charging and other prosecutorial decisions, it is not unreasonable to expect these decisions to be free from anti-Black bias.<sup>180</sup> The mere presence of Black prosecutors could discourage others from behaving in ways that are racially discriminatory, either because they are inhibited from acting in a consciously racially biased way or because through interaction with African American prosecutors they become more attuned to their own racial bias.<sup>181</sup>

A far less justifiable reason to hire African American prosecutors is to use them as a smoke screen for enduring discrimination. For example, an office might hire an African American so that any discriminatory practices would seem less objectionable because an African American was present. Such an approach would be mere tokenism. Unfortunately, it appears that tokenism is the intent behind most prosecutors' actions with respect to hiring practices.<sup>182</sup>

### III. "AM I MY BROTHER'S KEEPER?": AFRICAN AMERICAN PROSECUTORS AND THEIR OBLIGATIONS TO THE BLACK COMMUNITY

Although the professional responsibility texts do not state as much, I believe that African American attorneys have obligations that

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study intended to ferret out institutional racism" through a "proportionality review").

179. See Johnson, *More Black*, *supra* note 8 ("[R]ecruiters hope that hiring more minority prosecutors will help dispel the distrust some minorities—particularly [B]lacks—have of the criminal-justice system."); Kirk Loggins, *Six Minority Lawyers on Johnson's Staff*, *The Tennessean*, Mar. 13, 1998, at 6B (quoting a district attorney's expression of hope that hiring more minority lawyers will make minority victims and witnesses feel "more comfortable").

180. In general, this is not an unreasonable expectation, but self-hatred and pressures to conform to the norms of the office may lead to decisions as biased as would be made by non-[B]lack prosecutors.

181. See Constance Johnson, *Black Prosecutors: Balancing the Scales*, *Black Elegance*, Mar. 19, 1998, available in LEXIS, New American News Service database [hereinafter Johnson, *Black Prosecutors*] ("Many believe that having more [B]lacks as prosecutors is a good insurance policy against racism."); E.R. Shipp, *The Law; At the Bar*, *N.Y. Times*, Aug. 26, 1988, at B6 (quoting a former Black prosecutor's statement that "your mere presence in the office sometimes makes them more accountable").

182. Most prosecutors who address this question publicly state that the reason they are searching for African American attorneys is merely to address public *perceptions* that racism exists in the office. See Johnson, *More Black*, *supra* note 8. Such concern for appearances in the absence of concrete efforts to detect and control sources of racial bias is disappointing.

extend beyond, and in some cases trump, the ethical obligations they hold as attorneys. David Wilkins has written extensively about this proposition.<sup>183</sup> African Americans have an obligation to each other because of their shared group membership.<sup>184</sup> Many in the white majority have a problem with this proposition.<sup>185</sup> Most of the white commentary on race, which includes claims to colorblindness and the like, is grounded in the refusal to recognize African people as a bona fide group.<sup>186</sup> The white majority apparently thinks that by refusing to recognize us, we will no longer exist. This is no mere disagreement. This is an exercise of dominion and power in order to keep Blacks in their place.<sup>187</sup> Non-recognition is a device of control.<sup>188</sup>

When African Americans band together, assert their identity, and claim space and a right to existence, it is a revolutionary act.<sup>189</sup> This banding together undermines existing narratives of authority and privilege, and it responds to those who have actively and consciously

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183. See, e.g., David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 Geo. Wash. L. Rev. 1030, 1035 (1995) [hereinafter Wilkins, *Race, Ethics*] (acknowledging that the interests of the Black community may weigh against representing the Klan); David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 Stan. L. Rev. 1981, 1983-84 (1993) [hereinafter Wilkins, *Two Paths*] (arguing that African American corporate lawyers have moral obligations to fight racism and to aid less fortunate Blacks).

184. See Wilkins, *Two Paths*, *supra* note 183, at 1984-85. Professor Wilkins refers to this assertion as the "obligation thesis." *Id.* at 1984. The obligation thesis posits that African Americans "have moral obligations running to the [B]lack community that must be balanced against other legitimate professional duties and personal commitments when deciding on particular actions and, more generally, when constructing a morally acceptable life plan." *Id.* In addition, Professor Wilkins describes the obligation thesis as "a historically and contextually bounded obligation on the part of relatively advantaged members of a particular disadvantaged group to take account of the legitimate interests of other group members." *Id.* at 1995-96.

185. See Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758, 759 ("[E]xplicit [African] race consciousness has been considered taboo for at least 15 years within mainstream American politics and for far longer within the particular conventions of law and legal scholarship.").

186. See *id.* at 771 (arguing that the extreme integrationist position posits hope that "ethnic identity will become a thing of the past").

187. See Asa G. Hilliard, III, *SBA: The Reawakening of the African Mind* 27 (rev. ed. 1998) (arguing that racist attacks on the African American community are attempts to "prevent the reemergence of ethnic consciousness among Africans and thereby prevent the unity that will lead to mobilization and resistance to oppression").

188. See Robert Staples, *Introduction to Black Sociology* 261 (1976) (arguing that racial non-recognition is "mostly an attempt by Whites to maintain institutional arrangements which embody the residual results of past overt racism").

189. See Amílcar Cabral, *National Liberation and Culture, in Return to the Source: Selected Speeches of Amílcar Cabral* 39, 43 (African Information Serv. ed., 1973) ("[I]f imperialist domination has the vital need to practice cultural oppression, national liberation is necessarily an act of *culture*." (emphasis in original); Hilliard, *supra* note 187, at 26 ("Our survival as a people is connected to our unwavering identification as Africans."); Khan, *supra* note 28, at 120-24 (describing the revolutionary potential of identity formation).

sought the destruction of the Black community with the retort that "we are still here." It is defiant and angry and proud—as it should be.<sup>190</sup> Thus, claiming identity is more than an objective comment on reality. It is an act of consciousness. The development of group consciousness, of beginning to interpret the world in a way that draws a distinction between one's group and the rest of humanity, draws one closer to that group and creates a sense of belonging.<sup>191</sup> Belonging leads to allegiance.<sup>192</sup> The development of group consciousness in this sense contributes to the group's struggle for independence and freedom from oppression.<sup>193</sup> Belonging leads to a common understanding of the political struggle of the group.<sup>194</sup> It produces an awareness of one's role in the world and a common defense against oppressive forces<sup>195</sup> that would, arguably, wipe the oppressed peoples of the world off of the face of the planet. This awareness is why oppressed groups find solidarity with each other and, as their consciousness grows, they find it with other oppressed groups.

Oppressed people understand they are targets and that, like the homeless, their very presence disturbs. As members of a targeted group they draw together, naturally, instinctively and indeed, rationally.<sup>196</sup> Each member of the group, however, expects the others to shoulder some of the burden of a mutual defense.<sup>197</sup> Therefore, membership in the group brings obligations. These obligations are grounded in morality, because ultimately they are grounded on the moral imperative to fight oppression.<sup>198</sup>

African Americans fit this category of oppressed persons. African Americans constitute a distinct cultural group with an ancient

190. See Sekou Toure, *A Dialectical Approach to Culture*, in *Contemporary Black Thought: The Best From the Black Scholar* 3, 8 (Robert Chrisman & Nathan Hare eds., 1973) ("For us, to speak of culture is to fight.").

191. See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303, 306-09 (1986). "In defining ourselves, we rely heavily on other's view of us, real or imagined, and on our own connections with others." *Id.* at 307.

192. As members of oppressed communities develop a new sense of identity, psychic benefits accrue: "With this new sense of identity, the oppressed begin to treat each other with kindness. A feeling of solidarity permeates the group, creating bonds of mutual affection, care, and belonging." Khan, *supra* note 28, at 120.

193. See Karst, *supra* note 191, at 327-28 (describing "defensive identification" as helpful to self-protection and the pursuit of political goals).

194. See *id.* at 328.

195. See *id.* at 327-28.

196. See Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 10 La Raza L.J. 499, 515 (1998) (arguing that prejudice and random racial violence contribute to "a sense of solidarity among all [B]lack people").

197. Karst asserts that "[d]efensive identification with an ethnic or religious group has always been a major source of cultural pluralism in America; the victims of domination become bound together in a community." Karst, *supra* note 191, at 326.

198. See Khan, *supra* note 28, at 116 (arguing that the subjugated are morally empowered to use "any means necessary" to fight oppression).

history.<sup>199</sup> African Americans are an oppressed people whose condition brings them together, binds them, and obligates them to one another.<sup>200</sup> Every African American does not, and need not, claim membership in the African American community. The right to claim one's identity is personal. But those who do choose to belong, also assume a responsibility to advance the interests of the group.<sup>201</sup>

African Americans acquire this responsibility to further the interests of the group from another source as well. African Americans are indebted to their group because they benefit from the struggles that African Americans have endured before them.<sup>202</sup> African American prosecutors would not be prosecutors were it not for the civil rights revolution that opened these positions up to Black applicants. In addition they would not have their jobs were it not for the vocal Black constituencies in their communities who have cajoled, threatened, and politically rewarded prosecutors for maintaining diverse staffs. Moreover, it is doubtful whether, absent the efforts, struggle, and commitment of other African Americans, these Black prosecutors would ever have gotten into law school or received any education. The benefits Black attorneys received as a result of their community's efforts creates an obligation to give back.<sup>203</sup>

How should this obligation be performed? African American prosecutors have two duties to the African American community. The first, to paraphrase the physician's oath, is to do no harm.<sup>204</sup> African American prosecutors have a duty to avoid causing harm to the African American community.<sup>205</sup> This is not an unusual duty for a prosecutor to have. All prosecutors are expected to consider the interest of the community. African Americans and other people of color may not be able to have their interests protected by white prosecutors.<sup>206</sup> Thus, African American prosecutors must do so. In

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199. Professor Wilkins argues that, first of all, the African American community is a concrete reality, for "despite all of our many differences, [B]lack Americans continue to be joined by an identifiable common culture that overlaps with, but is distinct from, mainstream American culture." Wilkins, *Two Paths*, *supra* note 183, at 1997. Given this reality, one that for many African Americans "constitute[s] an important source of strength and well-being," African Americans should nurture and carefully tend the "bonds of solidarity and community" they share with other Black people. *Id.* at 1999-2000.

200. *See id.*

201. *See id.* at 2000.

202. *See id.* at 2000-01. Furthermore, Wilkins argues that the moral duty to assist the African American community extends even to those African Americans who choose not to claim an African identity. *See id.* at 2001-02.

203. *See id.* at 2001-02.

204. *See* Michael Kowalski, *Applying the "Two Schools of Thought" Doctrine to the Repressed Memory Controversy*, 19 J. Leg. Med. 503, 505 (1998) ("*Primum non nocere* (first do no harm) is a phrase recognized as one of the most significant admonitions from the Hippocratic Oath.").

205. *See* Wilkins, *supra* note 183, at 2010-11.

206. *See supra* notes 122-25 and accompanying text.

any event, African American prosecutors should prevent harm from happening to the African American community. This means that they should do no harm themselves and that they should prevent others from doing harm. This duty to prevent harm includes refusing to be used by others as a tool for harming the African American community. In other words, African Americans should not allow themselves to be used as tokens<sup>207</sup> or as a smokescreen for oppression.<sup>208</sup>

A common strategy for controlling subjugated populations is through divide and conquer policies.<sup>209</sup> It is not unusual for certain members of oppressed communities to receive fairly significant latitude and privilege.<sup>210</sup> These people are often used as a means to stymie social criticism and political resistance. They are also relied upon to mediate relationships because they form a barrier between the oppressed and the oppressors. They may be more efficient at oppression than the oppressors themselves because they know the community and because as beneficiaries of the process they have a stake in insuring its success.<sup>211</sup>

African Americans also have an affirmative duty to aid the African

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207. Paul Butler, an ex-federal prosecutor, says that tokenism is a "real dilemma" that Black prosecutors must face. See Paul Butler, *Brotherman: Reflections of a Reformed Prosecutor*, in Darden Dilemma, *supra* note 10, at 11.

208. See Wilkins, *Two Paths*, *supra* note 183, at 2002. Wilkins presents an example of how African American lawyers can be used to mask ongoing oppression:

No matter how much [a Black] lawyer protests that his race is irrelevant to the performance of his professional role, his very presence at the counsel table sends a message to the jurors (both [B]lack and white) about the merits of the discrimination claim. To the extent that this implicit message (i.e., a company that discriminated would not hire a [B]lack lawyer) helps the company defeat a valid claim of discrimination, the [B]lack lawyer has helped inflict a moral wrong on the [B]lack plaintiffs.

*Id.* (footnotes omitted).

209. See Espinoza & Harris, *supra* note 196, at 554 n.184 ("[D]ivide and conquer' is . . . one of the oldest chapters in the book of oppression.").

210. Such largess rarely comes without strings attached, as the following passage reveals:

[B]lacks who conform to the expectations of the white community—either by pursuing careers in mainstream fields such as corporate practice, or by openly defying the perceived or express wishes of other [B]lacks—often receive substantial rewards. Careers in the mainstream hold out the promise of all the money and status traditionally flowing to those in proximity to wealth and power. As I indicated above, criticizing other [B]lacks also has been known to improve the professional standing and personal wealth of those [B]lacks perceived as willing to challenge the prevailing orthodoxy within the [B]lack community.

Wilkins, *Straightjacketing*, *supra* note 21, at 805-06; see also Wilkins, *Race Ethics*, *supra* note 183, at 1066 (demonstrating that criticizing other Blacks can bring acclaim).

211. See Stokely Carmichael & Charles V. Hamilton, *Black Power: The Politics of Liberation in America* 10 (1967) ("[T]he white power structure rules the [B]lack community through local [B]lacks who are responsive to the white leaders . . . not to the [B]lack populace.").

American community, in addition to an obligation to prevent harm to the African American community. As Professor Wilkins points out, this duty to aid must be situated in a context that is limited and defined by the lawyer's professional obligations and personal goals.<sup>212</sup> Consequently, African American prosecutors should aid Black victims, witnesses, and defendants when doing so does not undermine the legitimacy of the process or otherwise conflict with legitimate professional or ethical constraints.<sup>213</sup>

#### IV. RESOLVING "DARDEN'S DILEMMA": CAN BLACK PROSECUTORS STEM THE TIDE?

In certain ways the presence of African American prosecutors is an advantage to the African American community. Black prosecutors provide African American representation in important public positions.<sup>214</sup> An extreme representation position argues that African Americans should be represented in all institutions in American society and at all levels.<sup>215</sup> This argument is, essentially, integrationist in orientation.<sup>216</sup> It asserts that African American representation is important because there are no places in society that African Americans should not be.<sup>217</sup> A less extreme version of this argument asserts that African Americans should be represented in any institution that is important to the goals and aspirations of the African American community.<sup>218</sup>

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212. See David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 Md. L. Rev. 1502, 1550 (1998) [hereinafter Wilkins, *Identities and Roles*]. According to Wilkins:

Black lawyers simultaneously inhabit [three] moral domains: the "professional," representing the legitimate demands that accompany their professional status as lawyers; the "obligation thesis," representing the legitimate moral commitments that [B]lack lawyers owe to the African American community; and, for want of a better term, the "personal" universe, representing the inherent right of every [B]lack lawyer to pursue her own unique projects and commitments.

*Id.*

213. Thus, while African American prosecutors should not treat African American defendants better than white defendants, the duty to aid, arguably, would require them to assist an African American defendant who is eligible for, and would benefit from, an alternative sentencing program.

214. See Johnson, *Black Prosecutors*, *supra* note 181 (quoting the statement of a Black prosecutor that "'Black people are starting to believe that you've got to be involved in every aspect of the criminal justice system, if there's ever going to be any justice.'").

215. See *id.*; Peller, *supra* note 185, at 770 (describing integrationists as those seeking the dual goals of equal treatment for individuals and the integration of institutions).

216. See Peller, *supra* note 185, at 770.

217. See *id.* Peller also describes another view of integration that advocates "the creation of a 'creole' institutional and public culture that would contain within itself the elements of composite cultures." *Id.* at 818.

218. See Randall Kennedy, *Persuasion and Distrust: A Comment on the*

The prosecutor's office occupies an important, politically prestigious position. African Americans should certainly be represented in this office. To the extent that individual African Americans gain political and social stature, as prosecutors, then so much the better.

Plainly, assuring the safety and well-being of the African American community is an important goal. To the extent that individual African American attorneys can assure that the prosecutorial power of the state is used to protect the African American community from violence, fraud, drugs, etc., this is unobjectionable.<sup>219</sup> In some ways, the presence of African American attorneys can make the office more effective. Black prosecutors may be more persuasive with African American jurors, may find it easier to relate to witnesses and informants in African American communities, and may be able to gauge the value of a given case when the exercise of prosecutorial discretion is called for. But these advantages are at best theoretical. Whether a prosecutor is able to accomplish these goals within a given prosecutors office is questionable. The effectiveness of individual prosecutors as social change agents is constrained by limitations on the prosecutor's role and by both internal and external pressures on the individual prosecutor.

First of all, Black prosecutors struggle with the same issues of job fairness and equality that African American professionals in other walks of life face.<sup>220</sup> They simply may not be able to do their jobs effectively, or they may face debilitating stresses as they attempt to do so. More importantly, as I indicated above, there are limits to how

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*Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1331 (1986) (asserting that affirmative action can be justified because "[t]he presence of [B]lacks across the broad spectrum of institutional settings upsets conventional stereotypes"). Another related integrationist justification holds that, in a truly integrated society, African Americans would have the same range of personal and career opportunities as everyone else. See Wilkins, *Two Paths*, *supra* note 183, at 1986.

219. For these reasons, Wilkins supports the presence of African Americans in prosecutors' offices. See Wilkins, *Straightjacketing*, *supra* note 21, at 803 n.38 (calling the charge that Black prosecutors invariably work against racial justice "speculative" and "contingent," and claiming "there are strong arguments that [B]lack prosecutors—either by watching out for racism in the prosecutor's office, or by preventing criminals . . . from preying on the [B]lack community—promote the cause of racial justice").

220. See Naftali Bendavid, *Race, Hope, and Eric Holder: Some Black AUSAs Say Expectations for Advancement Have Remained Unfulfilled*, Legal Times, Apr. 18, 1996, at 1 (reporting the continued existence of discrimination within the District of Columbia U.S. Attorney's Office, even while an African American served as the U.S. Attorney); Elliot Pinsley, *Black Prosecutors Upset Over Harlem Transfers*, Manhattan Lawyer, May 1990, at 1 (observing allegations by some Black prosecutors that personnel moves are discriminatory) Elliot Pinsley, *Minority DAs See Few Opportunities; Morgenthau Staff is 17% Minority But Not Many Supervise*, Manhattan Lawyer, Dec. 19, 1989, at 1 (noting the low percentage of minorities in positions of power at the Manhattan DAs office).

effective traditional crime fighting strategies can be.<sup>221</sup> In the long haul, a Black prosecutor's presence in the prosecutor's office may have a marginal impact on the amount of crime that takes place in the Black community. Thus, the value of a Black prosecutor to the Black community is relative to the amount of good he or she could do as a public interest lawyer or legal aid attorney working on the root causes of crime.<sup>222</sup>

All prosecutors face social, professional and political pressures to conform their decisions to social expectations. African American prosecutors are no different.

Ideally, African American prosecutors would be expected to provide protection from oppression to African American defendants and the African American community generally. As indicated above, African American prosecutors could work to change the dynamic in the office, so that conscious or unconscious racism would not infect prosecutorial decisions. But while Black prosecutors would strive to have a positive effect on the offices where they worked, the office environment might negatively impact on their ability to effect change.<sup>223</sup> The office might seek to employ African Americans with less African consciousness and lower levels of racial identification.<sup>224</sup> Once in the office, the Black prosecutor might be subject to significant social pressure to conform and "be one of the team."<sup>225</sup> Black

221. See *supra* notes 71-86 and accompanying text.

222. Wilkins makes a similar point in reference to whether African Americans should work as corporate attorneys. See Wilkins, *Two Paths*, *supra* note 183, at 1986-93. Although he concludes that African American corporate attorneys are desirable, he points out that to evaluate the social worth of corporate practice, African Americans must consider both the harm that corporate practice may inflict directly on the African American community and the opportunity missed to apply legal talent to pressing problems and concerns in the Black community. See *id.*

223. Professor Wilkins explains that because the legal system has made a formal commitment to equal justice:

[A]rguments about race in the courtroom appear to many whites to be out of place. This intuition, however, conflates the legal system's commitment to the ideal of colorblind adjudication with the factual assertion that this ideal has been met in practice. As a result, attorneys are under pressure to suppress or deny instances in which race affects the administration of justice.

Wilkins, *Straightjacketing*, *supra* note 21, at 802.

224. There is no inherent reason why African American prosecutors cannot exhibit racist behavior. For example, African American prosecutors may rely on stereotypical criteria in selecting jurors. See Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 Wis. L. Rev. 1003, 1072-73 n.250 (detailing how an African American prosecutor excused a Black female juror using stereotypical criteria, for he argued that he excused three challenged jurors because of "braids, obesity, [a]nd size" explaining that "[y]oung, obese [B]lack women are really dangerous to me").

225. Black prosecutors are under pressure to be "hard-line" to fit into the expectations of the office. See Susan Skiles, *Black Prosecutors Say They Face Unique Problems*, Chi. Daily L. Bull., Aug. 28, 1991, at 1. For instance, Black prosecutors may find it difficult to pursue police brutality cases or be lenient on Black defendants.

prosecutors might find that, because they are at the lower levels in the office, there is little autonomy and independence. Thus, a Black prosecutor might be unable to make much of a difference, even if he or she desires.

The prosecutor is considered the chief authority responsible for ensuring adherence to the law and thereby maintaining peace and order in society. As such, many in society view the prosecutor as a valued public servant deserving admiration and respect.<sup>226</sup> As I stated elsewhere:

Prosecutors have prestige not only because they are attorneys but also because they are representatives of the state. Prosecutors trade on the authority of the state. [In] the eyes and ears of the jury, it is "the state" that rests, "the government" that alleges, or "the people" that object[s]. The prosecutor, then, is not just some employee of the government; the prosecutor is the alter ego of the state—the government personified. To the extent that the state engenders authority, power, and respect, so too then does the prosecutor.<sup>227</sup>

Some African Americans may seek employment at the prosecutors' office in order to gain prestige and influence. As a result, some prosecutors will be particularly susceptible to pressure to engage in behavior that will earn the approval of society at large.<sup>228</sup> Indeed, for Black prosecutors, the pressure to conform to white standards will far exceed any pressure they may feel to maintain racial solidarity.<sup>229</sup> As Wilkins suggests, "[c]areers in the mainstream hold out the promise of all the money and status traditionally flowing to those in proximity to wealth and power"<sup>230</sup> and Blacks "who conform to the expectations of

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*See id.*

226. In particular, those who benefit from the established order, and would like to see that order endure, tend to view the prosecutor and the prosecutor's role favorably.

227. Nunn, *Trial as Text*, *supra* note 57, at 787 (footnote omitted). Arguably, the higher pay and resources afforded to prosecutors versus defense attorneys further demonstrates the high regard that society has for prosecutors. *See id.* at 809-13.

228. Indeed, there are strong reasons to believe African American prosecutors would be subject to the same "false consciousness" that Lani Guinier suggests severely limits the effectiveness of African American elected officials. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077, 1119 (1991). According to Guinier:

Once assimilated into the political mainstream, [B]lack officials may define their political agenda without reference to or consultation with a community base. Their reference point may instead become other members of the governing elite with whom they share personal experiences and comparable "rank." With access to prestige rather than power, some [B]lack politicians may simply censor themselves in order to "play ball" . . . .

*Id.* (footnotes omitted). *See also* Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 Law & Ineq. J. 323, 367-69 (1997) [hereinafter Nunn, *Law*] (arguing that the hierarchical nature of the legal system undermines the political consciousness of African American lawyers and judges).

229. *See* Wilkins, *Straightjacketing*, *supra* note 21, at 805-06.

230. *Id.* (footnote omitted).

the white community—either by pursuing careers in mainstream fields such as corporate practice, or by openly defying the perceived or express[ed] wishes of other [B]lacks—often receive substantial rewards.”<sup>231</sup>

A Black prosecutor also will be subject to the same social forces that cause all politicians to genuflect before the criminal justice altar. Resisting the “lock them up and throw away the key—especially if they are Black” mentality takes an extraordinary amount of strength and commitment. If Black prosecutors assert that position they will have problems with the political establishment, the police, and prominent citizens. They will not be prosecutors for long.

Regardless of their motivations for joining the office, African American prosecutors must seek to preserve the existing order. In doing so, the Black prosecutor must defend the order and its legitimacy. Thus, the African American prosecutor is under pressure not to speak out on racial injustice. Black prosecutors are likely to deny that racial injustice exists in the system, or to argue that its influence and effect is limited. Like other African Americans who seek advancement in white institutions, African American prosecutors cannot engage in “open political or cultural activism without risking their credibility or subjecting themselves to political or social pressure.”<sup>232</sup>

For the role of Black prosecutors to be fully examined, their cultural significance should be assessed. Black prosecutors make a social statement by their very presence. Their mere presence may be seen as evidence that racial discrimination does not exist in that environment. They indicate that the criminal justice system is fair and that there are no fundamental flaws in the way criminal law is applied in America. This implication is problematic because it is not true. Racism is rampant in the criminal justice system and prosecutors’ offices are to blame for a significant part of it.<sup>233</sup> Black prosecutors, thus, become a tool for the oppression of the African American community. They become a buffer between the powerful interests that control the criminal justice system and the African American community.<sup>234</sup> They stand as an endorsement of the proposition that social resources other than those used for criminal prosecution will not be spent on oppressed communities. All of these things conflict with the African American prosecutor’s ethical and moral duty to protect and assist the African American community.

Although some positive results come from the presence of Black prosecutors, on the whole, Black prosecutors are smokescreens, that obscure racial injustice. Prosecutors are simply not doing enough to

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231. *Id.* at 805.

232. Nunn, *Law*, *supra* note 228, at 368.

233. *See supra* Part II.

234. *See supra* notes 209-11.

eradicate the scourge of racism from the criminal justice system and from society. Until they do, African Americans should refuse to serve as prosecutors.

#### CONCLUSION

The presence of African American attorneys in prosecutors' offices brings some undeniable benefits to the African American community. Some, if not most, African American prosecutors seek to use their positions to pursue justice and insure fairness to African American victims, defendants, and the African American community at large. But the independent attempts of African American prosecutors to do justice one case at a time comes at a price. For, by their mere presence, African American prosecutors insulate the criminal justice system from charges of racism. From their tenuous position in the criminal justice system, African American prosecutors can do little to stem the racism that is endemic to the criminal justice process. This fact creates a moral conflict between the interests of the African American community and the professional obligations of the African American prosecutor, a conflict which is the source of the "Darden Dilemma."

As long as disturbing racial disparities exist in the criminal justice system, as long as prosecutors' offices contribute to these racial disparities through the discriminatory use of prosecutorial discretion, and as long as obscenely huge numbers of African Americans are incarcerated and warehoused in American prisons and jails, the solution to the "Darden Dilemma" is clear. African Americans should not prosecute crimes. They should not prosecute crimes in order to avoid doing harm to the African American community, and they should not prosecute crimes because their refusal to do so may finally generate a public commitment to confront and change a shamefully racist criminal justice system.

*Notes & Observations*