# 1NC

Counterplan Text: The United States should value community-based prosecutorial discretion in the criminal justice system.

The counterplan is competitive. CP incorporates the voices of local communities to achieve retributive equality. **Alfieri 99**[[1]](#footnote-1)

The **community justice-based** model of **prosecutorial discretion proceeds from** the premise of **lawyers as** morally independent **agents within** a system of **adversarial justice**.361T his model struggles against the competing roles and functions of prosecuting and defense attorneys in the criminal justice system.362 Under its alternative template, the function of **the prosecutorial role expands** beyond the predicate state obligation to the public **to encompass both victim and defendant communities**. In contrast to the usually obscurantist role of defense counsel,363 here prosecutorial role performance combines both intrasystemic and extrasystemic appeals to justice. Intrasystemic appeals invoke **princi-ples of justice embodied in** **the** legal **system and public morality.**364 Appeals of this kind **compel the** prosecutorial **duty to bargain justly**.365 Conversely, they bar "prosecutorial reliance on tactical and resource considerations'366 in the exercise of ethical discretion. **Informing** both **rehabilitative and punitive** discretionary **judgments, the appeals** strive to **achieve a retributive equity of blame and responsibility**, hence to strike a balance of equitable attribution and blameworthiness,367 in spite of the ambiguity of criminal rehabilitation and punishment.368

# Net Benefits

## Racism NB

Status quo prosecutor discretion makes systemic racism inevitable. Only the counterplan solves the colorblindness at the heart of white supremacy. **Alfieri 99**[[2]](#footnote-2)

**Liberal** models of lawyer **discretion suffer** deep-seated internal **tensions** rankling the pursuit of client, lawyer, and community interests. The **conflicting endorsement** of **client autonomy and lawyer independence** under the same normative slate of liberal individualism **works to the detriment of community** conceptions of a higher collective good. That endorsement also gives little guidance to the lawyer-client analysis of options in light of their impact on individually joined community. Additionally, though the privileged position accorded to autonomy under a theory of liberal individualism seems clear-cut, the scope of the privilege falls unbounded. Indeed, liberal theory seems to waver in the "acceptance of autonomy as a desirable end in itself, rather than as a means to the attainment of the good."348 Similarly, it seems to falter both in asserting the neutral quality of liberal autonomy "irrespective of the use to which it is put,"349 and in accommodating the adverse consequences flowing to individuals and communities. Consider then an alternative account of autonomy tied to community interest and collective responsibility.350L like **the standard** liberal **vision,** this account views lawyer discretion, and more specifically prosecutorial discretion, as an institutional necessity of the criminal justice system. Accepting that necessity, Angela Davis **concedes the difficulty of "imagin[ing]a** fair and **workable system that does not include** some level of measured **discretion in the prosecutorial process.**"351 Whether the institutional incentives and disincentives driving that discretion may accommodate competing considerations of merit, justice, and racial community evades easy answer. By way of answer, however, consider first merit-based discretion. The merit-based model of liberal ethical discretion seems well grounded in conventional ethics rules. In the criminal arena, for example, Model Rule 3.8 recognizes the function of merit in the exercise of prosecutorial decisionmaking.352Under that Rule, the demands of **merit-based** **discretion** **strive to guarantee impartiality** and state inde-pendence.3 Both elements are essential for legitimacy reasons. Here, the idea of legitimacy seems **untouched by** speculation of **racial harm** to the defendant or victim, and to the communities that may embrace each. Legitimacy remains undiminished because the theory of merit-based **prosecution relies on colorblind** claims of **punishment fired by the race-neutral logic of instrumental** and intrinsic **reasoning**.354 Driving **the rationality** of merit-based action, **these** claims **ignore** the fact **that prosecutorial discretion presents "a major cause of racial inequality in the c**riminal **j**ustice **s**ystem."355 **Causal neglect** of this kind **fosters the view of systemic racial inequality as a necessary cost of** prosecutorial **agency.**356 The sociolegal institutions of the state tolerate that view. **Curing** the **systemic racial inequality** operating **in** **criminal justice** institutions r**equires community-based prosecutorial discretion**. Converting institutional tolerance of systemic racial inequality into institutional condemnation under an ethical rationale of a community-oriented, racial justice-based model of prosecutorial discretion begins with a sense of moral activism. Consider David Luban's notion of moral activism in evaluating this contemplated conversion. Luban argues that "morally activist lawyers should sometimes refrain from zealously advancing lawful client interests even when the threat to third parties is minimal or even intangible, and even when the benefit to the client may be substantial."357 Specifically, he urges avoiding the performance of "collectively harmful actions."358 Transmuting Luban's cautionary prohibition for civil jus-tice into an exhortation for the use of prosecutorial power as a collective instrument of racial justice conforms to a community justice-based model of discretion. To that end, Angela Davis recommends deploying such power "to construct effective solutions to racial injustice."359Fo r Davis, **prosecutors possess "the power, discretion, and responsibility to remedy the discriminatory treatment of African Americans** in the criminal justice process."360

Status quo prosecution is the key internal link to alienation and white supremacy. Only the counterplan reclaims the black body and spills over outside of the criminal justice system. **Alfieri 99**[[3]](#footnote-3)

On this construction, **the prosecutor rises up as a** historic **witness to confront injustice**. The idea of bearing witness in legal advocacy animates other areas of the profession, notably the conduct of death penalty defense practice.463 Applied to the facts of the Louima case, the idea urges a more expansive view of Carter as a heroic witness in the historical struggle for American racial dignity and equality.464 The "heroic witness" tradition militates against the denunciation of the prosecutorial function as a blunt instrument of white domi-nance.465 Casting **that function** in the starkness of racial hierarchy **sends prosecutorial discretion** veering far from the abolition or punishment of racism **toward the manufacture** and reproduction **of sociolegal privilege**. **In cases of racial**ly motivated **violence, the re-entrenchment of dominance occurs in the** **state representation of the black body.** For **the prosecutor**, representation traditionally **entails** the **defense of the** victim's **body, rather than the** person or community of the **victim.** The notion of "**representing the body"**466 **suggests an alienation** or estrangement **from not only the person, but** also **the community** of the victim in criminal and civil rights prosecution. The practice of victim- and community-estrangement is deeply embedded in the tradition of criminal prosecution. In the Louima case, this practice finds challenge from calls for federal prosecutorial intervention. These calls articulate an inchoate politics of **prosecutor-instigated community organization** and mobilization around claims of criminal and civil rights injustice. Such mobilization **offers the promise of wider forms of community organization about issues relevant not only to** crime and **criminal justice, but** also **to education, equality, and economic development.**

Counterplan promotes race-consciousness, changing the identity categorization at the heart of racism. **Alfieri 99**[[4]](#footnote-4)

The alternative model of race-conscious, **community-oriented prosecutorial discretion** **sets aside** the **colorblind conventions** of advocacy and adjudication well known in the civil and criminal justice systems. Instead, this model **[and] seeks to employ critical race** **theory in developing race-consciousness.** Before implementation, however, this model must first survive the threshold controversy over the meaning of race-consciousness.377 Race-based classification schemes present categorical dilemmas concerning the construction of racial identity and narrative. The di-lemmas implicate Christopher Ford's notion of "administering iden-tity.""378Ford reveals the strained coherence of racial differentiation in regulating race-administration systems.379 Like any assembly combining advocacy and adjudication, these systems labor under the added strain of race-layered interactions of power. In this respect, john powell argues that the very "process of **racial categorizing is a power struggle implicating** structural, cultural, economic, and **identity politics."380 A product of this** struggle, **the prosecutorial role under** the proposed model of **race-conscious discretion** expands to **recast the performative function of racial identity in role-specific** moral **decisionmaking.** David Wilkins discerns this performative function in the role-specific behavior of the black bar during the civil rights movement.381Within such sociolegal movements, Wilkins contends, "race based ties have moral as well as social significance."382For Wilkins,**race consciousness of the self and** of the **other influences moral decisionmaking.**383

Counterplan transforms prosecution into a performance of resistance against racism.

**Alfieri 99**[[5]](#footnote-5)

Professionalism norms cast grave suspicion on such practices, especially when discovered in a prosecutorial setting. When located in that and related legal settings, Cover observes, "the avenues for traditional representational forms and the prerequisites for traditional respect for the institutional structures" of the law and the state collapse.5 **At first blush,** Cover's historical notion of **race-conscious advocacy** and adjudication **seems incompatible with** **the role of the prosecuto**r in the federal criminal justice process. Whatever attraction the role and function of the antislavery judge might hold in retrospect,532 particularly in seeking to avoid or to mitigate "harsh moral-formal conflicts,"533the contemporary federal prosecutor seems far removed from the imagined role of conciliator. Yet, **racial reconciliation serves a crucial** policy **function in the prosecutorial maintenance of the c**riminal **j**ustice **s**ystem. For **reconciliation** to succeed, it **must bring together** the stalwart **defenders and** active **resisters of racist ideology**. Like the antislavery judge-as-regulator, the prosecutor must "depend on his ability to communicate with ideological resisters."534He also must address the appropriate audience535 among an array of adversaries, colleagues, courts, victims, and communities. **Performance of this reconceived prosecutorial role demands** fidelity to **a different set of professional norms**. **This** differential fidelity **enables prosecutors vigorously to engage** what Cover calls **the** "moral-formal **battle" over race**.536

## Constitution NB

Counterplan solves racial discrimination. Independently key to constitutionality.

**Alfieri 99**[[6]](#footnote-6)

**Constitutional norms** may **provide the foundation for prosecutorial race-conscious** duties of **community outreach** in cases of racially motivated violence. That formulation stems from the federal prosecutor's role as a constitutional officer. **By constitutional grant** under Article II, the President enjoys the power to appoint, subject to Senate confirmation, the Attorney General and the inferior posts of U.S. Attorney for each of the twelve judicial districts.474 Codified in subsequent congressional enabling legislation, **the President** thus **appoints** **both the Attorney General and the U.S. Attorney for each** of the respective **judicial districts**.475 To this extent, Carter [**the prosecutor] inhabits a constitutionally sanctioned position ratified by** both **the executive and** the **legislative branches** of the federal government.476 **This** endorsement **gives** Carter **constitutional** and statutory sources of **authority beyond the endowment of** general **oversight function** over the federal criminal justice system within the Eastern District of New York. **Along** **with the charge** of district-wide administration of justice 477 **comes the duty to implement a** general **policy of nondiscrimination.** **The principle of nondiscrimination mandates** the **equal treatment of all defendants, victims, and communities**. The prosecutorial mandate of equal treatment extends to core, defendant-specific decisions to investigate, to charge, to go to trial, and to recommend sentence by plea or alternative means.478B

## Pluralism NB

Counterplan expands the role of the prosecutor while creating a shared citizenship. Independently key to pluralism. **Alfieri 99**[[7]](#footnote-7)

**Citizenship norms** likewise may **advance** the development of **prosecutorial race-conscious** duties of **community outreach** in cases of racially motivated violence. Early American history supplies a citizenship-inspired vision of a lawyer's role and duty.482 Bruce Frohnen points out that **the early American lawyer**'s responsibilities **transcended** narrow, **professional interests to encompass** a sense of **public good and community integration**.483Indeed, Frohnen notes, the lawyer's sense of calling **derived** in part **from the duties expected "of a citizen**, a member of a church, a member of a family, and a pious man."484 The cultivation of **prosecutorial race-conscious** duties of **community outreach** gleans from this vision to **create** **a "shared citizenship" of** liberal **constituents** engaged in "self-restrained, moderate , and reason-able" conduct.485 Derivation of the notion of self-government from a private/public sense of civic virtue evokes Michael Sandel's work on liberalism and self-governance.486 Sandel remarks that "**proliferating** sites of **civic activity** and political power can **serve** **self-government by cultivating virtue, equipping citizens for self-rule, and generating loyalties** to larger political wholes."487 **Local, decentralized proliferation** of this sort **conforms to** the scheme of **political pluralism,** often de-fined in terms of group competition, relative truth, and limited state mediation.

## Morality NB

Abstract moral claims in the context of the law are part of white supremacy. Only the counterplan creates prosecutorial duties based on moral norms. **Alfieri 99**[[8]](#footnote-8)

**Moral norms** additionally may **stoke the development of prosecutorial race-conscious** duties of **community outreach** in cases of racially motivated violence. The subject of moral norms brings attention to keenly debated matters of extraprofessional regulation. It also prompts revisiting the settled formalist separation of law and morality.553Returning to that separation proffers a choice between intrinsic and extrinsic venues for moral sustenance. An intrinsic choice to embrace the law itself for moral guidance in defiance of the law/morality separation relies on the disclosure of moral character. Look, for example, to the character standards for state bar admission,554 standards that are reiterated in the Model Rules"'5an d the Model Code.556 These standards prevail despite the often ad hoc and reprehensible application of character tests. To search out additional intrinsic sources of moral character, consider the substantive content of legal doctrine. Criminal law doctrine, for example, reflects a strong substantive **commitment to moral values**. 557 Alike commitment, evidencing a moral or at least theological disposition, **reverberates in** the **prosecutorial** use of **religious appeals**, **notwithstanding their** purported prejudicial effect"58 or their applied **ethical asymmetry**.559Be cause **moral claims** **echo** **a premodernist faith**,560they draw objection from separationist and neutrality561principles. As demonstrated below, **that** objection **shadows** the attempt to practice **racial morality** and, accordingly,t o abide by the antidiscrimination principle in government prosecutorial activity.562 **The confrontation of** faith**, race, and neutrality hinders** the search for an **objective moral** standpoint in **prosecutorial decisionmaking**. Contemplating objectivity in both its weak and strong senses mitigates the force of this confrontation and may evade the furor over moral objectivity. Although this distinction may ease the tension between morality and neutrality, the absence of transcendent possibility and the prevalence of moral uncertainty hamper any effort to reconfigure the meaning of objectivity. For R. George Wright, objectivity in a "weak sense" demands "only something like transcending some particular specified bias, authoritativeness, a standard external to the decision-maker whether that standard is authoritative or not, or a matter of judgment disciplined and constrained by some standard-setting community rules."563In contrast, objectivity in a "strong sense" entails "the fuller transcending of bias or of mere group conventional norms, or the transcending and correction of what might be called appearances."564 To fill the breach in a unified sense of moral objectivity, Alasdair MacIntyre offers the notion of norm-embedded practice traditions.565 For MacIntyre, practice traditions express normative standards through narratives.566 Yet neither professional norms nor rules may accommodate personal moral values.567In fact, the bureaucratic organizational settings and hierarchical work relations predominant in prosecutorial offices render "expectations of moral assertiveness" unreasonable.568 Nonetheless, significant historical precedent for moral invocation exists. **Segregationists,** for example, "**engaged in** highly **discursive strategies** of resistance **that facilitated** continued **discrimination by** **recreating the way** in which **the law defined African-Americans**."569 **These** strategies **recirculate in the modern** rhetorical **tactic of "substituting abstract** classifications of **morality for race."**570In the same way, the segregationist discursive tendency of "substituting the quality of blackness for the characteristic of immorality"571 equally "transformed blacks from the victims of wrong, to the agents of it."572The false depiction of Louima as a promiscuous homosexual, with a preference for rough-and-tumble nightclub sex, rather than as a victim of perverse police brutality, nicely illustrates this point. Invoking the ideal of the heroic prosecutor under morality- or virtue-based norms573 may work simply to refashion race-neutral discourse in order "to disguise racial discrimination as moral reform."574 The alternative resort to personal moral and religious norms offers no panacea. Bruce Green points out that personal moral values and religious beliefs present a double-edged sword-"they have the potential either to ameliorate or to exacerbate the deficiencies of the professional norms."575In an effort to modulate this tension, Green sketches a middle course remedy -the exercise of moral judgment on an "ad hoc basis."576 This course of action, however, fails to guide discretion in the encounter with a legal system rendered unjust by racial animus or by the pursuit of immoral objectives. Channeling **prosecutorial discretion** in these circumstances **based on ethical duties** **fashioned from** norms rooted in constitutional, citizenship, professionalism, **racial, and moral landscapes confronts** a battery of **objections to** a **race-conscious, community-based** ethic of **prosecutorial discretion.**

## K (General) NB

Counterplan builds community solidarity, deconstructing identity while solving the State manipulation at the heart of modern power structures. **Alfieri 99**[[9]](#footnote-9)

Conceiving the **prosecutor**ial function **as** **a political project dedicated** both **to dismantling hierarchical structures** of racial identity and narrative, **and** to **building** oppositional forms of **advocacy that liberate** **subordinate** images and **discourses**, **pushes prosecutors into** a model of **community participation**. Here the community at stake travels far out-side local boundaries to countenance a historical community connected by common issues of racially subordinated identity and narrative. Relevant models of community participation may be found in prior instances of identity-based criminal violence, even when confounded by the crosscutting categories of race, ethnicity, and gender that reflect the individual and group diversity of color.657 The **failure to recognize** the historical intersection of **gender, ethnicity, and class** 658 **in race cases permits** the continued manipulation of stereotypical images "in the service of political or economic expediencies."659 Ending the **state manipulation of stereotypical imagery** demands a study of race as a political and cultural project. In the Louima case, this overlapping project involves a process of sociolegal reimagination specific to the black male body. For Michael Uebel, undertaking a **recasting** of **the** signifying **male body** introduces "a political enterprise, **aim**ed **at producing** new **solidarities** and exposing the bounds of the dominant and 'normal' as fragile and subject to revision."660 **Recasting directs** the **mapping of identities** in terms **antagonistic to "colonial fantasy and** the **iconography of** racial masculine **bodies."**661 From this mapping, theoretical models may emerge "that are aimed at supplanting reductive accounts of identity formation at the intersection of race and masculinity."'662 The Louima case illustrates the performative intersection of race and masculinity. In demonstrating that the identity categories of race, sexuality, and nationality may be readily "defined less as fixed identities rooted in bodies, normative sexuality, nature, or geography, and more as dynamic and dramatic modes, the sum of one's cultural prac-tices,"663 the Louima assaults how that the cultural politics of race and masculinity play out in the sociolegal context of the criminal and civil justice systems. The play of racial masculinities in the Louima case highlights the "dynamic modes of cultural practice" in legal advocacy and adjudication.664 Evidence of this dynamic, divulged in "shifting, repeating sets of performances "with no "fixed or essential subject category,"665 compels the investigation of white/black masculinity" as a re-visionary process, a constitutive performance"666that inscribes race and masculinities within the cultural politics of performativity.667 The juridical **inscription of** **racial and masculine subjectivities** in the Louima case **through** the contextualized performance of **criminal** and civil **advocacy constitutes a** "politics of **representation" that** **manufactures its own** social and political **existence.**668 Confronting the harsh reality of that racially oppressive and segregated existence, and its animating politics of legal representation, commences a gradual process of ethical positioning for prosecutors, victims, and communities of color.669 This process involves the move toward the **prosecutorial** exercise of **race-conscious, community-oriented** ethical **judgment** accompanied by joint victim/community acts of moral solidarity. In these ethical moments,670 **prosecutor, victim, and community** collectively **acknowledge that the** discursive and symbolic **systems** of meaning **that configure race, sex, class, and nation** **may be** constructed and **deconstructed** by the force of human agency.671 Here, deconstruction refers to **[by] the contest over** the **performative space in** law and **legal advocacy** where identity categories become constituted.672 Unsurprisingly, **the construction** and negotiation **of identity** brokered **in this space occurs** "**against a** complex historical **matrix of** alterities, against a web of differences" signified by **race, class, gender, and sexual orientation.**

# Frontlines

## AT Perm

Perm fails. Combining the counterplan and the colorblind legal norms of the aff entrenches white hegemony. **Alfieri 99**[[10]](#footnote-10)

**Racial norms** also may **spur** the development of **prosecutorial race-conscious** duties of **community outreach** in cases of racially motivated violence. Several sites provide norms. **Civil rights law offers a** still evolving **antidiscrimination norm**. More recently, critical race theory advances an antisubordination norm. Historically, conservative black nationalism posits a black fundamentalist norm.537 Consider first the antidiscrimination norm trumpeted in civil rights law reform. **At the core** of the antidiscrimination principle **lies** the axiom of **colorblindness.** To many, **that** axiom **encourages** and tolerates **subordination,** separation, and **segregation**.538 Indeed, for critics, color-blindness presents a cultural process of **[and] white hegemony**. Accordingly, the discursive and material enforcement of a colorblind precept in the prosecution of race cases indicates a "nested and processual paradigm of hegemony."539 Since midcentury, the **colorblind paradigm** of race-neutral prosecutorial discretion **has** evolved to **become part of the state's** "remedial **responsibility"**540 **to eradicate** r ace **discrimination**. Angela Davis delineates a cluster of misleading race-neutral factors commonly deployed in prosecutorial decisions concerning initial charging and plea bargaining. Consider first the seriousness of the offense. Neutrality notwithstanding, **the** assessed **gravity of an offense** may **hinge on the** comparative **racial worth of the defendant** and the victim.541 **Similarly, the defendant's** prior criminal **record**, including arrests and convictions**, may be infected by discriminatory** police **policies** and practices, such as race profiles.542 Likewise, the victim's punitive, deterrent, or retributive interest in prosecution, especially when bolstered by the supplemental interests of the public, may prove race-susceptible, particularly to the extent it relies on the evaluation of a defendant's dangerousness.543 Furthermore, the strength of the evidence, coupled with the likelihood of conviction, both may depend on the assessment of racial credibility and preference.544 Finally, **the availability** of alternative dispositions at sentencing, such as **rehabilitation,** **dictates an estimate of rehabilitative potential that is** frequently **race-pervaded.**545 Even the alternative of restitution, based on the ability to pay, demonstrates the intersection of class and race in the criminal justice system. Together, **these** factors **muster only the pretense of race-neutral** **prosecutorial discretion**.

1. Anthony V. Alfieri (Professor of Law at the University of Miami). “Prosecuting Race.” April 1999. [↑](#footnote-ref-1)
2. Anthony V. Alfieri (Professor of Law at the University of Miami). “Prosecuting Race.” April 1999. [↑](#footnote-ref-2)
3. Prosecuting Race. Anthony V. Alfieri. April 1999. Professor Of Law At The University Of Miami [↑](#footnote-ref-3)
4. Prosecuting Race. Anthony V. Alfieri. April 1999. Professor Of Law At The University Of Miami [↑](#footnote-ref-4)
5. Prosecuting Race. Anthony V. Alfieri. April 1999. Professor Of Law At The University Of Miami [↑](#footnote-ref-5)
6. Prosecuting Race. Anthony V. Alfieri. April 1999. Professor Of Law At The University Of Miami [↑](#footnote-ref-6)
7. Prosecuting Race. Anthony V. Alfieri. April 1999. Professor Of Law At The University Of Miami [↑](#footnote-ref-7)
8. Prosecuting Race. Anthony V. Alfieri. April 1999. Professor Of Law At The University Of Miami [↑](#footnote-ref-8)
9. Prosecuting Race. Anthony V. Alfieri. April 1999. Professor Of Law At The University Of Miami [↑](#footnote-ref-9)
10. Prosecuting Race. Anthony V. Alfieri. April 1999. Professor Of Law At The University Of Miami [↑](#footnote-ref-10)