

TRYING NOT TO BE LIKE SISYPHUS: CAN DEFENSE COUNSEL OVERCOME PERVASIVE STATUS QUO BIAS IN THE CRIMINAL JUSTICE SYSTEM?

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“In general, the public, which on the whole likes its society orderly, is better disposed to the prosecutors as enforcers of order than to defense lawyers as challengers of that order in the interests of a fair trial.”

Defense lawyer and former prosecutor, Kendall Coffey¹

“[A]bsolutely everything that public defenders do is about challenging the status quo—pretrial motions, cross-examination, filing appeals. In fact, their mere existence poses such a challenge.”

Former Executive Director, District of Columbia Public Defender Service, Cynthia Jones²

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1. KENDALL COFFEY, *Defense Perspective on Media and the Court of Public Opinion*, in A GUIDE TO CRIMINAL LAWYERS USING THE MEDIA WISELY (Andrew E. Taslitz ed., forthcoming 2013) (manuscript at 12) (on file with author).

2. Email from Cynthia Jones, former Director of the Public Defender Service for the District of Columbia, to Andrew E. Taslitz, Professor of Law, Washington College of Law (Jan. 19, 2012) (on file with author).

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I. INTRODUCTION

A. Overview

This Article argues that there is a psychological bias toward the status quo³—represented by police and prosecutors, who are themselves subject to this bias.⁴ The bias is pervasive, also affecting judges, juries, and much of the broader citizenry.⁵ More specifically, this bias is toward preserving the

3. See generally SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION [hereinafter SYSTEM JUSTIFICATION BASES] (John T. Jost et al. eds., 2009) (collecting essays demonstrating the psychological, sociological, and historical forces biasing much judgment toward supporting current social systems, that is, toward the status quo). “System justification theory” is the umbrella term for these biases. *Id.* Sometimes the term “status quo bias” is used as a synonym for system justification, sometimes as referring to a subset of several biases fitting under the umbrella term. *Id.* Here I prefer to use the term “status quo bias” in its broader sense because it better conveys this Article’s themes.

4. See *infra* Part III.B.

5. See *infra* Part II.

current social system, particularly in the context of criminal justice.⁶ The role of defense counsel, both at trial and pre-trial—and I see the two criminal justice process stages as inseparable—is most often to combat the status quo’s psychological power.⁷ Once this point is understood, it has doctrinal, legislative, practical, and policy implications for providing for a more robust right to counsel.⁸

I am not arguing, however, that the status quo always benefits the state. To the contrary, in some cases, such as rape trials,⁹ white-collar prosecutions of the wealthy,¹⁰ and many prosecutions of corporations,¹¹ the status quo favors the defense. But in the run-of-the-mill prosecutions of the poor, largely racial minorities, for street and other crimes that dominate criminal court case loads, the way things *are* is understood as the way they *should be*.¹² The defense must combat this understanding.

Three cautions are necessary. First, I do not mean by this argument to condemn police and prosecutors for defending the system. That is their natural and appropriate role.¹³ A social system without a significant

6. See *infra* Part IV.A.1.

7. See *infra* Part IV.

8. See *infra* Part IV.

9. See generally ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 1 (1999) [hereinafter TASLITZ, RAPE AND THE COURTROOM] (crafting an extended argument that courtroom linguistic and ideological practices bias jury rape case decisions, especially in consent defense cases, toward the defense).

10. See *infra* text accompanying notes 29-35. American ideologies rooted in the Protestant ethic favor the wealthy as competent people deserving of their social status. Eric Luis Uhlmann et al., *America Moral Exceptionalism*, in SYSTEM JUSTIFICATION BASES, *supra* note 3, at 24, 27. Moreover, for this very reason, the wealthy are higher status people, and higher status witnesses start with a credibility advantage over lower status witnesses in the courtroom. See TASLITZ, RAPE AND THE COURTROOM, *supra* note 9, at 67-75. This admiration for the wealthy is itself indicative of a status quo bias. See *infra* text accompanying notes 36-41.

11. See, e.g., LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011) (articulating an extended explanation of how campaign finance and lobbying rules and practices allow the voice of the wealthy and powerful to dominate federal policymaking, too often drowning out the voices of ordinary people). In a capitalist system often dominated by large corporations and similar entities, most profit-making corporations necessarily are part of the political and economic status quo and fight to defend and extend the frequent dominance that our system permits them. *Id.*

12. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (describing the current criminal justice system status quo as one so disproportionately affecting poor racial minorities as to constitute a “new Jim Crow”—a race-based social system designed to subordinate African-Americans and other racial minorities—and explaining how the system maintains this subordination). See *infra* Part IV.A (explaining why criminal trials and other criminal justice processes tend to favor the status quo).

13. See Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2121-27 (2010) (discussing prosecutors’ self-perceptions). The success of prosecutors, as well as police to some degree, is often gauged, however, by their ability to put criminals in jail, and not necessarily their ability to enforce the law. *Id.*

measure of stability cannot survive or prosper.¹⁴ But the same is true if the system cannot change either to meet new needs or to right existing wrongs. A proper balance between stability and change is necessary.¹⁵ The status quo bias weights the balance too far toward sclerosis rather than growth. Reducing the bias's effect is more likely to promote a kind of social homeostasis for the body politic. A properly functioning adversary system, rather than one both psychologically and materially weighted against poor defendants, is among the best ways to restore the body's political health.¹⁶

Second, although this Article addresses defense counsel's role, the primary purpose of the bulk of the Article is to prove that status quo bias is so pervasive, especially in the criminal justice system, that a counterweight is needed.¹⁷ The last major part of this Article illustrates ways in which defense counsel—and likely *only* defense counsel—can properly serve that function.¹⁸ In an underfunded system of assembly-line justice, however, defense counsel might not only fail to serve as a counterweight but also might herself end up promoting the status quo—a position harmful to her client. The difficulty of her counterweight role—which much of this Article demonstrates—is why properly resourced and trained defense counsel is so important.¹⁹

Third, illustrating every way in which defense counsel can counteract status quo bias and every stage at which she can do so is a voluminous task. I do not attempt it here. My examples emphasize jury trial and trial-preparation tactics, though I touch on other matters such as guilty-plea preparation (which ideally should be almost as thorough as trial preparation).²⁰ But the logic of these examples should serve readily to

14. See KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 84, 92, 102 (2010) (discussing the importance of law's stability).

15. See *id.* (noting societal benefits in some challenges to legal stability).

16. See RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE 48 (1995) (discussing law's "homeostatic function" of trying to return to the status quo). I am not arguing that a properly functioning adversarialism is all that is necessary for the system to work at its best, nor that countering status quo bias is the sole role of defense counsel in an adversary system. But it is an important role. Furthermore, though making empirical claims—that there is such a bias and that defense can help to counteract it—the argument here is fundamentally a normative one: a plea for how to improve the system. This piece does not address the political feasibility of change. But before reformers can agitate for change, they must know what change they want, why they want the change, and what arguments support it. That educational role is this Article's major goal. It is worth noting too that many factors other than status quo bias determine case outcomes. See generally JESSICA D. FINLEY & BRUCE D. SALES, THE SCIENCE OF ATTORNEY ADVOCACY: HOW COURTROOM BEHAVIOR AFFECTS JURY DECISION MAKING (2012) (discussing many of these other factors).

17. See *infra* Part IV.A-E.

18. See *infra* Part V.

19. See *supra* Part I.

20. See *supra* Part I.

suggest the importance of defense counsel's status counterweight role in other contexts and to other audiences.²¹

B. *What Is to Come*

Part II of this Article, immediately following this Introduction, explains the ideological forces that encourage a bias toward the status quo. These forces are rooted in a Protestant ethic and winners-versus-losers ideology, which both assume that people get what they deserve. Conservative ideology and certain personality traits magnify embrace of the status quo.

Part III explains the cognitive and emotional causes of the bias. These processes include belief in a just world, the availability heuristic—favoring what is most easily available to thinking (how things are) over what is less readily available (how things might be), and anchoring (using starting points from which we resist deviating too greatly).

Part IV extends this analysis to the criminal justice system, first explaining what aspects of the system trigger the bias, then examining why law enforcement in particular is especially likely to defend the status quo and to be blind to its flaws and to the occasional wisdom of its alternatives. Triggers include a perceived—but not extreme—threat to a system's legitimacy, a suspect's low social status, and significant perceived dependence on the existing social system. Law enforcement may suffer from tunnel vision, selective information processing, behavioral stereotyping, conformity effects, and confirmation bias.²² Part IV also explores some of the ill social consequences of status quo bias, including convicting the innocent and reducing community support for the police.

Part V examines some of the ways in which defense counsel can serve as a counterbalance to the status quo bias. Zealous pretrial investigation to support system counter-narratives; challenging law enforcement as committing extreme violations of procedural rules, engaging in gross corruption, or displaying startling incompetence; portraying a client as personally less threatening to the status quo; anti-status-quo-informed jury voir dire; and informed use of relevant scientific evidence are among

21. See *supra* Part I.

22. Tunnel vision can be a particularly important problem. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292. The authors point out that

by tunnel vision we mean that “compendium of common heuristics and logical fallacies,” to which we are all susceptible, that lead actors in the criminal justice system to “focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from guilt.”

Id. (quoting Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002)).

counsel's tools for combatting the state's pro-current-social-system advantages.²³

Part VI, the Conclusion, briefly examines some of the implications for doctrine, legislation, and legal practice of recognizing defense counsel's critical counterbalancing role. These implications are briefly stated because this Article's goal is to open a conversation about a new, but underappreciated and under-theorized role for defense counsel—that of irritant to the status quo—not to end that conversation.

II. SYSTEM-JUSTIFICATION THEORY AND IDEOLOGY

This Part of this Article seeks to make the case that status quo bias—or system justification—is a pervasive and powerful phenomenon in American culture.²⁴ Part II, Section A addresses one cultural source of this phenomenon: the Protestant ideology of earthly desert, moral absolutism, and individual merit. Part II, Section B addresses a related but still distinct source: the American obsession with winning. Part II, Section C explains that this ideological grip is strongest for political conservatives—a point that, as a later section will explain, has significance for jury selection. Part III will thereafter turn to the cognitive and emotional, rather than ideological, causes of status-quo-bias. Parts II and III set the stage for Part IV's application of these general principles to the specific context of the criminal justice system.

23. See Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 *FORDHAM URB. L.J.* 1097, 1097-1104 (2004) (discussing the centrality of pretrial investigation, including discovery, to the effective assistance of counsel). Professor Darryl Brown notes, however, how frequently inadequately resourced defense counsel fall short of fulfilling their proper role:

Moreover, defense counsel have limited ability to extend investigations and prepare rigorous confrontation of evidence. What the Supreme Court tried to grant through constitutional doctrine, legislatures have been able to limit through funding constraints so that defenders have little time and few resources for most cases. Accounts of poor defense practice, especially for indigents, are widespread and routine across a wide array of jurisdictions. One study of appointed counsel in New York City found that defense attorneys visited crime scenes and interviewed witnesses in only 4% of non-homicide felonies, rates rose to only 21% for homicides. Defenders employed experts in only 2% of all felony cases (and only 17% for homicides). More recent studies of appointed counsel representation in other jurisdictions suggest these figures are fairly typical.

Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 *CALIF. L. REV.* 1585, 1602-03 (2005) (footnotes omitted).

24. See *infra* Part II.A.1-2.

*A. Protestants and Winners**1. Desert and the Protestant Ethic*

Ideology, though itself a contested concept, can fairly be defined as a conceptual framework structuring our thinking about the social world and our role in it.²⁵ Ideology makes a particular social system “seem natural, god-given, or ideal, so that the subordinate classes accept it without question.”²⁶

One American ideology that helps to sustain the status quo has its roots in a cluster of Protestant values deeply embedded in American history.²⁷ These values, research reveals, continue to affect behavior unconsciously, even among individuals who consciously reject the ideology’s precepts.²⁸ Central to this ideology is the idea of individual merit.²⁹ Earthly reward and punishment reflect a meritocracy.³⁰ The worthy thrive, and the unworthy suffer.³¹ Income and social status are, thus, earned by good works and character, poverty and stigma similarly earned, albeit by ill behavior.³² More Americans than in most other cultures endorse the belief that people get what they deserve.³³ Fully 96% of Americans believe in teaching their children that hard work is the key to success.³⁴ More Americans than in most cultures in developed nations believe in a just world in which the righteous are rewarded and the evil or lazy are punished.³⁵

An important consequence of this embrace of a Protestant ethic of desert is the promotion of prejudice against lower status social groups: the undeserving.³⁶ This prejudice is expressed as a character-based judgment:

25. See Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 404-10 (1996) [hereinafter Taslitz, *Patriarchal Stories*].

26. MIKE CORMACK, IDEOLOGY 13-14 (1992). See generally IDEOLOGY, PSYCHOLOGY, AND LAW (Jon Hanson ed., 2012) (collecting articles addressing the role of ideology and related psychological processes in the law).

27. See Uhlmann et al., *supra* note 10, at 27, 32-33.

28. See *id.* at 32-33, 47.

29. See *id.* at 32-33.

30. See *id.* at 33.

31. See *id.* at 34.

32. See WAYNE E. BAKER, AMERICA’S CRISIS OF VALUES 50-61 (2005) (discussing which protestant values have survived over generations and how others have been altered).

33. See Uhlmann et al., *supra* note 10, at 34-36.

34. See BAKER, *supra* note 32, at 51; Uhlmann, *supra* note 10, at 34;.

35. Uhlmann et al., *supra* note 10, at 36; FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS 60-63 (3d ed. 1998).

36. See Uhlmann et al., *supra* note 10, at 36 (“The (often implicit) belief that bad people are punished on earth contributes to ideologies that justify social inequality,” including a related set of values that foster “prejudice against members of low-status social groups.”). See generally John T. Jost

the poor and the lowly lack the personality traits of thrift, honesty, and hard work necessary for success.³⁷ Thus, in various studies, those most fervently embracing the Protestant work ethic were also most likely to embrace negative stereotypes toward African-Americans.³⁸ In one experiment, priming Protestant values led whites to endorse stereotypes of blacks as lazy and undisciplined.³⁹ Listening to a speech about Protestant work values similarly led white participants to view otherwise similarly situated black participants as less competent than the whites.⁴⁰ Priming experimental subjects with statements reflecting the Protestant ethic of success as reflecting desert likewise led participants to justify to themselves unfairly treating members of lower status groups.⁴¹

High levels of religiosity are also closely linked to such traditionalist moral values as protecting the heterosexual nuclear family, respecting religion, embracing nationalistic fervor, and repressing sexuality.⁴² But Americans are, on average, among the most religious people in the Western world.⁴³ Persons seemingly deviating from these prescribed traditional behaviors, as may also often be true of many of those ensnared in the criminal justice system, will, thus, be despised as undeserving of equal treatment.⁴⁴

& Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCHOL. 1 (1994).

37. See Uhlmann et al., *supra* note 10, at 36 (“[T]he belief that America is a meritocracy leads to a strong consistency pressure to further believe that individuals and groups who do less well lack the traits needed for success.”).

38. See *id.* at 36-37.

39. See *id.* at 36. See generally Irwin Katz & R. Glen Hass, *Racial Ambivalence and American Values Conflict: Correlational and Priming Studies of Dual Cognitive Structures*, 55 J. PERSONALITY & SOC. PSYCHOL. 893 (1988).

40. See Monica Biernat et al., *Violating American Values: A “Value Congruence” Approach to Understanding Outgroup Attitudes*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 387, 403-06 (1996).

41. See Uhlmann et al., *supra* note 10, at 36.

42. See *id.* at 37. These are the “traditional values” included in the index of such values used by the World Values Survey. See RONALD INGLEHART, *MODERNIZATION AND POSTMODERNIZATION: CULTURAL, ECONOMIC, AND POLITICAL CHANGE IN 43 SOCIETIES* 39-50 (1997); BAKER, *supra* note 32, at 189-97.

43. See Uhlmann et al., *supra* note 10, at 37 (noting that, while other historically Protestant nations have secularized, “America maintains an extremely high rate of religiosity in the face of enormous prosperity”); DAVID HACKETT FISCHER, *ALBION’S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* (1989).

44. See, e.g., Alexander T. Vazsonyi & Elizabeth Trejos-Castillo, *Crime and Deviance in the “Black Belt”: African American Youth in Rural and Nonrural Developmental Contexts*, in *THE MANY COLORS OF CRIME: INEQUALITIES OF RACE, ETHNICITY, AND CRIME IN AMERICA* 122, 122-37 (Ruth D. Peterson et al. eds., 2006).

2. Moral Absolutism

Another important aspect of the Protestant ethic is moral absolutism. Such absolutism views right and wrong as black and white.⁴⁵ The same moral rules apply to everyone, regardless of circumstances, and the rules are clear and therefore easy for those who respect them to follow.⁴⁶ Absolutism tends to prevail in impoverished, highly religious societies like Nigeria, rather than modern wealthy, secular societies like France.⁴⁷ Yet, as one group of authors puts it, “Americans today score closer to Nigerians than they do to Swedes” on moral absolutism.⁴⁸ Indeed, American absolutism has been steadily growing in recent years—a phenomenon crossing differences in gender, wealth, race, and age.⁴⁹ As twentieth century philosopher Walter Lippmann put it, sharply distinguishing good from evil is “one of the great American traditions.”⁵⁰ Two social scientists have argued that the rapid development of mass incarceration, disproportionately of racial minorities, over the last several decades is in part due to the American willingness to characterize offenders against the dominant moral system as irredeemably evil.⁵¹ Evil people must be separated from non-evil people to avoid the former tainting the latter’s essence.⁵²

Americans likewise display a penchant for seeing society as constantly devolving from some perceived, desirable moral status quo.⁵³ The media, in its effort to attract eyeballs to its product, feeds this impression with stories meant to shock and titillate.⁵⁴ Crime stories play a large role in creating this image of an ever-growing threat to the social system.⁵⁵ Such

45. See Uhlmann et al., *supra* note 10, at 38.

46. See *id.*

47. See *id.*

48. *Id.*

49. See BAKER, *supra* note 32, at 173-79; Uhlmann et al., *supra* note 10, at 38.

50. PETER SINGER, *THE PRESIDENT OF GOOD & EVIL: THE ETHICS OF GEORGE W. BUSH* 209 (2004).

51. See GEERT HOFSTEDE ET AL., *CULTURE AND ORGANIZATIONS: SOFTWARE OF THE MIND: INTERCULTURAL COOPERATION AND ITS IMPORTANCE FOR SURVIVAL* 248 (2010).

52. See *id.*; Uhlmann et al., *supra* note 10, at 40.

53. See Uhlmann et al., *supra* note 10, at 45; Richard P. Eibach et al., *When Change in the Self Is Mistaken for Change in the World*, 84 J. PERSONALITY & SOC. PSYCHOL. 917, 917 (2003).

54. See Andrew E. Taslitz, *Information Overload, Multi-Tasking, and the Socially Networked Jury: Why Prosecutors Should Approach the Media Gingerly*, 37 J. LEGAL PROF. (forthcoming 2013) (manuscript at 9-12, 32-35, 42-47) (on file with author); Andrew E. Taslitz, *The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press*, 62 HASTINGS L.J. 1285, 1303-05 (2011) (discussing how the media is drawn to crimes that amplify fear); LYNN S. CHANCER, *HIGH-PROFILE CRIMES: WHEN LEGAL CASES BECOME SOCIAL CAUSES* 11-12 (2005) (using high-profile crimes to show how media coverage extends crimes from the courtroom to the television and internet).

55. See TASLITZ, *RAPE AND THE COURTROOM*, *supra* note 9, at 8-10 (discussing the role of media in creating perceptions of what constitutes rape).

perceived threats further trigger pro-status-quo implicit biases and stereotypes linked to basic judgments of worth.⁵⁶ Once again, persons ensnared in the criminal justice system are simply likely to be labeled “evil,” thus, threats against the status quo. In more colloquial terms, criminal suspects are “losers.”

B. *Loving the Winner*

Several commentators have, indeed, spoken of the American ideology of loving the winner, disapproving of the loser.⁵⁷ Our love of competition exceeds all other countries’,⁵⁸ as does our belief in the fairness of unequal outcomes.⁵⁹ Winning reassures Americans that they have a valued place in society and that their lives have meaning.⁶⁰ Losing represents “the abyss.”⁶¹ Winning differentiates us from others and brings satisfaction from the competitive struggle.⁶² It also puts us in a group, the winners, distinct from the group of losers.⁶³ For Americans, however, the “very fact of standing apart from someone else *is* what defines us.”⁶⁴ The excitement of overcoming uncertainty in the process of struggling also leads to a sense of vindication when the prize is won.⁶⁵ Success breeds pride and self-esteem because it requires hard work and strong character; success is a marker of deserving more than others.⁶⁶ In Christian terms, “only those who heed the

56. See *infra* text accompanying notes 223-31; Charles Ogletree et al., *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 45, 48-50 (Justin D. Levenson & Robert J. Smith eds., 2012).

57. See FRANCESCO DUINA, *WINNING: REFLECTIONS ON AN AMERICAN OBSESSION* 4 (2011) (“We [Americans] are told to feel special and strive for new heights. Being smarter, better, and more knowledgeable than others are virtues, not faults.”).

58. See *id.* at 5 (“According to the World Values Survey, . . . our approval of competition is unmatched by any other major industrialized country on earth”; we have a “great love of ‘winning’ and deep fear of ‘losing.’”); Michelle R. Nelson & Sharon Shavitt, *Horizontal and Vertical Individualism and Achievement Values: A Multimethod Examination of Denmark and the United States*, 33 *J. CROSS-CULTURAL PSYCHOL.* 439, 440 (2002) (noting that Americans, unlike Danes, aspire to conspicuous indicators of success).

59. See DUINA, *supra* note 57, at 5, 21 (noting that, for Americans, unequal outcomes are the natural result of “rewarding those who try and succeed, and leaving those who fall behind to their own devices”) (“[S]ocial (and not only economic) differences in life are ‘justified.’”). Interestingly, some empiricists argue that a society’s happiness declines as its commitment to competition rises. See Evert Van De Vliert & Onne Janssen, *Competitive Societies Are Happy If the Women Are Less Competitive Than the Men*, 36 *CROSS-CULTURAL RES.: J. OF COMPARATIVE SOC. SCI.* 321, 333-35 (2002).

60. See DUINA, *supra* note 57, at 8.

61. *Id.* at 8, 18.

62. See *id.* at 9, 15-17.

63. See *id.* at 20-21; cf. ERIK ERIKSON, *INSIGHT AND FREEDOM: THE NINTH MEMORIAL LECTURE DELIVERED AT THE UNIVERSITY OF CAPE TOWN ON 6 AUGUST 1968*, at 7 (1968) (discussing the importance of group identity).

64. See DUINA, *supra* note 57, at 20.

65. See *id.* at 16-19, 25, 27, 29.

66. See *id.* at 17, 19, 21.

word of God and avoid doing evil are granted salvation.”⁶⁷ Occasionally losing, of course, is unavoidable. But true winners go back, try again, increase their effort, and ultimately prevail.⁶⁸ Consistent losers are, therefore, essential losers, marked by their status as undeserving of better.⁶⁹

Winners must, however, win fairly, that is, pursuant to the existing “rules of the game”—the status quo.⁷⁰ Those who gain reward by disobeying the rules are cheaters, not true winners at all.⁷¹ The criminal law sets the most central societal rules of the current game.⁷² Those garnering money, for example, by violating the rules, are among the worst sort of human beings: the cheaters, the norm-violators, robbing the true, essential winners of their justly deserved rewards.⁷³

The adversarial ideology of the courtroom, much like market ideology, is perhaps a manifestation of the winner-loser ethic.⁷⁴ The winner of the struggle for the favorable jury verdict is presumably in some sense more inherently deserving, more morally right than the loser.⁷⁵ The winner

67. *Id.* at 18.

68. *See id.* at 22-23; *cf.* Allan Mazur et al., *Testosterone and Chess Competition*, 55 SOC. PSYCHOL. Q. 70, 76-77 (1992) (showing that a winner’s rise in testosterone levels is highest when they win where the event was close and the outcome uncertain).

69. *See* DUINA, *supra* note 57, at 116-17.

70. *See id.* at 29.

71. *See id.* at 114-16, 132.

72. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in the Criminal Law*, 97 HARV. L. REV. 625, 626-36 (1984) (explaining the types and functions of various criminal law rules); Andrew E. Taslitz, *The Inadequacies of Civil Society: Law’s Complementary Role in Regulating Harmful Speech*, 1 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 305, 329, 341 (2001) [hereinafter Taslitz, *The Inadequacies of Civil Society*] (explaining the central social functions of the criminal law).

73. *See* DUINA, *supra* note 57, at 112 (discussing the particular shame of a winner being revealed to have won illicitly, that is, in violation of the rules of the game, “beyond the boundaries of acceptable social and moral behavior.”); *cf.* STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 54-68 (2012) (explaining the moral justifications for criminalizing the various forms of theft).

74. *See* TASLITZ, RAPE AND THE COURTROOM, *supra* note 9, at 81; ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION 174 (1971) (“Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious in nature . . . and it demands that the lawyer have the urge for vigorous contest.”).

75. *See generally* Callan & Kay, *Associations Between Law, Competitiveness, and the Pursuit of Self-Interest, in IDEOLOGY, PSYCHOLOGY, AND LAW*, *supra* note 26, at 193 (arguing, partly based upon original experimental data, that American adversarial legalism, especially in the form of the adversarial trial and media coverage of it, promotes an ideological vision of people as competitive and self-interested). The winner of the legal contest is more deserving in at least two ways. First, the system is supposed to promote truth and justice. *See id.* at 195-96. The system is binary: “[O]ne side is right, the other is wrong; one side wins, the other loses . . .” *Id.* at 195. The winner thus represents the forces of truth and justice. Second, the broader intertwined ideologies of Protestantism, moral absolutism, and “winner-ism,” discussed above, mark winners as fundamentally more deserving than losers. *See supra* Part II.A.

survives the moral fire of contest.⁷⁶ The game is thus assumed not to be stacked,⁷⁷ though in practice it is indeed.⁷⁸ When the poor, the uneducated, the minority, the outsider, stands before the court of judgment, he stands as a loser.⁷⁹ The mere fact of his arrest by winners—the very persons who enforce the existing rules of the game that separate winners from losers, namely, police and prosecutors—seems to confirm the suspect’s loser status.⁸⁰ He has sought to evade the game, attack its symbols, challenge its rules, reject its legitimacy.⁸¹ This loser’s arrogance in challenging *the ways things are* marks him as presumptively unworthy of the fair treatment and equal respect deserved only by the winners.⁸² He is marked to lose his case in the justice game, much as he was marked to lose in the game of life.⁸³

76. See *supra* text accompanying notes 62-66 (discussing the importance of surviving an uncertain and difficult struggle to the high moral status of the winner).

77. See PATRICK M. GARRY, *A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA* 64-65 (1997) (concluding that the adversary system is rooted in the “win-lose, opponent-trashing mind-set of sports”).

78. See *infra* text accompanying notes 572-73; Part II.B. The deck is “stacked” both because most criminal defendants lack the resources that the state has and because of the cognitive forces, such as the status quo bias and its psychological cousins, that favor the defenders of the status quo: the police and prosecutors. See *infra* text accompanying notes 572-73; Part II.B.

79. See TASLITZ, *RAPE AND THE COURTROOM*, *supra* note 9, at 68-69, 79, 106, 113-14, 134-37 (discussing the ways in which low social status, such as race or gender, can, combined with other factors, disadvantage parties and witnesses at trial).

80. Cf. *Atwater v. City of Lago Vista*, 532 U.S. 318, 346-47, 354-55 (discussing the embarrassment and humiliation attendant to arrest—though the humiliation in the case before the Court included some particularly pointless aspects); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 93 J. CRIM. L. & CRIMINOLOGY 15, 51 (2003) (discussing how racial profiling amplifies the humiliation of arrest); William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064 (1995) (noting that, regardless of race, “[t]he real harm . . . arises from the indignity of being publicly singled out as a criminal suspect and the fear that flows from being targeted by uniformed, armed police officers”).

81. See Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, But Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC’Y REV. 237, 239-40 (1997) (analyzing the psychology of why people want to punish rulebreakers—especially those breaking the rules of criminal law).

82. See Tom R. Tyler, *A Psychological Perspective on the Legitimacy of Institutions and Authorities*, in *THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS* 416, 422 (John T. Jost & Brenda Major eds., 2001) [hereinafter Tyler, *THE PSYCHOLOGY OF LEGITIMACY*] (arguing that individual interaction with authorities is an “exchange of status-relevant information” and that fair procedures signal to the individual that he is a valued member of a high-status group); *infra* text accompanying notes 481-87 (explaining some of the ways that law enforcement may treat those they believe to be guilty of a crime in ways likely to be perceived as disrespectful). Disrespectful treatment, even if done without recognition of its disrespectful nature and stemming from subconscious motives, is all the more likely where suspects are racial minorities who face disproportionate contact with the criminal justice system. See ALEXANDER, *supra* note 12. See generally *DISPROPORTIONATE MINORITY CONTACT: CURRENT ISSUES AND POLICIES* (Nicolle Parsons-Pollard ed., 2011) [hereinafter *DISPROPORTIONATE MINORITY CONTACT*] (collecting essays documenting the empirical fact of disproportionate minority contact with the criminal justice system and explaining its causes).

83. See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 173-74 (2012). Psychologist and law professor Dan Simon emphasizes that racial minorities are

Political conservatives are especially attentive to these losers' metaphorical "mark of Cain."

That attentiveness, this Article later explains, has important implications for jury selection; political conservatives, on average, will prove more supportive than liberals of the status quo bias that can interfere with a more neutral or balanced determination of guilt.⁸⁴ For this reason, the special role of political conservatives in embracing the status quo merits sustained attention.

C. *Conservatives and Losers*

1. *Conservative Motivations*

Conservative ideology can be defined in many ways. The ways discussed here turn both on self-interest and on conceptions of moral rightness. Commentator Corey Robin perhaps offers the most arresting of definitions of conservatism: "a meditation on—and theoretical rendition of—the felt experience of having power, seeing it threatened, and trying to win it back."⁸⁵ Conservative sentiments, thus, turn on a feared fall from the grace of a perceived status quo in which certain people rightly had power, others did not.⁸⁶ Conservatives are outraged by efforts to shift power to the "undeserving" subordinate classes.⁸⁷ "Levelling," the spirit of equality, interferes with this freedom of the deserving to act in ways that maintain their access to power.⁸⁸ Any movement for change is, thus, viewed as

disproportionately involved in the system and explains the resulting increased likelihood of convictions in many cases; thus,

[t]he experimental research shows that racial bias influences conviction rates when the crime charged is typical of the stereotype of the defendant's group. For example, white defendants are more likely to be found guilty than black defendants for embezzlement, but the reverse is true for auto theft and burglary. The research shows that the congruence between the crime and the stereotype leads to more superficial and confirmatory searches for information regarding the defendant's guilt, to attributions of the criminal behavior to the internal personality of the defendant, and to higher predictions of future criminal behavior.

Id.

84. *See infra* Part II.C.2.

85. COREY ROBIN, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN* 4 (2011).

86. *See id.* at 1-7. *See generally* Richard P. Eibach & Lisa K. Libby, *Ideology of the Good Old Days: Exaggerated Perceptions of Moral Decline and Conservative Politics*, in *SYSTEM JUSTIFICATION BASES*, *supra* note 3, at 402 (explaining why conservatives and others may have an exaggerated perception of moral decline in society).

87. ROBIN, *supra* note 85, at 7 ("Conservatism is the theoretical voice of this animus against the agency of the subordinate classes. It provides the most consistent and profound argument as to why the lower orders should not be allowed to exercise their independent will, why they should not be allowed to govern themselves or the polity. Submission is their first duty, agency, the prerogative of the elite.")

88. *See id.* at 8 ("What the conservative sees and dislikes in equality . . . is not a threat to freedom but its extension. For in that extension, he sees a loss of his own freedom."); JAMES BOSWELL, 3 *LIFE*

threatening a just perceived status quo.⁸⁹ In modern times, it is the quest for greater equality in the private spheres of power (e.g., the home, the business, the workplace, or the bedroom) that particularly inflames the conservative imagination.⁹⁰ Any challenges by subordinates, particularly poor racial minorities, charged with unsettling private security and freedom, should likewise be perceived by conservatives as a threat to the just existing hierarchies of race and class.

It oversimplifies the conservative mind, argues Robin, however, to see it as only about personal (or group) power.⁹¹ Rather, it is the conviction that a more equal private sphere will “lack the excellence of a world where the better man commands the worse.”⁹² It may be that many conservatives view themselves as the “better man” than some others whom they believe the state wants to give power, but it is the conviction that the deserving, left to their own devices, will rise to the top and rule rightly that animates the ideology.⁹³ Under this perspective, a commitment to limited government or extreme versions of libertarianism are not the core of what identifies thinking as conservative but may merely sometimes follow from the quest to have the “best” continue their rule.⁹⁴ This attitude breeds a distrust of rapid change, particularly if it will have a socially equalizing effect in the sphere of private power.⁹⁵ Philosopher Michael Oakshott captured this sensibility thus,

To be conservative, then, is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible,

OF SAMUEL JOHNSON, LL.D. 258 (London, George Routledge & Sons 1866) (“I believe we hardly wish that the mob should have liberty to govern us.” (quoting conservative thinker Samuel Johnson)); EDMUND BURKE, FURTHER REFLECTIONS ON THE REVOLUTION IN FRANCE 205 (J.C.D. Clark ed., 2001) (“The levellers therefore only change and pervert the natural order of things . . .”).

89. See ROBIN, *supra* note 85, at 6-7.

90. See *id.* at 10-13.

91. See *id.* at 15-16.

92. See *id.* at 16.

93. See *id.* (arguing that this connection between excellence and rule is what modernly joins the libertarian, the traditionalist, and the statist as “conservatives”).

94. See *id.* at 15-16 (explaining that commitments to limited government, liberty, evolutionary reform, and a politics of virtue are modern “byproducts of conservatism” in one of its ever-changing historical manifestations but are not conservatism’s “animating purpose”). Although many conservatives may see themselves as superior to others, a conservative may or may not personally benefit from the positions that he advocates; but it is more important to him that those he sees as the “best” govern public, and especially private, life. ROBIN, *supra* note 85, at 16; see *supra* text accompanying notes 86-90; Conservatives rely on the issues they advocate *against* in order to maintain their stand as advocates for the best form of government. GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE 81-88 (2004) (describing the conservative’s reliance on the “cultural civil war”).

95. See ROBIN, *supra* note 85, at 15-16 (noting the modern conservative’s wariness of change and the “fusion of capitalists, Christians, and warriors” that is “impelled by a more elemental force—the opposition to the liberation of men and women from the fetters of their superiors”).

the limited to the unbounded, the near to the distant, the sufficient to the superabundant, the convenient to the perfect, present laughter to utopian bliss.⁹⁶

The conservative is therefore “acutely aware of having something to lose which he has learned to care for”⁹⁷ An important part of that something is the hierarchical private regimes that he sees as providing social stability.⁹⁸ Again, challenges to that regime by poor racial minority criminal defendants are, thus, unlikely to garner conservative acceptance.

Conservatives consequently also favor tradition, as they perceive it.⁹⁹ They favor some sorts of change, primarily those that help to restore the status quo that they see in the continuing process of devolving in the face of its enemies.¹⁰⁰ The stronger its perceived enemies, the stronger becomes conservatism’s commitment to its defining values: “power . . . demonstrated and privilege earned” by success in the struggle for these very things without government stacking the deck or holding back the talented.¹⁰¹ The modern conservative’s favored battlefield is that of the marketplace—of manufacture and trade.¹⁰² The successful capitalist merits respect not because of his wealth but because he has proven his right to rule.¹⁰³ But this hierarchy of private power is not limited to the marketplace, extending to all private institutions, including the family.¹⁰⁴ Life is hierarchical, and each has his or her place in the social order.¹⁰⁵

96. Michael Oakeshott, *On Being a Conservative*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 168, 169 (1962); accord Michael Oakeshott, *Rationalism in Politics*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS*, *supra*, at 1.

97. *See id.* at 169.

98. *See* BOSWELL, *supra* note 88, at 258 (“Order cannot be had but by subordination.”); ROBIN, *supra* note 85, at 24 (“No conservative opposes change as such or defends order as such. The conservative defends particular orders—hierarchical, often private regimes of rule—on the assumption, in part, that hierarchy *is* order.” (emphasis added)) (“When the multitude are not under this discipline of the wiser, the more expert, and the more opulent, they can scarcely be said to be in civil society.” (quoting EDMUND BURKE, *An Appeal from the New to the Old Whigs*, in *FURTHER REFLECTIONS ON THE REVOLUTION IN FRANCE* 73, 167 (Daniel F. Ritchie ed., 1992) (internal quotation marks omitted))).

99. *See* ROBIN, *supra* note 85, at 28 (“Conservatism is about power besieged and power protected. It is an activist doctrine for an activist time. It waxes in response to movements from below and wanes in response to their disappearance”). I say as “they perceive it” because conservatives can often be quite radical in their calls for a return to the true values that, according to them, define a particular society. *See id.*

100. *See id.* at 24-27.

101. *See id.* at 29 (noting that “there is no better way to exercise power than to defend it against an enemy [threat] from below.”); *supra* text accompanying notes 94-98 (discussing modern conservatism’s embrace of limited government).

102. *See* ROBIN, *supra* note 85, at 30.

103. *See id.* at 30-32.

104. *See id.* at 9-10, 13.

105. *See id.* at 8 (“Historically, the conservative has favored liberty for the higher orders and constraint for the lower orders.”). I recognize that Robin’s interpretation of conservatism’s meaning is not the only possible one. But, it is the one that I find most convincing and that is most consistent with

Those who challenge that order, as poor racial minority criminal defendants defying authorities' accusations are wont to do, should be dealt with harshly.

2. *Conservatives and the Status Quo*

This essentially psychological definition of conservatism is indeed mirrored in some of the psychological literature on system-justification motives.¹⁰⁶ Adherents of conservative ideology are seen as committed to conscientiousness, rule-following, a reluctance to embrace new experiences, but a zeal for order, structure, and closure.¹⁰⁷ Factors making the world seem a more dangerous place—as can the simple fact of becoming a parent¹⁰⁸—prod individuals toward a more conservative ideological

the psychological empirical data. In any event, debating the nature of conservatism would require its own article but would not add appreciably to the points I make here. I note one important alternative perspective: that of professor Jonathan Haidt. Haidt does not disagree with the empirical findings about the nature of conservatism, but he objects to what he sees as its unduly critical tone. For Haidt, the psychological difference between conservatives and liberals is a difference in moral systems. Liberals have a simple morality that stresses care/avoiding harm and fairness, leading to favoring fostering equality and governmental action to prevent harm. Conservatives have a more complex, five-factor morality and are more likely to emphasize the other three factors. Those three factors are loyalty, authority, and sanctity. JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 130, 156 (2012). But it is precisely the strength of the view that deference is due to those who have earned authority and that sanctity requires purity, including social purity (feeling disgust at, and thus avoiding, those seen as socially deviant) that can help to explain the conservative embrace of hierarchy and struggle. *See id.* at 141-54. Haidt makes the following point concerning the authority foundation in particular that is especially relevant to status quo bias:

When people within a hierarchical order act in ways that negate or subvert that order, we feel it instantly, even if we ourselves have not been directly harmed. If authority is in part about protecting order and fending off chaos, then everyone has a stake in supporting the existing order and in holding people accountable for fulfilling the obligations of their station.

Id. at 144. Some of what I describe as conservative attitudes may sometimes be overtly expressed, but it is just as often unconscious, and Haidt agrees that our real moral reasoning generally occurs unconsciously, our stated reasons being post hoc justifications for our actions. *See id.* at 52-71. Robin's analysis has this same feel of understanding what is "really going on" in conservatism, what motives and worldviews unite conservatives across stated ideological boundaries. It is this feature of his vision of conservatism, which also looks for its consistencies across time and cultures, that makes it unique and, especially in light of the supportive empirical data, gives it its explanatory power.

106. *See* Hulda Thorisdottir et al., *On the Social and Psychological Bases of Ideology and System Justification*, in *SYSTEM JUSTIFICATION BASES*, *supra* note 3, at 3, 9-10.

107. *See id.* at 3, 10.

108. *See* Eibach & Libby, *supra* note 86, at 402-04. Eibach and Libby explain that changes in people's personal circumstances, rightly or wrongly, can make them feel more afraid. *Id.* For example, new parents perceive risks they did not perceive before. But they may attribute this heightened fear not to their new circumstances but to actually increased risk caused by social decline. *See id.* at 402-04, 406-09, 411-13. These perceptions of decline are particularly linked to conservative attitudes, that is, conservatives are more likely than others to perceive such decline. *See id.* at 404. But the perception of decline has itself been shown as well to move individuals toward more politically conservative ideologies. *See id.* at 413-15; *see also id.* at 415 ("The belief that social conditions are declining may influence people to become more conservative because decline represents a threat to the social order,

stance.¹⁰⁹ In doing so, they consistently gravitate toward system-justifying positions.¹¹⁰ These positions include a preference for high-status over low-status persons that is more extreme among conservatives than liberals, an implicit acceptance of group stereotypes that support the current distribution of power, and a greater resistance than is true for liberals to social change associated with increased egalitarianism.¹¹¹

In the view of its harshest critics, the major purpose of the criminal justice system is precisely to reinforce existing class, race, and gender structures of dominance.¹¹² On a more benevolent view, there are ample good reasons to punish murderers, rapists, robbers, burglars, and car thieves.¹¹³ Yet it is the case that the bulk of criminal prosecutions,¹¹⁴ and certainly the dominant image of them in the public's mind,¹¹⁵ are against

and conservatism is often a psychological reaction to such threats.”). The emphasis on decline may help conservatives challenge further threats to the social order and motivate efforts to restore the traditional social hierarchies. *See id.* Moreover, “[t]he proposition that disorder is increasing is easy for people to believe, because many have undergone changes that enhance the salience of threats to their families and communities, and they ordinarily fail to appreciate the extent to which such personal changes have altered their perceptions.” *Id.* at 416. Framing a policy as restoring a loss also often has political appeal because “people are often willing to take more extreme actions to prevent or undo losses than to achieve new gains.” *Id.*

109. *See, e.g.,* Jacqueline M. Anson et al., *Political Ideology in the 21st Century: A Terror-Management Perspective on Maintenance and Change of the Status Quo*, in SYSTEM JUSTIFICATION BASES, *supra* note 3, at 210, 222 (concluding that reminders of death often shift people toward more conservative attitudes, including increasing support for former President George W. Bush and greater praise for a charismatic leader more generally, though death-reminders can sometimes simply activate a preexisting more conservative world view); *id.* at 230 (discussing data showing that death reminders increased conservatives' attraction to fellow conservatives but made liberals more accepting of different worldviews and of the persons holding them).

110. *See* Jonathan Haidt & Jesse Graham, *Planet of the Durkheimians: Where Community, Authority, and Sacredness Are Foundations of Morality*, in SYSTEM JUSTIFICATION BASES, *supra* note 3, at 371, 385 (explaining that conservatives are usually united in their desire to preserve the status quo, oppose change, support long-existing institutional norms, and favor traditions embodying the wisdom of generations). Conservatives also generally share a dark view of human nature, leading to the belief that strong institutions and social constraints are required to channel human behavior properly, yet these institutions can be too easily lost if questioned, being hard to replace. *See id.*

111. *See* Irina Feygina & Tom R. Tyler, *Procedural Justice and System-Justifying Motivations*, in SYSTEM JUSTIFICATION BASES, *supra* note 3, at 351, 359 (noting that conservatives report more need for order, resistance to change, and opposition to equality, while displaying a greater system-justification need); *id.* at 361 (noting that conservatives are more satisfied than liberals with authority figures like police officers); *id.* at 362-67 (noting that conservatives are less likely to view procedural unfairness from authorities—such as the police—negatively than are liberals, an observation consistent with deference to authority and preference for the status quo).

112. *See* ALEXANDER, *supra* note 12, at 95-136 (discussing race); TASLITZ, RAPE AND THE COURTROOM, *supra* note 9, at 67-80 (discussing, in part, associations between gender and class that come from language used in rape trials).

113. *See* Taslitz, *The Inadequacies of Civil Society*, *supra* note 72, at 329-41 (explaining the social functions of criminal law).

114. *See* ALEXANDER, *supra* note 12, at 83-92.

115. *See id.* at 5 (discussing the media's coverage of the crack cocaine epidemic in the 1980s and 1990s).

poor racial minorities who have lost out in the private sector's status wars.¹¹⁶ The pleas of the losers for attention to their claims, thus, may seem to the conservative mind as but an instance of the most undeserving seeking to take power from their betters through the former's crimes, mitigation pleas, and evasions.¹¹⁷ The real or imagined typical criminal defendant is but one face of a horde ready to wreak havoc on the order, stability, and earned hierarchy that conservatives so prize.¹¹⁸ Those fears, perceptions of social distance, acceptance of social stereotypes, and aversions to "leveling" efforts at change should enhance the police and prosecutor's aura of protecting the "true" system from its enemies.¹¹⁹ That does not mean that some conservative activists will not fear the potential overweening power of the state to use force via its criminal justice system.¹²⁰ But it should mean that conservative jurors (and judges) will more likely favor the State in common criminal cases than will a liberal and that conservative police and prosecutors will be even more likely than most of law enforcement's members to harbor no doubt about the righteous wisdom of their every action.¹²¹

116. See *infra* text accompanying notes 572-73 (discussing the low social status of poor racial minorities).

117. See ALAN DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES AND EVASIONS OF RESPONSIBILITY* 1 (1994). Thus, they might, for example, derogate defenses rooted in a criminal suspect's difficult childhood or current life or in social inequality, as mere "abuse excuses" designed to evade personal responsibility. *Id.*

118. Cf. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 829-45 (2000) (arguing that harsh-on-crime political demands promote social solidarity in an uncertain and frightening world through punishment).

119. See *infra* Part III.A.

120. See, e.g., *Statement of Principles: Principle 6*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/> (last visited Sept. 25, 2012) (noting conservative principles aimed to reform criminal justice, including the following: "Criminal law should be reserved for conduct that is either blameworthy or threatens public safety, not wielded to grow government and undermine economic freedom."); Bob Barr, *The Barr Code: Power to Strip Search Passengers Claimed by Feds*, ATLANTA J.-CONST. (Mar. 18, 2011, 5:00 AM), <http://blogs.ajc.com/bob-barr-blog/2011/03/18/authority-to-strip-search-passengers-at-will-claimed-by-feds/> (stating that suspicionless strip searches of airline passengers "truly [mean that] the Fourth Amendment will have been gutted[] and with it, the single most important and effective check on government power enjoyed by the American People for over two centuries").

121. See, e.g., Adam Benforado & Jon Hanson, *Attributions and Ideologies: Two Divergent Visions of Human Behavior Behind Our Laws, Policies, and Theories*, in IDEOLOGY, PSYCHOLOGY, AND LAW, *supra* note 26, at 298, 308-12, 314-17 (noting empirical data showing that, relative to liberals, conservatives more strongly favor order, structure, system stability, intolerance of difference, and inequality, while embracing a "strict father" model of moral responsibility as taught by strict discipline and while preferring to associate only with like-minded individuals and ideas).

III. SYSTEM-JUSTIFICATION THEORY: COGNITION, AFFECT, AND THE JUST WORLD

Part III now shifts from the ideological causes of status quo bias to the cognitive and affective ones. Cognitive contributors include the easier accessibility of the familiar to the human mind, the primacy of the status quo (we learn of it first before being exposed to alternatives), its fostering of change-resistant and cognitively cheap anti-egalitarian stereotypes, and its hindering counterfactual thinking.¹²² Affective causes include the tendency to fondly embrace the familiar, avoidance of cognitive dissonance, greater aversion to risked losses than potential gains, and perception of change agents as extreme.¹²³ Embrace of just-world beliefs, stronger in political conservatives—the idea that what is fundamentally just usually prevails so that what has already prevailed is probably already just—also fosters commitment to the status quo.¹²⁴ Part III concludes by identifying situational factors that can promote or retard status quo bias.¹²⁵ That lays the groundwork in Part IV for understanding the presence of status-quo-bias-amplifying factors with particular vigor in the criminal justice system.

A. Overview

The status quo is, for social scientists' purposes, not the existing state of affairs, but what individuals and groups perceive it to be.¹²⁶ There are ample material obstacles to changing the status quo.¹²⁷ It is an expensive, risky business.¹²⁸ The status quo will be harshly defended by those who benefit from it.¹²⁹ But there are cognitive and affective (emotional) barriers to change too.¹³⁰ System justification theory posits that human thinking and

122. See *infra* Part III.B.

123. See *infra* Part III.C.

124. See *infra* Part III.D.

125. See *infra* Part III.E.

126. See Scott Eidelman & Christian S. Crandall, *A Psychological Advantage for the Status Quo*, in SYSTEM JUSTIFICATION BASES, *supra* note 3, at 85-86, 100.

127. See *infra* text accompanying notes 128-33.

128. See *infra* text accompanying notes 129-33 (noting material and other expenses of seeking change, including expense, effort, attention, leadership, obtaining consent of the governed, and overcoming the difficulty of getting people even to imagine an unfamiliar alternative universe); Robert J. Robinson & Laura Kray, *Status Versus Quo: Naive Realism and the Search for Social Change and Perceived Legitimacy*, in THE PSYCHOLOGY OF LEGITIMACY, *supra* note 82, at 135-39, 150 (reviewing empirical data suggesting that opponents of the status quo may have an uphill battle because they are often perceived as extremists, while supporters of the status quo are seen as “more flexible, more reasonable, and less of a source of conflict compared to those advancing change”).

129. Cf. DELGADO, *supra* note 16, at 48 (discussing law's tendency toward “homeosta[sis],” meaning to return to favoring the original balance of power); see *supra* Part II.C.1 (discussing conservative resistance to challenges to their perceived existing social power).

130. See *infra* Part III.A-C.

emotional processes tend to favor, indeed justify, the existing social system.¹³¹ While other theories challenge the precise processes at work, those theories still end up finding outcomes defending the status quo.¹³² These are biases, that is, tendencies, not cognitive and emotional limits, so they can be overcome.¹³³

Below is a sampling of the biases at work that are relevant to understanding resistance to change and its impact in the criminal justice system.

B. Basic Cognitive Principles

Existing states of affairs are necessarily likely to be frequently encountered.¹³⁴ Indeed, the perceived frequency of encounter might serve as a working definition, or at least a hallmark, of the status quo.¹³⁵ But things often encountered are easily available for cognitive processing.¹³⁶ The process is akin to the availability heuristic, which says that we are more likely to estimate probabilities based upon the information that is readily available—what “readily come[s] to mind.”¹³⁷ The status quo is always available and, thus, in similar fashion, is the first basis for decision making. Such information will be processed earlier and used as more of a reference point than its alternatives.¹³⁸

The status quo is also more accessible to memory because we more easily remember frequent and recent experiences.¹³⁹ Environmental cues triggering memory of the status quo are also more likely because of their pervasiveness.¹⁴⁰ Although novel alternatives may briefly attention-grab, short-run changes in focus do not readily compensate for greater memory

131. See SYSTEM JUSTIFICATION BASES, *supra* note 3, at 8-9.

132. See, e.g., Kees van den Bos, *The Social Psychology of Uncertainty Management and System Justification*, in SYSTEM JUSTIFICATION BASES, *supra* note 3, at 185 (arguing that fear of uncertainty and the need to manage it in an unpredictable world is a major determinant of support for the status quo); Anson et al., *supra* note 109, at 210 (arguing that the fear of death, rather than simply cognitive bias, plays an important role in favoring the status quo); Haidt & Graham, *supra* note 110, at 371 (arguing that differing moral views account for conservatives' greater support for the status quo relative to liberals).

133. See *infra* Part III.E.

134. See Eidelman & Crandall, *supra* note 126, at 86.

135. See *id.*

136. See *id.*

137. See Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1297 (2003).

138. See Eidelman & Crandall, *supra* note 126, at 86. The status quo, therefore, becomes a starting point for comparison, leading it to dominate cognitive processing. See *id.*

139. See *id.*

140. See *id.*

accessibility.¹⁴¹ Accessible constructs are more readily assimilated into subsequent judgments and “seen as more numerous and as more likely to occur in the future.”¹⁴² Similarly, accessibility-based judgments breed overconfidence in them.¹⁴³ They also result in biased hypothesis testing: looking for ways to confirm, rather than to disconfirm, the initial judgment.¹⁴⁴

Earlier-processed information also has other advantages over its competitors.¹⁴⁵ Earlier-processed information is better remembered and is perceived as more stable and less mutable.¹⁴⁶ Moreover, once reasons have been generated justifying this earlier perceived state of affairs, generating alternatives becomes difficult, and predictions about the future are more likely to be made in ways consistent with the past.¹⁴⁷ These primacy effects are wide-ranging and powerful.¹⁴⁸

Earlier-encountered circumstances also serve as anchors for change.¹⁴⁹ Just as a ship’s anchor prevents it from drifting too far from where the anchor is dropped, so does a cognitive-anchor bias change toward deviating only mildly from the starting point.¹⁵⁰ Anchoring effects have been observed in everything from making numerical estimates to personality judgments.¹⁵¹ These effects prevent sufficiently revising status quo judgments in light of later inconsistent information.¹⁵² The mere order in

141. *See id.* at 86-87. *See generally* THOMAS H. DAVENPORT & JOHN C. BECK, *THE ATTENTION ECONOMY: UNDERSTANDING THE NEW CURRENCY OF BUSINESS* (2001) (summarizing research on what grabs attention in a cacophonous world competing for it).

142. Eidelman & Crandall, *supra* note 126, at 87.

143. *See id.*

144. *See id.* This accessibility bias includes the accessibility of the racial status quo, particularly in moments of stress or time urgency. *See, e.g.*, B. Keith Payne et al., *Best-Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 *J. EXPERIMENTAL SOC. PSYCHOL.* 383, 384-85 (2002) (showing how experimental subjects making quick judgments were more likely to perceive a harmless object as a weapon when in a black person’s hand than a white one’s). The confirmation bias is the tendency to look for evidence confirming a hypothesis and ignoring or minimize disconfirming evidence. *See* Barbara O’Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 *PSYCHOL. PUB. POL’Y & L.* 315, 315-17 (1999).

145. *See infra* text accompanying notes 148-50.

146. *See* Eidelman & Crandall, *supra* note 126, at 87.

147. *Id.*

148. *See id.* These primacy effects are pervasive and are intuitively understood by trial lawyers crafting trial strategy. *See generally* Hyatt Browning Shirkey, *Last Attorney to the Jury Box Is a Rotten Egg: Overcoming Psychological Hurdles in the Order of Presentation at Trial*, 8 *OHIO ST. J. CRIM. L.* 581, 581 (2010) (discussing these effects and suggesting ways to respond to them in the trial setting).

149. *See* Emily LeBron Foster, *Anchoring and the Expert Witness Testimony: Do Countervailing Forces Offset Anchoring Effects of Expert Witness Testimony?*, 77 *TENN. L. REV.* 623, 623-29 (2009) (explaining anchoring effects and related phenomena).

150. *See* Eidelman & Crandall, *supra* note 126, at 88.

151. *See id.*

152. *See id.*

which jury instructions are given can alone affect verdicts.¹⁵³ For example, in one experiment, instructing mock-murder-trial jurors to consider the harsher verdict first biased them toward guilty verdicts and harsher sentencing verdicts than did giving the more lenient charge instruction first.¹⁵⁴ Yet this pro-harshness order is the one most often used in real trials.¹⁵⁵

The status quo also serves as a cognitive reference point.¹⁵⁶ Primacy, familiarity, and frequent exposure combine to create this reference point.¹⁵⁷ Reference points “determine[] the dimensions on which [an] evaluation will occur,” resulting in more easily assimilating alternatives to the reference point than vice versa.¹⁵⁸ Thus, Americans are more likely to compare communism relative to capitalism.¹⁵⁹ With capitalism as the reference point, however, the dimensions for evaluation will be things such as efficiency and individual freedom¹⁶⁰ rather than equality and communal solidarity.¹⁶¹ Where logically feasible, alternatives may also be seen as more similar to, than different from, a reference point, thus, not worth serious reevaluation of the status quo reference point.¹⁶²

Occurrences of events are also more salient than non-occurrences.¹⁶³ What does not yet exist is, thus, less salient than what does.¹⁶⁴ Most learning, payoff, and behavioral reinforcement likewise occur in the status

153. *See id.*

154. *See* Jeff Greenberg et al., *Considering the Harshes Verdict First: Biasing Effects on Mock Juror Verdicts*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 41, 46-48 (1986).

155. *See* Eidelman & Crandall, *supra* note 126, at 88.

156. *See id.* at 88-89.

157. *See id.* at 89.

158. *See id.*

159. *See id.*

160. *See, e.g.*, ARTHUR C. BROOKS, *THE ROAD TO FREEDOM: HOW TO WIN THE FIGHT FOR FREE ENTERPRISE* 3-18 (2012) (making the moral case that one type of capitalism—“free enterprise”—best promotes individual freedom and ideals of earned success); GUY SORMAN, *ECONOMICS DOES NOT LIE: A DEFENSE OF THE FREE MARKET IN A TIME OF CRISIS* 4 (2012) (“One can now say that a consensus exists among economists as to the superior *efficiency* of market economics.” (emphasis added)).

161. *See generally* G.A. COHEN, *WHY NOT SOCIALISM?* (2009) (arguing that markets, especially capitalist ones, degrade the human spirit, while socialism fosters egalitarianism and community); TARIQ ALI, *THE IDEA OF COMMUNISM* (2009) (defending the Communist idea—rather than its practice—as more egalitarian and noble than the idea of capitalism).

162. *See* Eidelman & Crandall, *supra* note 126, at 89.

163. *See id.*

164. *See id.* at 89-90.

quo.¹⁶⁵ It is, thus, “feature-positive.”¹⁶⁶ The value of what is missing is, by contrast, untested and, thus, “feature-negative.”¹⁶⁷

Basic learning theory also offers some insights.¹⁶⁸ Notably, a second, new stimulus resists conditioning with a previously paired stimulus, thus obstructing new learning.¹⁶⁹ The status quo, because it is more salient, also benefits from the observation that the more salient of two simultaneously presented stimuli is more likely to result in conditioning.¹⁷⁰ It, thus, overshadows pairing with alternatives.¹⁷¹

The status quo further breeds cultural stereotypes supportive of the existing state of affairs.¹⁷² But, stereotypes block noticing and properly weighting stereotype-inconsistent information, making deviation from the status quo all that much harder.¹⁷³

Social changes require counterfactual thinking: imagining alternatives to current reality and those alternatives’ likely outcomes.¹⁷⁴ Counterfactual thinking is effortful, requiring significant motivation.¹⁷⁵

In sum, the easier accessibility and primacy of the status quo, its role as a cognitive anchor, its greater salience, its trigger of powerful stereotypes, and its processing ease relative to imagining alternatives all make deviations from it hard.¹⁷⁶ In the case of the criminal justice system, as will be discussed shortly, this means that suspicion of poor racial minorities’ testimony, resistance to seeing them as getting anything other than what they deserve, minimization of the weight of the arguments supporting their innocence, and the difficulty of conceiving any of these

165. *See id.* at 90.

166. *See id.* at 89-90 (citing Joseph Newman et al., *The Feature-Positive Effect in Adult Human Subjects*, 6 J. EXPERIMENTAL PSYCHOL. 630, 645 (1980)) (illustrating the feature-positive effect in a study in which “college students were substantially better at discriminating between cards that were ‘good’ and ‘not good’ when the presence of a symbol indicated goodness than when it indicated the ‘absence’ of goodness”).

167. *See* Eidelman & Crandall, *supra* note 126, at 90 (“Unlike Sherlock Holmes, most people quite easily miss the importance of the dog *not* barking in the night.”).

168. *See id.*

169. *See id.*

170. *See id.*

171. *See id.*; Mark E. Bouton, *Context and Behavioral Processes in Extinction*, 11 LEARNING & MEMORY 485, 487-88 (2004) (defining and explaining overshadowing phenomenon, while reviewing supporting data).

172. *See* Vincent Yzerbyt & Anouk Rogier, *Blame It on the Group: Entitativity, Subjective Essentialism, and Social Attribution*, in THE PSYCHOLOGY OF LEGITIMACY, *supra* note 82, at 103-27 (2001) (arguing, drawing on a wide array of empirical data, that stereotypes *are created* to rationalize the social status quo).

173. *See* Eidelman & Crandall, *supra* note 126, at 90; Jost & Banaji, *supra* note 36, at 11-20.

174. *See* Eidelman & Crandall, *supra* note 126, at 91.

175. *See id.* Motivation for change might come from unhappiness or a failure to understand one’s place in the world. *See* Neal J. Roese, *Counterfactual Thinking*, 121 PSYCHOL. BULL. 133, 135 (1997).

176. *See* Eidelman & Crandall, *supra* note 126, at 91.

assumptions as being flawed likely dominate decision making about guilt or innocence.¹⁷⁷

C. Basic Affective Principles

Processes by which we assign value to things also advantage the status quo.¹⁷⁸ Perhaps most importantly, the status quo is assigned “worth, value, and goodness” merely because it defines the existing state of affairs.¹⁷⁹ Alternative, nonexistent options are devalued, even dismissed or disregarded entirely.¹⁸⁰

Mere familiarity with stimuli, even if unreinforced,¹⁸¹ as occurs with familiar faces,¹⁸² leads to a more favorable evaluation of the stimuli.¹⁸³ These effects have been demonstrated in real-world settings, as well as experimental ones.¹⁸⁴ Familiarity, as noted earlier, is a central feature of the status quo.¹⁸⁵

When two inconsistent alternatives are offered, that dissonance produces tension.¹⁸⁶ To resolve that tension, one alternative (the one not initially chosen) will be downgraded, the other (the one initially chosen) upgraded.¹⁸⁷ The status quo creates the appearance of being an initially

177. *See id.* at 92-97.

178. *See id.* at 91-92.

179. *See id.* at 92.

180. *See id.* A related phenomenon that may come into play is the “endowment effect.” *See* Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1326 (1990). The endowment effect means that we value what we have more than what we do not already have, all things being equal, so we may be willing to pay more to keep things we own than to buy identical things we do not. *See* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 129-37 (2008) (defining and explaining the endowment effect). This effect applies to ideas as well as things. Behavioral economist Dan Ariely explains,

O[wnership] is not limited to material things. It can also apply to points of view. Once we take ownership of an idea—whether it’s about politics or sports—what do we do? We love it perhaps more than we should. We prize it more than it is worth. And most frequently, we have trouble letting go of it because we can’t stand the idea of its loss. What are we left with then? An ideology—rigid and unyielding.

Id. at 137-38. The idea that the status quo is better than any alternative may itself be subject to this effect. *See* Robinson & Kray, *supra* note 128, at 151-52.

181. *See* Robert F. Bornstein, *Exposure and Affect: Overview and Meta-Analysis of Research, 1968-1987*, 106 PSYCHOL. BULL. 265, 265 (1989).

182. Robert B. Zajonc, *Attitudinal Effects of Mere Exposure*, 9 J. PERSONALITY SOC. PSYCHOL. 1, 18-19 (1968).

183. *See* Eidelman & Crandall, *supra* note 126, at 92.

184. *See id.* The unreinforced stimulus must, however, not be an initially aversive one. *See id.*

185. *See supra* text accompanying notes 156-62.

186. *See* Eidelman & Crandall, *supra* note 126, at 92; LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 2-3 (1957) (articulating the theory of cognitive dissonance).

187. *See* Eidelman & Crandall, *supra* note 126, at 92-93. This effect is most likely to occur when both options are initially unattractive. *See* Thomas R. Shultz & Mark R. Lepper, *Cognitive Dissonance Reduction as Constant Satisfaction*, 103 PSYCHOL. REV. 219, 255 (1996).

chosen option.¹⁸⁸ When that is so, later offered options are devalued relative to the earlier chosen one.¹⁸⁹ By comparison, the status quo looks even better, alternatives worse.¹⁹⁰ The negative aspects of the other options are enhanced, those of the status quo option minimized.¹⁹¹

Two related phenomena further benefit feelings toward the status quo.¹⁹² Most people are more averse to losses than drawn to gains.¹⁹³ This loss aversion leads them to imagine greater regret from action than from inaction because action risks loss.¹⁹⁴ Even when assured that the outcomes of the two choices will be identical, most people still imagine more regret from acting than from not acting.¹⁹⁵

Moreover, those seeking change are judged by their supporters and opponents alike as more extreme and less reasonable than avatars of the status quo.¹⁹⁶ Because change-agents' positions seem less meritorious, their advocates are apparently assumed to take them because of self-interest.¹⁹⁷ Because their positions are viewed as self-serving rather than reflecting rational argument, observers view change-agents' positions as less meritorious.¹⁹⁸ Some authors even argue for a "mere existence" effect: things exist as they are because it is good that they be so.¹⁹⁹ This effect is automatic, effortless, and outside awareness.²⁰⁰

Many of these cognitive and affective biases are also enhanced by time pressure.²⁰¹ Warning people about these effects does little, if anything, to counteract them.²⁰² Political ideologies, on the other hand, as described above, can support them.²⁰³

188. See Eidelman & Crandall, *supra* note 126, at 93.

189. See *id.*

190. See *id.*

191. See *id.*; cf. Ryan K. Beasley & Mark R. Joslyn, *Cognitive Dissonance & Post-decision Attitude Change in Presidential Elections*, 22 POL. PSYCHOL. 521, 524-26 (2001) (showing that presidential winners then become viewed more positively, the losers more negatively).

192. See Eidelman & Crandall, *supra* note 126, at 93-94.

193. See MICHAEL SHERMER, *THE MIND OF THE MARKET: COMPASSIONATE APES, COMPETITIVE HUMANS, AND OTHER TALES FROM EVOLUTIONARY ECONOMICS* 93 (2008) (defining loss aversion and suggesting that "people tend to fear losses about twice as much as they desire gains").

194. See Eidelman & Crandall, *supra* note 126, at 93-94.

195. See *id.* at 94.

196. See *id.* at 94-95; Robinson & Kray, *supra* note 128, at 138-39.

197. See Eidelman & Crandall, *supra* note 126, at 94-95; Laurie T. O'Brien & Christian S. Crandall, *Perceiving Self-Interest: Power, Ideology, and Maintenance of the Status Quo*, 18 SOC. JUST. RES. 1, 12 (2005).

198. See Eidelman & Crandall, *supra* note 126, at 95.

199. See *id.* Because these states of affairs are treated as positive just because they exist, the effect does not turn on rationalization. See *id.*

200. See *id.*

201. See *id.* at 97-98.

202. See *id.* at 98.

203. See *supra* text accompanying notes 109-17.

D. Belief in a Just World

The belief in a just world—what is, and should be, because the world is a fair place—necessarily favors the status quo.²⁰⁴ The universe is a fundamentally just place, and events within it must be seen within that frame.²⁰⁵

But the intensity of belief in a just world (BJW) varies based upon individual differences.²⁰⁶ Personal experiences, socialization, and the need to believe that justice has been done all affect BJW's intensity.²⁰⁷ The BJW scale and other measures can help to gauge these differences.²⁰⁸ Beliefs in individual mobility, political conservatism, control, anti-egalitarianism, and the Protestant work ethic all support BJW.²⁰⁹

Persons high in BJW are more likely to hold the elderly at fault for their poor health,²¹⁰ to consider poverty the result of poor people's ill character and behavior,²¹¹ and to blame sexual harassment victims for unwanted sexual advances.²¹² African-Americans high in BJW are more likely to oppose affirmative action and to view whites favorably.²¹³ High BJW leads its holders to attribute AIDS to promiscuous personality traits, even in the face of evidence to the contrary in a specific case.²¹⁴ More generally, strong BJW leads to accepting situations that might otherwise appear illegitimate, motivating strategies to restore the belief when contradicted.²¹⁵

BJW generally entails reading ambiguous situations—such as whether conduct was racially discriminatory or not—in favor of the status quo.

204. See Carolyn L. Hafer & Becky L. Choma, *Belief in a Just World, Perceived Fairness, and Justification of the Status Quo*, in SYSTEM JUSTIFICATION BASES, *supra* note 3, at 107, 108.

205. See *id.*; JOEL D. LIEBERMAN & BRUCE D. SALES, SCIENTIFIC JURY SELECTION 90-93 (2006) (summarizing just world research).

206. See Hafer & Choma, *supra* note 204, at 108 (noting that while the majority of Americans believe in a just world, the intensity of this belief varies among individuals).

207. See *id.* at 109.

208. See *id.*

209. See *id.*

210. Laurent Bègue & Marina Bastounis, *Two Spheres of Belief in Justice: Extensive Support for the Bidimensional Model of Belief in a Just World*, 71 J. PERSONALITY 435, 444 (2003).

211. Danielle Campbell et al., *Attributing "Third World Poverty" in Australia and Malawi: A Case of Donor Bias?*, 31 J. APPLIED SOC. PSYCHOL. 409, 411 (2001).

212. Margaret De Judicibus & Marita P. McCabe, *Blaming the Target of Sexual Harassment: Impact of Gender Role, Sexist Attitudes, and Work Role*, 44 SEX ROLES 401, 403 (2001).

213. See Hafer & Choma, *supra* note 204, at 112.

214. Isabel Correia & Jorge Vala, *When Will a Victim Be Secondarily Victimized? The Effect of Observer's Belief in a Just World, Victim's Innocence and Persistence of Suffering*, 16 SOC. JUST. RES. 379, 380 (2003). Moreover, there is data suggesting that persons high in just world beliefs to be more punitive toward criminal law breakers, though such persons may also be more likely to blame the victim in certain cases, such as sexual assault. See LIEBERMAN & SALES, *supra* note 205, at 91-92.

215. See Hafer & Choma, *supra* note 204, at 110.

BJW's effect is also linked to group status.²¹⁶ Thus, low-status groups embracing beliefs related to a just world are less likely to attribute negative effects delivered by an outgroup member to discrimination.²¹⁷ But, high-status groups attributed harm imposed on them by outgroup members to discrimination.²¹⁸

E. Selected Promoters of Systemic Change

Social change does, of course, occur. One group of researchers has indeed argued that there are competing system-justification and social-change motivational systems, the strength of each turning on a variety of factors.²¹⁹ When one motive dominates over another, it affects how we seek and process information.²²⁰ Thus, when the system-justification motive is at work, we look for information supportive of the status quo and give it the greatest weight.²²¹ When the system-change motive prevails, we do the opposite.²²²

Four situational factors are of particular importance. First, threats to a system's legitimacy seem to evoke a defensive, system-justifying

216. *See id.* at 116-17.

217. *See id.* at 117; *see also* Aaron C. Kay et al., *The System Justification Motive and the Maintenance of Social Power*, in *THE SOCIAL PSYCHOLOGY OF POWER* 313, 321 (Ana Guinote & Theresa K. Vescio eds., 2010) (concluding that belief in a just world suggests that attributing positive characteristics to those in power restores belief in a just world by making them seem suited to their social position).

218. *See id.* at 321-23.

219. *See* India R. Johnson & Kentaro Fujita, *Change We Can Believe in: Using Perceptions of Changeability to Promote System-Change Motives over System-Justification Motives in Information Search*, 23 *PSYCHOL. SCI.* 133, 133 (2012). This dual-motive theory is rooted in an analogy to the literature on individual self-evaluations, which posits two motives concerning self-change: self-protection motives versus self-change ones. *Id.* Self-protection motives "promote the construction, confirmation, and defense of people's positive beliefs about themselves." *Id.*; *accord* Constantine Sedikides & Michael J. Strube, *Self-Evaluation: To Thine Own Self Be Good, to Thine Own Self Be Sure, to Thine Own Self Be True, and to Thine Own Self Be Better*, in 29 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 209, 211-12 (M.P. Zanna ed., 1997) (elaborating on this definition). Self-change motives, including "self-assessment and self-improvement, drive people to diagnose their strengths and weaknesses and to use this information to better themselves." Johnson & Fujita, *supra*, at 133; *accord* Constantine Sedikides & Erica G. D. Hepper, *Self Improvement*, 3 *SOC. & PERSONALITY PSYCHOL. COMPASS* 899 (2009) (developing this definition further). Negative feedback about one's self causes a conflict between these two emotions, the balance between them affecting whether individuals in fact seek negative feedback. *See* Johnson & Fujita, *supra*, at 133. Johnson and Fujita found experimental support in their own work and that of others to support the wisdom of this analogy, that is, to show that similar conflicting motivations may be at work in system-justification processes. *See id.*

220. *See* Johnson & Fujita, *supra* note 219, at 133-34.

221. *See id.* at 134.

222. *See id.* Much more research is needed, however, to confirm the existence of a "system-change" motivation. But even if no such motivation exists, it is clear that the strength, even the presence, of system-justifying motives is powerfully affected by situational and personality factors. *See infra* text accompanying notes 234-64.

response.²²³ Thus, terrorist attacks, or even simple reminders of terrorism, trigger greater support for the political system and its authorities, such as Congress and the President.²²⁴ But even simple criticism of a social system by perceived outsiders can cue these defensive reactions.²²⁵ The criticism can be as mild as a foreign visitor criticizing aspects of the American political or economic system.²²⁶ The reaction can be subtle, such as more intense endorsement of system-supporting stereotypes,²²⁷ or overt, including blatantly hostile calls for punishing the system's outsider critics.²²⁸ The two likely keys here are the perception of who is an outsider, of who is an insider,²²⁹ and of the degree of system threat.²³⁰ The media can be expected to play a role in molding both sets of expectations.²³¹

Second, the greater an individual's, or group's, dependence on a particular social system, the greater the degree of system support.²³² That support may be expressed by more fervently defending current policies or by more harshly evaluating system critics.²³³ For example, university students made to feel dependent on their country but not on their university for funding are more likely to support a particular method of education funding when portrayed as originating in national policy than as originating

223. See Aaron C. Kay & Justin Friesen, *On Social Stability and Social Change: Understanding When System Justification Does and Does Not Occur*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 360, 360-61 (2011).

224. See, e.g., Jeffrey M. Jones, *Sept. 11 Effects, Though Largely Faded, Persist*, GALLUP POLL, www.gallup.com/poll/9208/Sept-Effects-Though-Largely-Faded-Persist.aspx/ (Sept. 9, 2003) (showing greater public support for all system-level authorities, including Congress, the Executive, and the police, in the wake of the September 11 attacks); Robb Willer, *The Effects of Government-Issued Terror Warnings on Presidential Approval Ratings*, 10 CURRENT RES. ON SOC. PSYCHOL. 1, 2 (2004) (showing government terror warnings increase system support); Johannes Ullrich & J. Christopher Cohrs, *Terrorism Salience Increases System Justification: Experimental Evidence*, 20 SOC. JUST. RES. 117, 120 (2007) (showing other reminders of terrorism increase system-justifying processes).

225. See Kay & Friesen, *supra* note 223, at 361.

226. See Aaron C. Kay et al., *Victim Derogation and Victim Enhancement as Alternate Routes to System Justification*, 16 PSYCHOL. SCI. 240, 241-42 (2005) (noting that the simple statement, "[M]any countries in the world are enjoying better social, economic, and political conditions than the U.S." was perceived as a system threat by an outsider, prompting system defense).

227. See *id.*; John T. Jost et al., *System-Justifying Functions of Complementary Regional and Ethnic Stereotypes: Cross-National Evidence*, 18 SOC. JUST. RES. 305, 306-07 (2005).

228. See Aaron C. Kay et al., *Inequality, Discrimination, and the Power of the Status Quo: Direct Evidence for a Motivation to See the Way Things Are as the Way They Should Be*, 97 J. PERSONALITY & SOC. PSYCHOL. 421, 421 (2009) [hereinafter Kay et al., *Status Quo Power*].

229. See *supra* text accompanying notes 74-83 (discussing perceptions of outsider status in the criminal justice system).

230. See Kay & Friesen, *supra* note 223, at 360-61.

231. See, e.g., MATTHEW B. ROBINSON, *MEDIA COVERAGE OF CRIME AND CRIMINAL JUSTICE* 107-46 (2011) (discussing media focus on "the Black, the Young, and the 'Crazy'"); RAY SURETTE, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES, REALITIES, AND POLICIES* 1-51, 180-99 (4th ed. 2011) (discussing how the media molds public images of criminals as dangerous predators).

232. See Kay & Friesen, *supra* note 223, at 361.

233. See *id.*

from their individual university.²³⁴ But, when induced to feel dependent on their university, they favor whatever is the current university-crafted funding mechanism over any proposed changes.²³⁵ Greater system dependence also leads to more support for those who represent the system.²³⁶ In the case of criminal justice, that means more support for police and other system bureaucrats, making them seem more legitimate.²³⁷ Police and prosecutors themselves depend upon the system,²³⁸ suggesting that they too have more motivation to favor the current system against change.²³⁹

A perhaps related phenomenon is that there are multiple social systems—working at different levels and in different ways to affect our lives.²⁴⁰ Each person lives in a world of family, friends, and neighborhood; local government, state government, and national government; and religious communities and secular communities.²⁴¹ Which systems matter most to an individual may vary based upon individual experience and circumstances.²⁴² A person identifying closely with a perceived social system of the “Black church,” thus, might be more inclined to its status quo set of rules and values under certain circumstances, rather than to a perceived white-secular alternative.²⁴³

234. *See id.*

235. *See id.*

236. *See* Jojanneke van der Toorn et al., *More Than Fair: Outcome Dependence, System Justification, and the Perceived Legitimacy of Authority Figures*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 127, 131 (2011). Professors Kay and Friesen summarized the point effectively:

In three field studies, people who reported more dependence on authority figures such as university professors, government bureaucrats, and police officers also viewed those authorities as more legitimate and were more trusting and deferential to them. In subsequent laboratory studies, making participants directly dependent on an authority figure caused those participants to view the authority figure as more legitimate.

Kay & Friesen, *supra* note 223, at 361.

237. *See* Kay & Friesen, *supra* note 223, at 361 (discussing the police); *infra* text accompanying notes 238-39 (discussing dependence on the prosecution and courts).

238. *See* Kay & Friesen, *supra* note 223, at 361. Their salaries are paid by the state, and their job is precisely to defend the most central rules defining the current political, social, and economic system against challengers to its authority. *See id.* at 130-31.

239. *See infra* text accompanying notes 240-55 (suggesting various other psychological mechanisms that explain many police and prosecutors’ reluctance to change the status quo, even when confronted with strong scientific evidence of the need for change to achieve the system’s stated goals).

240. *See* Thorisdottir et al., *supra* note 106, at 8-9.

241. *See id.*

242. *See* Kay & Friesen, *supra* note 223, at 361 (arguing that healthy young undergraduate students are likely more dependent on their universities for the quality of their daily lives than on the national health care system, thus more likely to care about supporting the former, which can affect such things as their tuition, class schedules, and dormitory rules).

243. *Cf.* C. ERIC LINCOLN & LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE* 309-10 (1990) (noting the long dominance of the Black Church in the lives of many African-Americans but its modern declining importance among younger, poor Black urbanites lacking the same degree of church identification).

Third, the system's degree of inescapability matters.²⁴⁴ The more irrevocable and inevitable a social system and its outcomes seem, the greater system participants' attachment to the way things now stand.²⁴⁵ Class,²⁴⁶ race,²⁴⁷ or gender²⁴⁸ inequality might seem inescapable, fostering a defense of that state of affairs as unavoidable, a necessary cost of an otherwise beneficent social system, or even as an affirmative good.²⁴⁹ But most social systems are hard to leave, with few apparent alternatives at hand.²⁵⁰ One cannot easily find another criminal justice system at a given

244. See Kay & Friesen, *supra* note 223, at 361-62.

245. See *id.* at 362; Kay et al., *Status Quo Power*, *supra* note 228, at 424-25 (describing an experiment in which those told that emigrating from their country was very difficult were far more supportive of a status quo of wealthy elected leaders than those told that emigration was easy); Kristin Laurin et al., *Restricted Emigration, System Inescapability, and the Defense of the Status Quo: System-Justifying Consequences of Restricted Exit Opportunities*, 21 PSYCHOL. SCI. 1075, 1078 (2010) (concluding that female participants believing that gendered pay disparities were unavoidable refused to blame them on systemic unfairness, instead believing that they resulted from "genuine" male-female differences, while participants believing change was feasible felt quite the opposite).

246. Cf. Kay et al., *Status Quo Power*, *supra* note 228 (finding wealthy class domination of the political system more acceptable when seemingly unavoidable); Heather E. Bullock & Bernice Lott, *Social Class and Power*, in THE SOCIAL PSYCHOLOGY OF POWER, *supra* note 217, at 408, 414 ("Poor urban students, particularly those of color, are stereotyped as less capable learners than other children, as potential troublemakers or criminals, as having behavioral or emotional problems, or, perhaps, as salvageable, if they can adopt the culture of those who are White and middle class."); Jennifer Pastor et al., *Makin' Homes: An Urban Girl Thing*, in URBAN GIRLS REVISITED: BUILDING STRENGTHS 75, 90 (Bonnie J. Ross Leadbeater & Niobe Way eds., 2007) ("If young people see pervasive social inequity and its adverse consequences, but they cannot imagine transformation, such information may simply fold into a heap of hopelessness, cynicism, or alienation.").

247. See, e.g., George Ciccariello-Maher & Matthew W. Hughey, *Obama and Global Change in Attitudes About Group Status*, in THE OBAMAS AND A (POST) RACIAL AMERICA? 215, 216 (Gregory S. Park & Matthew W. Hughey eds., 2011) [hereinafter POST RACIAL AMERICA] (noting that surveys taken between the mid-1990s and 2005 found that "African-Americans increasingly believed that racial equality for Blacks would either not be achieved during their lifetimes or, for some, not at all within the United States," but further noting that these attitudes improved substantially with Obama's 2008 presidential campaign); *id.* at 193-96 (arguing that system-justification processes promote acceptance of the racial status quo by oppressed racial groups at least implicitly internalizing a sense of their own inferiority); P. J. Henry & Felicia Pratto, *Power and Racism*, in THE SOCIAL PSYCHOLOGY OF POWER, *supra* note 217, at 341, 341-56 (discussing myriad social psychological processes by which dominant racial groups maintain their power).

248. Cf. Laurin et al., *supra* note 245, at 2-5 (discussing experiments involving one kind of gendered disparity and its triggering system-justification processes when the disparity seemed inescapable). See generally Theresa K. Vescio et al., *Power and Sexism*, in THE SOCIAL PSYCHOLOGY OF POWER, *supra* note 217, at 363 (summarizing many social psychological processes that maintain gendered power disparities).

249. See *supra* notes 246-48.

250. See Kay & Friesen, *supra* note 223, at 362. Cognitive psychologists Kay and Friesen explain, Practically speaking, most social systems are difficult to leave. Getting beyond the reach of the federal government, for example, involves moving to another country. Other systems seem inescapable for more psychological reasons. Leaving one's religion, for instance, could involve the loss of family and friends. The system-justification motivation, therefore, should be stronger for systems that are relatively more inescapable. This leads to an ironic prediction: While rational people should judge systems from which they cannot escape most harshly, system-justification theory instead predicts that, all else being equal, people will

point in time. As for envisioning an improved one, that too depends upon belief in the practicability of change.²⁵¹ If change seems hard, its costs too heavy to bear, its benefits uncertain, defense of the status quo rises as does disdain for its critics. The task of critics is, thus, to change these perceptions—to make the immutable seem mutable, the costly cheap, and the painful less so than without change.

Fourth, Westerners take comfort in having a sense of control over their own lives.²⁵² Lacking that sense of control offends an overarching need for order in each person's individual life.²⁵³ Social systems can reassure people that order exists, that life can be controlled rather than being random and chaotic.²⁵⁴ A weaker sense of personal control, thus, encourages people to rely on their governments, resisting change and endorsing specific beliefs that support stability, such as "law and order" political platforms.²⁵⁵

Yet, there seem to be limits on these reactions.²⁵⁶ The World Values Survey thus reveals that people with clear selfish motivations to support an existing political system endorse change when the governments seem extremely corrupt.²⁵⁷ Studies in the business context similarly show that subordinates are more likely to challenge the power of leaders whose rule appears illegitimately obtained or exercised.²⁵⁸ Encouraging credible perceptions of extreme circumstances can, thus, help to override pro-system situational factors.

show more system defense within inescapable systems.

Id. at 361.

251. See generally Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133 (2011) [hereinafter Taslitz, *The Criminal Republic*] (arguing that fundamental flaws in American democracy make quick, large-scale change in the American criminal justice system unlikely, though conceding that modest changes *might* be achievable in the shorter run because of the high cost of the system in hard economic times). Some commentators are not optimistic. See *id.*

252. See Kay & Friesen, *supra* note 223, at 362.

253. See *id.*

254. See *id.*

255. See *id.*; Steven Shepherd et al., *Evidence for the Specificity of Control Motivations in Worldview Defense: Distinguishing Compensatory Control from Uncertainty Management and Terror Management Processes*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 949, 949 (2011) (suggesting that a reduced sense of personal control leads to greater support for politicians stressing order and stability); Taslitz, *The Criminal Republic*, *supra* note 251, at 140-43 (recounting long success of law and order campaigns to toughen criminal punishments in California).

256. See Taslitz, *The Criminal Republic*, *supra* note 251, at 152.

257. See Kay & Friesen, *supra* note 223, at 363 ("Extreme system illegitimacy may be one such context [that promotes social change]. That is, there may be a tipping point at which systems are no longer seen as less legitimate but as completely illegitimate and thus nearly impossible to defend."); Aaron C. Kay et al., *God and the Government: Testing a Compensatory Control Mechanism for the Support of External Systems*, 95 J. PERSONALITY & SOC. PSYCHOL. 18, 25-27 (2008) (Study 3).

258. See Joris Lammers et al., *Illegitimacy Moderates the Effects of Power on Approach*, 19 PSYCHOL. SCI. 558, 558 (2008).

Additionally, the inverse of many of the circumstances promoting system support can encourage system change. Just as some personalities tend toward system support, others do not;²⁵⁹ some ideologies and political party memberships favor the status quo, others the opposite.²⁶⁰ When there is some measure of control over who are the decision makers, there can, therefore, be some effect on the likelihood of system-justifying beliefs prevailing. Moreover, the kinds of arguments made to decision makers should be able to cue or suppress system-justifying tendencies. Arguments triggering the Protestant ethic described above, or drawing on system-justifying stereotypes, may raise the intensity of status quo biases.²⁶¹ Thus, one example noted earlier is a study that found that white participants merely listening to a speech about Protestant values became more likely than otherwise to judge similarly situated black participants less competent than their white counterparts.²⁶²

Finally, it is important to stress that system-justifying motives are not the sole determinants of any political, philosophical, legal, or factual individual or group decision.²⁶³ Impressions of an individual attorney's aggressiveness, competence, personal traits, and theatrics; the strength of the evidence; and a host of other factors affect juror decisions.²⁶⁴ My point is only that system justification is likely one pervasive, important, and under-theorized element at work in the criminal justice system that can help to view defense counsel's role in a new, or at least under-appreciated, light.

259. See generally John Duckitt & Chris G. Sibley, *A Dual Process Motivational Model of Ideological Attitudes and System Justification*, in SYSTEM JUSTIFICATION BASES, *supra* note 3, at 292 (arguing that relative support for the status quo varies in part based upon individual differences in social dominance orientation (competitiveness) and right wing authoritarianism (threat-driven and security-driven motivations), which in turn arise partly because of personality differences, such as low agreeableness and low openness to experience favoring pro-status-quo attitudes relative to high levels of agreeableness and openness fostering the opposite); Christopher M. Federico & Paul Goren, *Motivated Social Cognition and Ideology: Is Attention to Elite Discourse a Prerequisite for Epistemically Motivated Political Affinities?*, in SYSTEM JUSTIFICATION BASES, *supra* note 3, at 267 (noting that a high need for closure and certainty in beliefs, which is strongest among those ordinary citizens high in political expertise, is associated with conservative, system-justifying beliefs, while the opposite is true for those low in need for closure); J. Peter Renfrow et al., *Statewide Differences in Personality Predict Voting Patterns in 1996-2004 U.S. Presidential Elections*, in SYSTEM JUSTIFICATION BASES, *supra* note 3, at 314 (arguing that relative degrees of the personality traits of conscientiousness and openness affect relative likelihood of supporting Democratic v. Republican party candidates).

260. See *supra* Part II.C.

261. See *supra* Part II.A.1.

262. See *supra* text accompanying notes 39-41.

263. See generally FINLEY & SALES, *supra* note 16 (summarizing research on these other sorts of factors affecting jury decisions).

264. See *id.*

IV. SYSTEM JUSTIFICATION AND THE CRIMINAL JUSTICE SYSTEM

Up until now, this piece has largely sought to prove that there is a status quo bias that often dominates decision making.²⁶⁵ This part of the Article shifts gears specifically to the criminal justice system. Part IV, Section A explains why the broader public and criminal justice system actors such as jurors and judges, sometimes overtly, sometimes implicitly, suffer from this bias in handling criminal cases. In particular, Part IV, Section A addresses the situational triggers and psychological biases that lead to activation of system-justifying processes in the criminal justice arena. Part IV, Section B focuses on why, as individuals, albeit ones assigned institutional roles, members of law enforcement—police and prosecutors—are especially likely to resist challenges to the status quo, even when those challenges may be sensible. Indeed, well-meaning members of law enforcement may sometimes be blind to arguments that status quo alternatives are more consistent than the current state of affairs with the pursuit of the justice to which law enforcement’s members formally commit themselves. The combination of pro-status-quo juries and judges with change-resistant law enforcement makes fact-finder and investigator bias toward the criminal justice system’s current processes, and the choice of police and prosecutors to proceed against a specific individual as a perceived threat to the dominant social order, hard to overcome.

*A. Criminal Justice as the Status Quo’s Champion**1. Retributive Punishment Reinforces Existing Social Norms*

One critical purpose of the criminal law is to articulate those rules most central to a society’s moral structure.²⁶⁶ Violation of those rules is, thus, viewed as an injury to the public rather than to an individual.²⁶⁷ These rules always reflect and reinforce many of the sustaining political ideologies of the current social system.²⁶⁸ Violation of these rules sparks retributive emotions, not only in victims but in society as a whole.²⁶⁹ Society experiences indignation, a kind of group retributive anger, at the wrong done.²⁷⁰ Sating the public’s retributive desires requires punishing rule

265. See *supra* Part I.

266. See Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 20-24 (1993) [hereinafter Taslitz, *Myself Alone*].

267. See *id.* at 21.

268. See Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado’s Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 93-100 (2011) [hereinafter Taslitz, *The Rule of Criminal Law*] (explaining why this is so).

269. See Taslitz, *The Inadequacies of Civil Society*, *supra* note 72, at 339-40.

270. See *id.* at 317; Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15

transgressors.²⁷¹ Such punishment also serves symbolic functions in reaffirming the equal dignity of members of a shared community.²⁷² A criminal offender insults his victim by treating the victim's needs for safety and property as less important than the offender's needs.²⁷³ Punishment in the name of the community sends the message to all that the victim is not of lesser worth than the offender.²⁷⁴ Words alone would not be convincing.²⁷⁵ Only punishment adequately reaffirms this idea of equal membership.²⁷⁶

Psychological research demonstrates, however, that retributive punishment also promotes social solidarity by reaffirming central social norms.²⁷⁷ Psychologist and law professor Neil Vidmar makes the point emphatically:

An offense is a threat to community consensus about the correctness—that is, the moral nature—of the rule and hence the values that bind social groups together. In this sense the offense makes the social group or community a victim. Hostility toward the offender can thus arise from the “belongingness” in the group independent of empathy toward the specific victim or of internalized feelings about a social contract.²⁷⁸

This perspective about the threat of an offense to group or community values also draws attention to the fact that punishment can serve the goal not only of attempting to change the beliefs or status of the offender but also of reestablishing consensus about the moral nature of the rule among members of the relevant social community.²⁷⁹

Crimes unavenged can, thus, help to shatter the bonds of consensus that join members of a political-moral community together.²⁸⁰ Criminal law is thus designed in part to reinforce, and often has the effect of reinforcing, the existing moral, political, and economic arrangements that constitute the

WIS. WOMEN'S L.J. 3, 58-59 (2000).

271. See Taslitz, *The Inadequacies of Civil Society*, *supra* note 72, at 317.

272. See *id.* at 325.

273. See *id.* at 317.

274. See *id.*

275. See *id.* at 325.

276. See *id.*

277. See Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH L. REV. 419, 444-46 (2009) [hereinafter Taslitz, *Tinkerbell*] (defining social norms); Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. 73, 91-92 (2011) (explaining criminal punishment's role in reinforcing social norms).

278. Neil Vidmar, *Retribution and Revenge*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 42 (Joseph Sanders & Lee Hamilton eds., 2001).

279. *Id.*

280. See Taslitz, *The Inadequacies of Civil Society*, *supra* note 72, at 317.

status quo.²⁸¹ Again, this need not always be the case: criminal law may need to change to adapt to evolving values,²⁸² or it may occasionally take the lead in trying to change community consensus.²⁸³ But, defense of the status quo is criminal law's default function, especially in the run-of-the-mill criminal prosecutions of the poor and racial minorities.²⁸⁴

Indeed, American criminal law embraces some rules that serve the specific function of preventing questioning of the status quo.²⁸⁵ Most notably, American criminal law, subject to rare exceptions, rejects the idea of shared fault.²⁸⁶ In particular, it rejects the idea that an individual can share fault with society.²⁸⁷ The courts' consistent unwillingness to consider the validity of the "rotten social background" (RSB) defense is an example.²⁸⁸ That defense argues for mitigation of an offender's punishment—not acquittal—because he came from an RSB.²⁸⁹ Such a background might, for example, include being born into a crime-ridden, poverty-stricken neighborhood of weak schools combined with drug-addled, irresponsible, unemployed parents.²⁹⁰ The argument here is in part that society's failure to address issues of poverty and the quality of education, indeed, its choice of policies that contribute to these evils, helped to make society partly at fault for the conditions that led the defendant to do wrong.²⁹¹ Society must, thus, pay for its shared fault, and the defendant must benefit for his reduced responsibility, by mitigating his punishment.²⁹² The opportunity RSB offers to explain to a jury—the community's representatives²⁹³—the flaws of the status quo, have, with a single, decades-

281. Cf. Taslitz, *The Rule of Criminal Law*, *supra* note 268, at 89-100 (explaining why the rule of law, especially criminal law, always embodies ideological assumptions supportive of a particular conception of the social system, the American criminal justice system being no exception).

282. See, e.g., Andrew E. Taslitz, *Patriarchal Stories*, *supra* note 25, at 389-92 (discussing rise of the anti-rape movement and its impact on the law). Rape law reform, a response to the rise of the feminist anti-rape movement, may be one example.

283. See generally ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2002) (articulating a history of how feminists used the battered women's syndrome and other ideas to change the law and the attitudes of criminal justice system actors toward battered spouses).

284. See *supra* text accompanying notes 115-16.

285. See Taslitz, *The Rule of Criminal Law*, *supra* note 268, at 91-100.

286. See *id.* at 100.

287. See *id.* at 104-06.

288. See *id.* at 80-81.

289. See *id.* See generally Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 L. & INEQUALITY 9, 9 (1985) (providing a scholarly articulation of the defense).

290. See *id.* (offering similar examples).

291. See Taslitz, *The Rule of Criminal Law*, *supra* note 268, at 107.

292. See *id.*

293. See Andrew E. Taslitz, *The People's Peremptory Challenge and Batson: Aiding the People's Voice and Vision Through the "Representative" Jury*, 97 IOWA L. REV. 1675, 1677-79 (2012) [hereinafter Taslitz, *People's Peremptory Challenge*].

old exception,²⁹⁴ been roundly rejected or ignored by the courts, despite receiving much scholarly attention.²⁹⁵ To permit the RSB defense to be raised would be to permit open challenge to the status quo, including rejecting ideological narratives of individual responsibility.²⁹⁶ Criminal law cannot permit that outcome.

2. Attribution Errors and Naïve Realism

The “fundamental attribution error” also contributes to defense of the status quo.²⁹⁷ This error is the tendency, especially in Western cultures,²⁹⁸ to judge others’ behavior as indicative of basic character traits rather than situational factors.²⁹⁹ Moreover, observers will make these judgments based upon minimal information.³⁰⁰ Furthermore, they will suffer from the “devil’s horn” effect: one character flaw is taken as indicative of an overall bad character.³⁰¹ The consequence of these related phenomena is that jurors are likely to ignore or minimize situational pressures that contribute to a criminal act—including pressures that might call into question the current social order.³⁰² Any admissible evidence of a prior offender’s wrongs may thus be given undue weight in suggesting that he is a “bad guy” who deserves to be convicted in his current trial,³⁰³ ignoring the teachings of psychological studies that “criminality” usually manifests itself in some

294. See *United States v. Alexander*, 471 F.2d 923, 923, 959 (D.C. Cir. 1972).

295. See Taslitz, *The Rule of Criminal Law*, *supra* note 268, at 80-81.

296. See *supra* text accompanying notes 27-35 (explaining how the ideology of individual responsibility supports the status quo generally).

297. LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 4, 126 (1991).

298. See RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* 207-08 (2004) (explaining that the fundamental attribution error has a much stronger grip in Western, as opposed to Asian, societies).

299. See ROSS & NISBETT, *supra* note 297, at 4, 126.

300. See *id.* at 122-24.

301. See Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 17-18 (2010) [hereinafter Taslitz, *Police Are People Too*]. Race can magnify the problem. See Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 180 (2007) (describing the “ultimate attribution error” as the tendency to view out-group members in particularly stereotypical ways).

302. See Taslitz, *Myself Alone*, *supra* note 266, at 110-12.

303. See *id.* at 7-9. Although evidence of prior wrongs cannot usually be admitted to prove “act propensity”—that an offender committed a current act—there are many exceptions to this rule. STEVEN FRIEDLAND ET AL., *EVIDENCE LAW AND PRACTICE* 115-25 (4th ed. 2010). These exceptions sometimes allow admissibility of prior wrongful acts only for certain purposes, but it is likely that juries ignore instructions so to limit that use. See *id.* at 116-21; Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1490 (2005) (explaining that evidence of act propensity is confusing, distracting, and undermines the presumption of innocence). Moreover, the rules of evidence do not bar using prior wrongful acts to prove the defendant’s mental state. See FRIEDLAND ET AL., *supra*, at 116-19.

situations but not others.³⁰⁴ But discussion of the situation, perhaps temporary poverty or being subjected to abuse in a flawed foster care system that caused the earlier transgression, will generally not be allowed.³⁰⁵ Evidence contradicting individualistic ideology or exposing societal flaws is, thus, not usually heard under these circumstances.³⁰⁶

The requirement that a defendant's actions or beliefs be "reasonable"—which is ubiquitous in American criminal law—can also reinforce beliefs supportive of the status quo when the fundamental attribution error is combined with "naïve realism."³⁰⁷ Naïve realism is the widely shared belief, even if not always a conscious one, that how "I" would perceive certain circumstances or respond to them is how most people would.³⁰⁸ A belief related to this false sense of consensus is that "my" beliefs are moderate, normal, or average, while those who disagree with me—who would think or act differently—are extreme, abnormal, beyond the pale.³⁰⁹ When combined with the fundamental attribution error, this likely means that jurors, police, and judges will under-appreciate the role that different circumstances can play in evoking different thoughts and behaviors.³¹⁰ "I" might have seen and done things differently had "I" been in the offender's shoes.³¹¹ Instead, observers reach the conclusion that the unusual is itself unreasonable and indicative of ill character.³¹² Yet most observers will, for the reasons discussed earlier, make their judgments about how they and most people will react by drawing on the status quo circumstances and ideologies so readily available to them.³¹³

3. *The Power of Cultural Narratives*

Judgment turns on credibility. But juries, judges, and police all rely on common sense ideas about when people are lying³¹⁴ or, in the case of the

304. See Lee Ross & Donna Shestowsky, *Two Social Psychologists' Reflections on Situationism and the Criminal Justice System*, in IDEOLOGY, PSYCHOLOGY, AND LAW, *supra* note 26, at 612, 616.

305. See Taslitz, *The Rule of Criminal Law*, *supra* note 268, at 103-04.

306. See *id.* at 102.

307. See Ross & Shestowsky, *supra* note 304, at 617.

308. See *id.*

309. See *id.* at 617-18.

310. Cf. Taslitz, *Myself Alone*, *supra* note 266, at 110-11 (making a similar point).

311. See Ross & Shestowsky, *supra* note 304, at 617-18.

312. Compare *id.* (arguing that the unusual or different is seen as unreasonable), with *supra* text accompanying notes 297-300 (arguing that observers view behaviors as indicative of fundamental character traits rather than situational forces).

313. See *supra* Part II (discussing why the availability and other cognitive biases make people easily embrace the status quo).

314. See Taslitz, *Patriarchal Stories*, *supra* note 25, at 474-75.

police, are mistrained about how to spot lies.³¹⁵ Most people, under current methods, are not very good at judging credibility.³¹⁶ Credibility judgments are made in part by assessing the degree to which a person's story is consistent with cultural understandings of what makes a believable narrative.³¹⁷ These cultural understandings generally reflect dominant ideas about human nature, including gender roles, class position, and race.³¹⁸ It is these understandings that are most readily available to decision makers.³¹⁹

In a criminal case, whether the defendant or someone else did the criminal act will often turn on witness credibility.³²⁰ But even if the offender admits to the act, his mental state will frequently be in issue.³²¹ Yet, mental states are generally stated in vague terms that invite moral evaluation.³²² For example, whether a killing was done with a "depraved heart" or as a result of reasonable provocation in the "heat of passion" can determine whether an offender is guilty of second degree murder or merely of voluntary manslaughter.³²³ These moral judgments turn partly on credibility judgments but also on empathy and sympathy.³²⁴ "Empathy" is the ability to stand in another's place—to see and feel what he did.³²⁵ "Sympathy" is the desire to reduce or eliminate another's suffering.³²⁶ Fair judgment requires empathy to truly understand what was in the defendant's mind.³²⁷ But, only sympathy is likely to lead to mitigating murder to manslaughter, thus reducing the degree of suffering (or punishment) imposed on the defendant.³²⁸ Empathy can be blocked, and sympathy

315. See Taslitz, *Police Are People Too*, *supra* note 301, at 28-29 (quoting Heather M. Gray, *To What Extent, and Under What Conditions, Are First Impressions Valid?*, in *FIRST IMPRESSIONS* (Nalini Ambady & John J. Skowronski eds., 2008)).

316. See *id.* at 71.

317. See TASLITZ, *RAPE AND THE COURTROOM*, *supra* note 9, at 15; Taslitz, *Myself Alone*, *supra* note 266, at 18; see also REID HASTIE & ROBYN M. DAWES, *RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 123 (2d ed. 2010) ("Good trial attorneys know that good stories win cases.").

318. See Taslitz, *Patriarchal Stories*, *supra* note 25, at 387, 406-09; Andrew E. Taslitz, *An African-American Sense of Fact: The O.J. Trial and Black Judges on Justice*, 7 B.U. PUB. INT. L. J. 219, 247 n.186 (1998) [hereinafter Taslitz, *An African-American Sense of Fact*]; HASTIE & DAWES, *supra* note 317, at 125 (explaining how different racial experiences led to different understandings of the events between whites and blacks involved in the O.J. Simpson murder trial).

319. See Taslitz, *Patriarchal Stories*, *supra* note 25, at 414.

320. See ELLEN S. PODGOR ET AL., *CRIMINAL LAW: CONCEPTS AND PRACTICE* 232-33 (2d ed. 2009) [hereinafter PODGOR ET AL., *CRIMINAL LAW*].

321. See *id.* at 103-72.

322. See Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH J. GENDER & L. 1, 25-26 (1998).

323. See *id.* at 76-77; ELLEN S. PODGOR ET AL., *MASTERING CRIMINAL LAW* 136-38 (2008) [hereinafter PODGOR ET AL., *MASTERING CRIMINAL LAW*] (explaining the meaning of these terms).

324. See Taslitz, *Tinkerbell*, *supra* note 277, at 431-40, 447-50.

325. *Id.* at 431.

326. *Id.* at 426.

327. *Id.* at 431-35.

328. See *id.* at 441-50.

reduced, when observers judge someone they perceive to be of lower status than them, dissimilar to them, or fitting negative race and class-based stereotypes.³²⁹ Non-diverse juries worsen these problems of perceived difference between jurors and offenders.³³⁰

Sympathy also requires a sense of the offender's relative blamelessness in bringing about his plight³³¹—a blamelessness often missing from criminal cases in which victims' backgrounds may be far from spotless and their bad judgment in getting involved in a bad situation evident.³³² Compassion (but another word for sympathy³³³) likewise requires a shared sense of vulnerability and of being part of the same "circle of concern."³³⁴ But, social norms, by definition reflecting the status quo, guide each of these judgments.³³⁵ Poverty and racial minority status, under implicit norms, often mark those fitting into these categories, as most criminal offenders do, as outside the circle of concern.³³⁶ These same categorical markers contribute to an evaluation of alleged offenders as being of "low social worth," contributing little to society.³³⁷ That too blocks compassion.³³⁸ Without sympathy, there can be no emotional bridge to arguable rule breakers,³³⁹ no sense that they are "us" and not "them."³⁴⁰ The problem is compounded by the reality that these same forces mark defendants as simply not credible should they become witnesses.³⁴¹

329. *Accord* TASLITZ, RAPE AND THE COURTROOM, *supra* note 9, at 73-75 (analyzing social science demonstrating that status differences between factfinders and alleged victims in rape cases can skew the accuracy of jurors' credibility and mental state judgments); Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 1 (2007) [hereinafter Taslitz, *Racial Blindsight*] (exploring myriad ways that racial differences subconsciously interfere with various criminal justice system actors' ability to make accurate judgments about a purported offender's thoughts, emotions, and character); Taslitz, *Tinkerbelle*, *supra* note 277, at 439-40. *See generally* DAVID HUME, A TREATISE OF HUMAN NATURE (John P. Wright et al. eds., J.M. Dent 2003) (1739).

330. *See* Taslitz, *People's Peremptory Challenge*, *supra* note 293, at 1692-93.

331. *See* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 48-52 (2004).

332. *See* Ronald F. Wright & Marc L. Miller, *Dead Wrong*, 2008 UTAH L. REV. 89, 98-100 (citing instances where prosecutors sought lesser sentences because of victims' criminal records). *See generally* VERA BERGELSON, VICTIMS' RIGHTS AND VICTIMS' WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW (2009) (arguing that victim responsibility often is implicitly, and should be more explicitly, a central part of the criminal law).

333. *See* Taslitz, *Tinkerbelle*, *supra* note 277, at 426.

334. *See* NUSSBAUM, *supra* note 331, at 51-53.

335. *See* Taslitz, *Tinkerbelle*, *supra* note 277, at 447-50.

336. *See supra* text accompanying notes 112-16, 246-49; *infra* Part IV.D-E.

337. *See* Taslitz, *Tinkerbelle*, *supra* note 277, at 453; BURKE, *supra* note 88, at 113-14.

338. *See* Taslitz, *Tinkerbelle*, *supra* note 277, at 453; BURKE, *supra* note 88, at 113-14.

339. *See* Taslitz, *Tinkerbelle*, *supra* note 277, at 441.

340. *See generally* DONALD R. KINDER & CINDY D. KAM, US AGAINST THEM: ETHNOCENTRIC FOUNDATIONS OF AMERICAN OPINION (2009) (analyzing the tendency to divide the world into "us" and "them").

341. *See* TASLITZ, RAPE AND THE COURTROOM, *supra* note 9, at 79-80 (discussing reduced credibility of low-status speakers in the courtroom).

4. Threat

Threat to the status quo is, as noted above, an important trigger of system-justifying psychological processes.³⁴² Yet, such a perceived threat is necessarily present to one degree or another in all criminal cases.³⁴³ Drunk drivers, thieves, embezzlers, extortionists, rapists, and murderers all violate social norms so fundamental as to be embodied in criminal codes.³⁴⁴ The degree of perceived threat should vary with the severity of the violation. Violent criminals or corrupt bank managers whose joint activity helps bring down an economy represent major threats to the sense of order, stability, and safety.³⁴⁵ But race, too, plays a powerful role in amplifying perceptions of threat.³⁴⁶

Criminal prosecutions today are overwhelmingly instituted against African-Americans and other racial minorities—usually against young men.³⁴⁷ Yet, at least at an implicit level, the faces of such defendants are strongly associated with fear of normless, antisocial behavior.³⁴⁸ Whites report greater feelings of fear when even imagining contact with a black stranger relative to a white stranger.³⁴⁹ Young black men are feared most of all.³⁵⁰ Whites often admit to seeing blacks as threats to physical safety and property.³⁵¹ Whites also readily associate blacks with anger, “a threat-related emotion.”³⁵² Thus, in one experiment, white observers watched the facial expressions of white and black subjects slowly morph from neutral to

342. See *supra* text accompanying notes 223-29.

343. See *supra* text accompanying notes 223-29.

344. See Taslitz, *The Inadequacies of Civil Society*, *supra* note 72, at 313-24 (explaining that the criminal law embodies society’s central moral norms).

345. See *id.* (violent criminals); Janet Tavakoli, *Third World America 2012: A Country at War with Itself*, HUFFINGTON POST (July 6, 2012, 9:25 AM), http://www.huffingtonpost.com/janet-tavakoli/third-world-america-2012_b_1653745.html; Opinion, *Barclay’s Bank Bash: The Regulators Protect Themselves and the Giant Institutions*, WALL ST. J. (July 5, 2012, 7:26 PM), <http://online.wsj.com/article/SB10001424052702304211804577502943967390270.html> (corrupt bank managers).

346. See *infra* text accompanying notes 347-67, 629.

347. See DANIEL GIVELBER & AMY FARRELL, NOT GUILTY: ARE THE ACQUITTED INNOCENT? 123, 131, 138-39 (2012).

348. See Jennifer A. Richeson & Meghan G. Bean, *Does Black and Male Still = Threat in the Age of Obama?*, in POST RACIAL AMERICA, *supra* note 247, at 94, 94-100 (summarizing research); see also Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1473-76 (1998) (discussing implicit bias and prejudice against black men).

349. Craig St. John & Tamara Heald-Moore, *Fear of Black Strangers*, 24 SOC. SCI. RES. 262, 262 (1995).

350. See *id.* at 270.

351. See *id.*; Catherine A. Cottrell & Steven L. Neuberg, *Different Emotional Reactions to Different Groups: A Sociofunctional Threat-Based Approach to “Prejudice,”* 88 J. PERSONALITY & SOC. PSYCHOL. 770, 776 (2005).

352. Richeson & Bean, *supra* note 348, at 95.

angry expressions.³⁵³ More racially biased subjects were faster to detect anger and slower to detect its fading in black relative to white faces.³⁵⁴ Other work found that inducing fear and anxiety in whites leads them to misperceive anger when it is not present in black faces while not making that error with white faces.³⁵⁵ Another study found that observers are more likely to perceive angry racially ambiguous faces as black rather than white.³⁵⁶

People also pay greater attention to threatening stimuli.³⁵⁷ One study rapidly displayed one white male photograph and one black male photograph, and then one of the two photographs was replaced with a dot.³⁵⁸ Subjects were asked quickly to identify the dot as soon as it appeared.³⁵⁹ White subjects were faster at this task when the dot replaced a black photograph rather than a white one, suggesting that the subjects had, at least initially, been paying more attention to the black face in the first place.³⁶⁰ Analogous studies have likewise found that those displaying more fear of blacks as dangerous are more likely to show an attentional bias toward black male faces.³⁶¹ Neuroimaging has also revealed that the amygdala, a brain structure activated by threats, increases activity when white observers, especially those harboring high levels of racial bias, observe blacks but not whites.³⁶²

Some research is more directly connected to the criminal justice system.³⁶³ Experimenters have, thus, shown that police and probation officers primed with the category “black” viewed a hypothetical juvenile as more hostile and culpable than when primed with a race-neutral concept.³⁶⁴ Other studies found that, for example, priming subjects with black rather than white facial photographs led the participants to more effectively

353. See Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 640-42 (2003).

354. See *id.*

355. See Jon K. Maner et al., *Functional Projection: How Fundamental Social Motives Can Bias Interpersonal Perception*, 88 J. PERSONALITY & SOC. PSYCHOL. 63, 63 (2005).

356. See Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342, 342 (2004); Paul B. Hutchings & Geoffrey Haddock, *Look Black in Anger: The Role of Implicit Prejudice in the Categorization and Perceived Emotional Intensity of Racially Ambiguous Faces*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1418, 1418 (2008).

357. See Richeson & Bean, *supra* note 348, at 96.

358. Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322-23 (2008).

359. See *id.*

360. See *id.* at 1324.

361. See Richeson & Bean, *supra* note 348, at 97.

362. See *id.*

363. See *infra* notes 364-367 and accompanying text.

364. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 496 (2004).

identify degraded images of crime-related objects as what they were but not objects unrelated to crime.³⁶⁵ These same authors found that similar priming led participants to identify neutral objects as weapons.³⁶⁶ Still, other studies have even found that non-black participants told to shoot criminals in a video game are more likely incorrectly to shoot unarmed black than unarmed white civilians.³⁶⁷

A different line of work shows that describing someone as “American” spontaneously brings white faces to mind.³⁶⁸ Self-reports from subjects asked to identify who looks more American are consistent with this conclusion.³⁶⁹ Likewise, many whites are more likely to quickly and easily pair white, rather than black, faces with symbols of being American, such as the national flag, the White House, Mount Rushmore, and the bald eagle.³⁷⁰ Moreover, “[f]or White Americans, the stronger their national identification, the more they project their own ethnic characteristics onto the definition of a whole nation (i.e., the more they think that American equals White. . .).”³⁷¹ Some low-status minority groups, such as Asian Americans and Latinos, have “internalized the implicit belief that their ethnic ingroup isn’t quite as authentically American as Whites.”³⁷² This sense of blacks and other racial and ethnic minorities as “other” likely makes it easier for them to be seen as threatening, their perceived cultural practices as contaminating “true” Americans.³⁷³

5. Miscellaneous System-Justifying Triggers

A few other triggers of status quo bias discussed earlier merit a brief note here. First, “inescapability”—the belief that alternative social systems are not available—initiates system-justifying psychological processes.³⁷⁴ But, there is only one police force, one criminal law, one court system, and one jury system in any particular jurisdiction. In the short-run, they cannot

365. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 881-83 (2004).

366. See *id.*

367. See Richeson & Bean, *supra* note 348, at 98.

368. See Nilanjana Dasgupta & Kumar Yogeeswaran, *Obama-Nation? Implicit Beliefs About American Nationality and the Possibility of Redefining Who Counts as “Truly” American*, in POST RACIAL AMERICA, *supra* note 247, at 72, 74.

369. Sapha Cheryan & Benoît Monin, “Where Are You (Really) From?”: Asian-Americans and Identity Denial, 89 J. PERSONALITY & SOC. PSYCHOL. 717, 719-20 (2005).

370. See Dasgupta & Yogeeswaran, *supra* note 368, at 75.

371. *Id.*

372. See *id.*

373. Cf. *id.* at 82 (“[R]eading about . . . ethnic minorities increased people’s fear that non-European cultural practices are contaminating American society and threatening the distinctiveness of what it means to be American; this fear and perceived threat was in turn responsible for people restricting the definition of who counts as American.”).

374. See *supra* text accompanying notes 244-51.

be replaced, and they are likely to seem resistant to change in the long run too because they seemingly have “always been there.”³⁷⁵ We simply cannot choose others. Moreover, we are all, to one extent or another, dependent upon the police and prosecutors to provide us with safety for our bodies and our property and with justice when wrongs occur. This too fosters embrace of the status quo.³⁷⁶ Finally, individuals may feel that they have limited personal control over criminals. Unless we have the wealth to make our homes into fortresses and the willingness thus to cut ourselves off from our neighbors, our personal behavior cannot prevent burglars, car thieves, or grifters from preying on our possessions. There are certainly exceptions in which observers believe that purported victims do have substantial control over whether they will be victimized.³⁷⁷ But, we nevertheless often feel that we lack such control in many instances, leaving it to the state, however limited its abilities may be, to protect us from crime.³⁷⁸ Calling the police—not seeking to investigate and wreak vengeance on our own—is the likely common response to the risk and occurrence of crime. But this reduced sense of personal control also fosters status quo biases.³⁷⁹

6. Law Enforcement as the Status Quo’s Symbolic Representatives

A police officer’s job is, in one sense, to enforce the status quo. They search for violations of the criminal law, itself a tool of the current social consensus. They sometimes punish even minor offenses against the status quo, as might be true of those embracing the “Broken Windows” policing philosophy.³⁸⁰ Their uniforms and openly displayed weapons are public reminders that they have the right to use force, if necessary, to enforce the rules set by the governing political system.³⁸¹ They may sometimes arrest picketers, antiwar protestors, trespassers, and peace-disturbers—anyone overtly or subtly challenging the current system.³⁸² They often react to

375. Cf. Dasgupta & Yogeewaran, *supra* note 368, at 82.

376. See *supra* text accompanying notes 232-39.

377. See ‘Rape Victim’ Was in Control of Her Actions, Footballer Claims, MIRROR NEWS (Apr. 16, 2012, 7:11 PM), <http://www.mirror.co.uk/news/uk-news/ched-evans-and-clayton-mcdonald-rape-796978>.

378. See G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN’S L.J. 133, 138-41, 151 n.115 (2007) (illustrating reliance on police’s expertise for protection); DAVID A. MAY & JAMES E. HEADLEY, REASONABLE USE OF FORCE BY POLICE: SEIZURES, FIREARMS, AND HIGH-SPEED CHASES 39-40 (2008).

379. See *supra* text accompanying notes 252-55.

380. See generally GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996).

381. See generally MAY & HEADLEY, *supra* note 378.

382. See *id.* at 27-31 (explaining that police can arrest individuals with probable cause); TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 220-58 (2009) (illustrating and analyzing these activities).

challenges to their authority aggressively.³⁸³ They believe, and most of the public believes, that their training and expertise ensures that they arrest only the guilty, attributing to them an almost magical power to spot wrongdoers and separate truthful wheat from lying chaff.³⁸⁴

A similar aura surrounds prosecutors. They and much of the public also believe that they can do no wrong. They are the People's servants and voices, defending them against the violent, unruly hordes.³⁸⁵ Elected prosecutors run and win on tough-on-crime platforms.³⁸⁶ Even gentler calls for "Smart on Crime" policies defended by some prosecutors are still touted as better protecting public safety.³⁸⁷ They wear suits, speak in the formal language of the law, and present a demeanor suggesting that a threat is present in our midst.³⁸⁸ But the prosecutor, like the police officer, will work to contain that threat, creating a "thin grey (suited) line" of protection against chaos, violence, and social instability.³⁸⁹ Ordinary citizens indeed tend to side with authority and want to believe what police and prosecutors have to say.³⁹⁰ Similarly, the National Jury Project, in an extensive empirical study, found that despite the presumption of innocence, most jurors believe that those accused of crime are probably guilty, ought to testify if they are not, and bear the burden of proving their innocence.³⁹¹

383. See Andrew E. Taslitz, *Wrongly Accused: Is Race a Risk Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 127-28 (2006); Malcolm D. Holmes & Brad W. Smith, *Intergroup Dynamics of Extra-Legal Police Aggression: An Integrated Theory of Race and Place*, 17 AGGRESSION & VIOLENT BEHAV. 344, 345 (2012) ("[I]n the socially disorganized neighborhoods where lax enforcement occurs, various forms of police misconduct may be normalized by officers who encounter conflict with citizens and challenges to their legitimacy.")

384. See GIVELBER & FARRELL, *supra* note 347, at 13-15. See generally Ben Bradford & Jonathon Jackson, *Public Trust in Criminal Justice: A Review of the Research Literature in the United States* (JUSTIS: Scientific Indicators of Confidence in Justice, Working Paper, 2009).

385. See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132-33 (2004) (explaining that prosecutors are Ministers of Justice).

386. *Id.* at 153.

387. See KAMALA D. HARRIS, SMART ON CRIME: A CAREER PROSECUTOR'S PLAN TO MAKE US SAFER 124-28 (2009).

388. See generally Adam Trahan & Daniel M. Stewart, *Examining Capital Jurors' Impressions of Attorneys' Personal Characteristics and Their Impact on Sentencing Outcomes*, 7 APPLIED PSYCHOL. CRIM. JUST. 93 (2011) (explaining public perceptions of prosecutors).

389. *Cf. supra* text accompanying note 13 (discussing the police as the "thin blue line" between social madness and stability).

390. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1739-40 (1993) (noting prosecutors' procedural advantages).

391. See NAT'L JURY PROJECT, INC., JURYWORK: SYSTEMATIC TECHNIQUES 2-12 to 2-20 (Elisa Kraus & Beth Bonora eds., 2d ed. 2002); Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 122 (1995) (explaining that trial juries make the assumption that charges are valid "because the grand jury would not have brought them otherwise"). See generally William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 395-96 (1995) (discussing jury partiality despite the presumption of innocence); Molly Armour, *Dazed and Confused: The Need for a Legislative Solution to the Constitutional Problem of Juror Incomprehension*, 17 TEMP. POL. & CIV. RTS. L. REV. 641, 653-54 (2008) (stating that jurors are more likely to convict because of misunderstanding of the presumption of innocence).

When combined with other forces noted above, it is, thus, difficult to get jurors to accept that innocent people sometimes confess³⁹² or that eyewitnesses can be wrong.³⁹³ It is likewise hard to get them to believe that police officers engage in entrapment, sometimes “testily,” or occasionally plant false evidence.³⁹⁴ Police officers also act first in making an arrest, frequently acting on their own or pursuant to ex parte contacts with a judge in obtaining a search or arrest warrant.³⁹⁵ Likewise, prosecutors go first at trial, making initial opening arguments and offering their case-in-chief first.³⁹⁶ Thus, law enforcement benefits from order effects—the chance to get their pro-status-quo message across to the jury before the defense speaks—if it chooses to do so.³⁹⁷ Going first primes juries with pro-state, pro-status-quo messages.³⁹⁸ Police and prosecutors will generally be exposed to only one side of the story until the time of trial, committing them to convicting the defendant based on a one-sided perception of evidence and arguments.³⁹⁹ They may readily convey that confidence in the righteousness of their cause to juries, who must await the defendant’s case, if any, to hear a contrary tale, although defense opening statements and cross-examination of prosecution witnesses can at least plant the seed of an alternate narrative at an earlier time.⁴⁰⁰ Still, when acquittals do occur, they occur primarily when the defense has presented its own case, with its own witnesses (including the defendant and at least one other person), crafting its own, more persuasive narrative.⁴⁰¹ Achieving that feat is a hard one,

392. See Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J.L. & SOC. POL’Y 400, 405 (2012).

393. SIMON, *supra* note 83, at 53-58.

394. See Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996) (defining testilying as officers lying to convict the guilty); Taslitz, *An African-American Sense of Fact*, *supra* note 318, at 247 n.186 (illustrating detectives’ motives to plant evidence).

395. See ANDREW E. TASLITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 236-85, 302-20 (4th ed. 2010) [hereinafter TASLITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE] (describing arrest and warrant procedures).

396. 2 PETER J. HENNING ET AL., MASTERING CRIMINAL PROCEDURE: THE ADJUDICATORY STAGE 229-54 (2012) [hereinafter HENNING ET AL., ADJUDICATORY STAGE] (summarizing trial procedures).

397. See James R. Lucas, *Opening Statement*, 13 U. HAW. L. REV. 349, 351 (1991) (explaining that first impressions are important because jurors make up their minds during the opening statement).

398. See Shari Seidman Diamond et al., *Juror Reactions to Attorneys at Trial*, 87 J. CRIM. L. & CRIMINOLOGY 17, 27 (1996) (“Opening statements may create thematic frameworks, or schemata, that guide jurors during the trial and deliberations in their observation, organization, and retrieval of evidence.”).

399. See GIVELBER & FARRELL, *supra* note 347, at 63-66; *infra* text accompanying notes 409-18.

400. See GIVELBER & FARRELL, *supra* note 347, at 101-02.

401. See *id.* at 85-88. Prosecutors also benefit from their association with victims. One law professor aptly explained the presumptive aura surrounding victims in American criminal trials:

This thinking is reflected even in the way we identify criminal cases: “People v. John Doe.” We, “the People,” prosecute John Doe. If he is wrong, then we—all of us, including the victim—are right. . . . In fact, perception of victims as innocent has a long history, which

however, because of the symbolic power of police uniforms and prosecutor voices in defending what we have against those alleged to threaten our losing it.

7. *Summing Up*

It may be that the status quo bias is pervasive and ever-present. If so, it would naturally follow that it is present at a criminal trial. Even if the bias requires certain triggers, many of those trip wires are present in the criminal justice system. The system triggers a sense of threat to the social order, ignites racial and class stereotypes, draws on common cultural narratives supportive of dominant social norms, and invites solidarity-promoting retributive emotions. Moreover, law enforcement—police and prosecutors—serve as representatives of the status quo. They are imbued with an aura of being its defenders against the rabble. None of this means that justice cannot be done, but to ensure that convictions stem from a more balanced consideration of evidence and arguments rather than a reflexive embrace of the status quo's voices, a counterweight is needed.⁴⁰² That counterweight, I will argue shortly, is a well-resourced defense counsel.⁴⁰³ First, it is necessary to address one more feature of the criminal justice system's connection to the status quo: law enforcement's personal resistance to even the most well-reasoned challenges to the status quo.

B. Police and Prosecutors Themselves Embrace the Status Quo and Thereby Cause Ill Effects

David Harris,⁴⁰⁴ Alifaire Burke,⁴⁰⁵ and Daniel S. Medwed,⁴⁰⁶ among others,⁴⁰⁷ have written extensively about the psychological and social forces

significantly predates our legal system. In numerous cultures, as evidenced by linguistics, the notion of victimhood is tied to the religious sacrifice. Most Semitic, Germanic, Romance, and Slavic languages have the same word for the victims of sacrifice and the victims of crime. This homonymy is rooted in the dichotomous vision of the world as split into two categories, the guilty and the innocent. Those who were to serve as victims of sacrifice had to be pure, without blemish, and today too we continue to associate victimhood with innocence.

See BERGELSON, *supra* note 332, at 1 (footnote omitted).

402. See *infra* Part V.

403. See *infra* Part V.

404. See DAVID A. HARRIS, *FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE* (2012) [hereinafter HARRIS, *FAILED EVIDENCE*].

405. See Alifaire S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593 (2006).

406. See Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-conviction Pulpit*, 84 WASH. L. REV. 35 (2009).

407. See, e.g., Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 401 (2011).

leading both police and prosecutors to resist change from a perceived status quo. I will, therefore, only briefly summarize the teachings of their work here. Much of this work has focused on law enforcement's resistance to evidence of an individual accused's innocence or to changing seemingly "time-tested" investigative procedures that science suggests unduly raise the risk of mistaken convictions.⁴⁰⁸

This work often stresses the importance of the initial decision to charge or arrest someone.⁴⁰⁹ Once that decision has been made, the status quo choice is now to prosecute that person as the likely guilty offender.⁴¹⁰ Extreme evidentiary weakness or special circumstances may lead to overriding that decision.⁴¹¹ But, especially in a serious case, individuals involved in law enforcement tend to seek evidence confirming the initial choice to proceed.⁴¹² Data supporting the decision becomes overvalued, while data challenging the status quo is discounted.⁴¹³ Beliefs, thus, persevere with great strength, even in the face of countervailing evidence.⁴¹⁴

These effects can lead to the infamous "tunnel vision": subconsciously disregarding exculpatory evidence once the decision to prosecute has been made.⁴¹⁵ Although police may initially fall prey to this form of cognitive blindness, prosecutors will suffer from it too.⁴¹⁶ They often receive only the information the police have uncovered and usually will not independently investigate leads not pursued.⁴¹⁷ Furthermore, as trials approach, "[p]rosecutors directly interact not only with the police, but also with the victims and witnesses in their cases, and may become somewhat emotionally attached to them and their accounts of the criminal event."⁴¹⁸

408. See *supra* notes 404-07.

409. See HARRIS, FAILED EVIDENCE, *supra* note 404, at 2-8.

410. See *id.*; Burke, *supra* note 405, at 1593-94 (discussing, in the context of prosecutorial decision making, the "confirmation bias"—the tendency to look for evidence to confirm rather than contradict initial hypotheses).

411. See R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 13-24 (2005) (discussing ethics codes on prosecutor charging); MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, DECISION MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 113-37 (2d ed. 1988) (discussing prosecutors' actual charging practices).

412. See Orenstein, *supra* note 407, at 425.

413. See Burke, *supra* note 405, at 1593-94 (discussing "selective information processing"—overvaluing data supporting and unduly discounting data opposing an initial theory).

414. See *id.* (discussing "belief perseverance," that is, embracing a theory long after evidence suggests it should be rejected).

415. See Medwed, *supra* note 406, at 45-46.

416. See *id.* ("Prosecutors, for their part, work closely with the police and may fall prey to a comparable form of tunnel vision at the trial stage . . .").

417. See *id.*

418. *Id.* at 46.

“Cognitive dissonance”—the need to resolve the psychic tension caused by an inconsistency between two ideas⁴¹⁹—also contributes to law enforcement’s commitment to the arrest decision as the status quo.⁴²⁰ Police and prosecutors generally think of themselves as talented, ethical, hard working, and well-meaning.⁴²¹ To acknowledge that an arrest or the decision to charge resulted from flawed investigative procedures or judgments contradicts these beliefs that are central to the law enforcement identity.⁴²² The easiest path to resolving the inconsistency is by simply rejecting evidence of error, or explaining it away; conservation of cognitive effort is a strong psychological tendency.⁴²³ Rejecting the need for change thus eliminates psychologically uncomfortable thoughts or feelings.⁴²⁴

Such discomfort can also arise from challenges to police or prosecutors’ social status, which they prize as much as anyone.⁴²⁵ Much of that status comes from their self-conception and others’ conception of them as skilled, by nature of training and experience, in ways that other persons and groups are not.⁴²⁶ If police or prosecutors’ use of eyewitness identification or interrogation techniques that they and their peers have long trusted to catch the “bad guys” is challenged by upstart scientists or defense attorneys, that challenge is perceived as an assault on professional and social status.⁴²⁷ Defense of the status quo, thus, becomes defense of law enforcement’s special social position.⁴²⁸

Police and prosecutors’ status, and the material and other rewards that they receive from their superiors, also turn respectively on their numbers of good arrests or successful convictions.⁴²⁹ These institutional forces combine with the endowment effect—giving what you currently possess (in this case, “tried-and-true” procedures or a seemingly good arrest or conviction) more value than you would otherwise assign it and doing so just because you have it.⁴³⁰ Those same institutional forces also combine with loss aversion to create the tendency to regret losses more than valuing

419. See CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS* 13 (2007) (defining the term).

420. See Burke, *supra* note 405, at 1613 (“To avoid cognitive dissonance, an ethical prosecutor might cling to the theory of guilt to reconcile her conduct with her beliefs, especially after the defendant has been convicted.”).

421. See HARRIS, *FAILED EVIDENCE*, *supra* note 404, at 5-7.

422. See *id.*

423. See *id.*

424. See Burke, *supra* note 405, at 1613.

425. See HARRIS, *FAILED EVIDENCE*, *supra* note 404, at 24-25.

426. See *id.* at 24-28.

427. See *id.*

428. See *id.*

429. See HARRIS, *FAILED EVIDENCE*, *supra* note 404, at 2-5.

430. See SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 96-97 (1993).

gains.⁴³¹ A related but distinct idea is posed by “regret theory.”⁴³² Regret theory focuses on the pain experienced upon determining that a different decision or behavior than the one made would have resulted in a better outcome.⁴³³ But, most studies show that regret is greater when the more desirable outcome is caused by commission rather than omission.⁴³⁴ Fear of regret, thus, favors *not* acting—here, sticking with the status quo rather than changing it.⁴³⁵ The result is a reluctance, for example, to change current procedures because they now result in many seemingly good arrests and convictions.⁴³⁶ The fear is that new, allegedly more trustworthy, procedures will simply lower conviction rates and let the guilty roam free.⁴³⁷

Conformity effects—“[the] desire to act in line with a peer”—amplify the problem.⁴³⁸ Prosecutors do not relish contradicting their partners in prosecution, the police, much less other prosecutors.⁴³⁹ Persons within an organization or profession prefer to act as if their predecessors’ or compatriots’ decisions merit trust.⁴⁴⁰ They want to paint a flattering portrait of the organization with which they identify.⁴⁴¹ They are especially likely to defer to the decisions of their superiors, for example, in approving an arrest or prosecution.⁴⁴² Moreover, some measure of task specialization is unavoidable in a large organization and a complex world.⁴⁴³ Each individual prosecutor cannot personally reinvestigate what police or other

431. Richard Coughlan & Terry Connolly, *Predicting Affective Responses to Unexpected Outcomes*, 85 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 211, 217 (2001); see HARRIS, FAILED EVIDENCE, *supra* note 404, at 9-38 (pointing out that other institutional forces can amplify each of these status-quo-supportive tendencies, including the “them/us” culture of the police, the power of change-resistant police unions, the political aspirations of many prosecutors, law enforcement’s close ties to legislatures, and the media tendency to feed excessive fear of crime).

432. See Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 65-66.

433. See *id.*

434. See Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 610 (2003).

435. See *id.*

436. See HARRIS, FAILED EVIDENCE, *supra* note 404, at 16-24.

437. See *id.*

438. See Medwed, *supra* note 406, at 53.

439. See *id.*

440. See *id.*

441. See *id.* (discussing this need for flattery as the “egocentric bias”).

442. See Findley & Scott, *supra* note 22, at 309 (discussing how the confirmation bias can be intensified when the initial judgment or theory came from “a person of superior status in a team effort”); Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 702-03 (2005) (similar).

443. See Medwed, *supra* note 406, at 53 (noting especially great reluctance to alter the decision of a colleague who may have had greater information, such as a post-conviction litigator deferring to a trial attorney because the latter “interacted with witnesses and the police closer in time to the event that gave rise to the prosecution”).

prosecutors have done.⁴⁴⁴ Nor can a prosecutor's office afford to hire enough investigators to do so in every case.⁴⁴⁵ Respect for peers saves cognitive effort and psychologically justifies to an individual prosecutor continuing down the path blazed by his predecessors.⁴⁴⁶

A phenomenon also turning on police and prosecutors' relationships with peers is that of "group polarization."⁴⁴⁷ Group polarization is the tendency of group members to become, over time, more extreme in their original positions.⁴⁴⁸ This polarization occurs partly because of the limited number of arguments raised, the growing confidence in the original belief spurred by that limited discussion, and the peer feedback from offering ever-more-enthusiastic defenses of the original position.⁴⁴⁹ Group polarization should be especially powerful for individuals closely bonded to their relevant groups.⁴⁵⁰ But such bonding among police and among prosecutors is well-known.⁴⁵¹

Once a prosecutor becomes committed to defending the decision to prosecute against all challengers, however, he then has an incentive to portray the accused as an extreme deviant from normal expectations or mores, or at least as someone who takes advantage of even minor deviations from expectations.⁴⁵² Observers, thus, feel more sympathy toward victims who suffer from abnormal events.⁴⁵³ Mock jurors feel more anger at a rapist who takes advantage of his victim's choice of an unusual route home.⁴⁵⁴ They see more harm done to a robbery victim attacked while

444. See Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 23 n.105 (2002) (explaining that prosecutors have heavy workloads); cf. Medwed, *supra* note 406, at 53 (suggesting that post-conviction lawyers do not usually re-investigate the evidence gathered by the trial lawyer).

445. Cf. Lain, *supra* note 444, at 23 n.105 (stating that prosecutors' offices have limited resources).

446. Cf. Medwed, *supra* note 406, at 53 n.76 ("Individuals may be particularly wary of second-guessing their initial decisions after those decisions have received external validation—for instance, through trial results and affirmation on direct appeal.").

447. See HARRIS, FAILED EVIDENCE, *supra* note 404, at 7-16.

448. See Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175, 176 (2002).

449. See *id.*

450. See HARRIS, FAILED EVIDENCE, *supra* note 404, at 12-14.

451. See *id.*; DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING 154-71 (2005) (arguing that police group identity's strength is so great that it has led to a distinct police culture); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 187 (2007) (arguing that "[p]rosecutors see themselves as warriors in a fight between the good and the guilty").

452. See *infra* text accompanying notes 454-60.

453. See Prentice & Koehler, *supra* note 434, at 615 ("Another study showed that if a person is mugged on his way home, jurors will feel sorer for him, view the muggers as more responsible, and impose a higher punishment if they are told that the person took an abnormal route home.").

454. See Kandi Jo Turley et al., *Counterfactual Thinking and Perceptions of Rape*, 17 BASIC & APPLIED SOC. PSYCHOL. 285, 289-90 (1995) (concluding mock jurors imposed heavier sentences under these circumstances).

visiting a store he normally rarely frequents.⁴⁵⁵ “[U]nusual acts and circumstances,” attribution theorists and legal philosophers have suggested, stand out as causal candidates over more usual ones.⁴⁵⁶ “Abnormalities are not merely perceived to be more causal, they also cause greater regret and receive greater blame.”⁴⁵⁷ This normality bias is linked to the status quo bias because the status quo ordinarily defines what is “normal.”⁴⁵⁸ The power of the normality bias seems rooted in the ability to imagine counterfactuals: states of affairs other than those that occurred.⁴⁵⁹ Once the abnormal has led to a result, it is usually easier to imagine what normalcy would have wrought (usually perceived as better outcomes) than imagining in a normal world what the abnormal option would have brought about. Two authors give this example:

For the man who is car-jacked while taking an unusual route home from work, it is not hard to imagine what might have happened if only he had taken his usual route. He can easily imagine this option because it is one he has taken many times before. He knows that his usual route is a safe one. In contrast, for the man who is car-jacked while taking his usual route home, it is unnatural for him to imagine what would have happened if only he had taken an unfamiliar route. It is equally unnatural for those observing or judging the actor to see strong links between normal behavior and subsequent bad outcomes.⁴⁶⁰

Agents who follow unconventional paths are judged more harshly in light of the normality bias partly because they are viewed as violating a social norm.⁴⁶¹ They need to be punished both for their bad judgment and their threat posed to the social order.⁴⁶² Thus, two social scientists counsel these tactics: “prosecutors might try to paint a defendant’s actions as

455. Dale T. Miller & Cathy McFarland, *Counterfactual Thinking and Victim Compensation: A Test of Norm Theory*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 513, 515-16 (1986).

456. See Prentice & Koehler, *supra* note 434, at 612, 615.

457. See *id.* at 615.

458. See *id.* at 642 (describing something as “conventional” and viewing it as “normal”); *supra* Part III (discussing the social and psychological pressures toward the status quo).

459. See Prentice & Koehler, *supra* note 434, at 616-17, 619-21.

460. See *id.* at 619.

461. See *id.* at 631-35. The embrace of norms follows from two ideas: first, “social proof,” basing our “judgments of appropriate conduct, in part, on the behaviors of those around us,” *id.* at 632, and, second, on the need for conformity, see *id.* at 634-35.

462. See *id.* at 631-32 (“[T]rusted agents who make judgment errors may be punished once for their misjudgment, and punished again if their misjudgment runs afoul of a cherished norm. Accordingly, the degree of blame and punishment fact finders assign for misdeeds reflects the degree to which those misdeeds threaten or harm the social order.” (footnote omitted)).

abnormal. Conversely, defendants' attorneys might try to characterize their clients' acts as normal for the existing circumstances."⁴⁶³

As noted earlier, law enforcement benefits at trial and at other proceedings from being perceived as legitimate representatives of the status quo against its challengers.⁴⁶⁴ This section has established, however, that police and prosecutors are also at least unconsciously motivated to defend the status quo aggressively.⁴⁶⁵ They will, thus, too often close their eyes to evidence that the status quo is undesirable, thus failing to acknowledge the at least occasional untrustworthiness of pretrial procedures, the possibility of defendant innocence or mitigation-deservingness, or the validity of defense claims that justice requires something other than the harsh penalties law enforcement seeks.

V. WHAT CAN DEFENSE COUNSEL DO?

In this penultimate section of this Article, I want to suggest some ways that defense attorneys, particularly public defenders, can serve as counterforces to status quo bias. I focus on defenders because they do not have to contend with the profit motive's tug on their decisions, thus making it easier to highlight other aspects of defense counsel's role. In doing so, I also want briefly to explore defenders' self-understanding as combatants against the status quo, drawing partly on the few empirical studies of defender views, partly on more impressionistic and anecdotal sources. I do not claim that defenders are motivated entirely by anti-status-quo motivations, but I do claim that those who stick with the job for a significant period of time are partly motivated by just such concerns.⁴⁶⁶ Even if we assume that their stated motivations are self-deceptive, they still offer enlightenment as to the anti-system-justification role that defenders can play. Although private criminal defense counsel may arguably have different self-conceptions of

463. *Id.* at 635. Race should play a role too, that is, race and other indicators of low social status should trigger status quo biases in prosecutors and police, just as they do in other actors. *See supra* text accompanying notes 14-16; *see also* Justin D. Levinson, *Forgotten Racial Equality, Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007) ("Results of the study confirmed the hypothesis that participants remembered and misremembered legally relevant facts in racially biased ways. For example, participants who read about an African-American story character were significantly more likely to remember aggressive facts from the story than participants who read about a Caucasian story character. Other results indicated that these racial memory biases were not related to *explicit* racial preferences." (emphasis added)). To avoid repetition, I address race in more detail in discussing defense counsel's potential responses in the next section. *See infra* Part V.D.

464. *See supra* text accompanying notes 380-84.

465. *See supra* Part IV.B.

466. *See* MICHAEL SCOTT WEISS, PUBLIC DEFENDERS: PRAGMATIC AND POLITICAL MOTIVATIONS TO REPRESENT THE INDIGENT 52-61, 65-66, 68-71, 74-76, 79-82 (2005). Other motivations can be more pragmatic, such as getting trial experience, enjoying intellectual challenge, finding professional autonomy and variety, and serving needs for ego-enhancement, camaraderie, and people contact. *Id.*

their social function than do defenders, defenders well illustrate the proper potential role of all defense counsel, however provided.⁴⁶⁷ Defenders' anti-status-quo function is served when they press for expanding constitutional protections, work to keep law enforcement honest, help to protect the innocent, combat racism, and challenge the disadvantage imposed on members of low-status groups based simply on their social status.

A. *Expanding Constitutional Protections*

A prosecutor seeking conviction necessarily has an incentive to seek narrow interpretation of the meaning of the Constitution's criminal justice protections. Too-generous interpretations of constitutional rights might result in suppression of evidence or even outright dismissal of cases.⁴⁶⁸ But, defenders have just the opposite incentive: to seek to expand constitutional rights, to push the envelope well beyond the current constitutional status quo.

Many defenders have a reverence for their capacious understanding of the Constitution.⁴⁶⁹ They view its aspirational soul as being sullied by police, prosecutors, and judges who render the Constitution in practice a near-dead letter.⁴⁷⁰ Indeed, defenders often share a deep-seated distrust of government, or at least of law enforcement—which they view as including most judges.⁴⁷¹ For these defenders, law enforcement functions largely as a tool for creating a more oppressive state.⁴⁷² By standing against such oppression, they prevent erosion of constitutional rights that protect all of us, not merely those already ensnared in the justice system.⁴⁷³ In particular,

467. *See id.* at 82-84.

468. *See* 1 PETER J. HENNING ET AL., *MASTERING CRIMINAL PROCEDURE: THE INVESTIGATIVE STAGE* 206-08, 233-34, 269-73, 297 (2010) (discussing the exclusionary rule); HENNING ET AL., *ADJUDICATORY STAGE*, *supra* note 396, at 103-05, 411 (discussing violation of constitutional speedy trial rights and double jeopardy rights as grounds for dismissing a case).

469. *See* WEISS, *supra* note 466, at 97 (“And for me, the Constitution is like the Bible.”).

470. *See id.* at 158-59; LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 145 (1987) (“I expected a fairly corrupt system, and I found one. Here I am representing people who cheat, lie, and steal, and I find the same intellect represented in the police who arrest them, in some of the prosecutors and some of the judges as well.”).

471. *See* WEISS, *supra* note 466, at 109, 250-52; JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 156 (Univ. Press of Am., Inc. 1991) (1977) (reporting that Detroit Defender Association lawyers see judges as pro-prosecution and racist).

472. *See* WEISS, *supra* note 466, at 109-10.

473. *See id.* at 109 (including quoting one defender as saying that “if the indigent were not represented, then the government would go crazy, because the government would be able to wreak havoc and then none of us would have any rights to do anything”). At least one public defender is optimistic that the defenders' efforts to expand constitutional rights in theory and on the ground does bear fruit: “[T]he police aren't out there abusing people as much as they used to be. That's because people like me who came before me did these things.” DEBRA S. EMMELMAN, *JUSTICE FOR THE POOR: A STUDY OF CRIMINAL DEFENSE WORK* 22 (2003).

defenders help to combat any state's natural tendency to oppress society's most vulnerable populations most of all.⁴⁷⁴ As one defender eloquently put it,

We are—it may sound corny but I'll say it with a straight face because I mean it—we are really the front line against the oppression of individuals by society. And I think that's the core of what we do, because the people whose rights it's easiest to take away are indigent, they have no political power, they have no friends, they have no one but us. And when their rights get eroded, yours and mine are next. I feel that every day that I do this work . . . I believe it as firmly as ever. And I guess when I stop believing it I'll be done doing this job. But I feel that more strongly than I did when I first started.⁴⁷⁵

The public, under this view, is misled by its leaders into supporting bad choices that restrict freedom in the name of public safety.⁴⁷⁶ Security must include security in the rights protected by the Constitution.⁴⁷⁷ As one commentator explains, defenders “believe that they come not to destroy the law but to fulfill it.”⁴⁷⁸ When defense lawyers challenge grand jury subpoenas, raise double jeopardy arguments, seek dismissal for violation of speedy trial rights, seek changes in venue, challenge hearsay as contrary to the Confrontation Clause, demand discovery of exculpatory evidence, challenge sentences as excessive, or move to suppress evidence as unreasonably obtained, they see themselves as acting to defend the

474. See EMMELMAN, *supra* note 473, at 23 (“While the Defenders perceive that politics pressures D.As and judges to deal harshly with criminal suspects, they view themselves as guardians of the poor and powerless.”).

475. See WEISS, *supra* note 466, at 109.

476. See *id.* at 109. As one defender argued,

Most people think that it's okay to put cameras on street corners. It's acceptable to stop people on the sidewalk. If you're not doing anything wrong, hey, where's the harm? So people think that's okay. They wouldn't mind being stopped and patted down. *They* don't have a gun, *they* don't [have] drugs. They don't realize!

Id.; see also EMMELMAN, *supra* note 473, at 19 (noting that defenders view both prosecutors and judges as politically motivated by the need not to be seen as soft on crime and that the public reflects this communal law-and-order attitude).

477. See EMMELMAN, *supra* note 473, at 22 (quoting a defender as explaining that he is “interested in living in a free society) (“It's been said that criminal defense lawyers are the last champions of personal liberty.”). One commentator thus insists that

[d]efense lawyers are the true conservatives, defenders of the Constitution, of law and order. Without defense lawyers, there'd be no rule of law, no limit at all to what the government did. Governments have a demonstrated tendency to lock people up. You have to draw the line way out there, at the least sympathetic defendant, so the government doesn't even come close to taking you.

JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER 37 (1983).

478. See MCINTYRE, *supra* note 470, at 142.

Constitution against tyrants.⁴⁷⁹ One defender made the point quite expressly:

In my opinion, limiting the application of the Fourth Amendment, the Fifth Amendment, and the Sixth Amendment . . . is not what government is supposed to be doing. It's what the government is *trying* to do—gain all the power back it gave the people 200 years ago. . . . And I think we're here to say “No.” Enough is enough.⁴⁸⁰

B. Keeping Law Enforcement Honest

Apart from raising legal challenges, defenders try to keep law enforcement honest—acting consistently with its publicly stated ideals.⁴⁸¹ In the case of the police, many defenders just do not like cops.⁴⁸² They are ready to see many officers as liars and willing to use any means to achieve the end of conviction.⁴⁸³ Exposing those lies, catching an officer “in a whopper in front of the jury, and let[ting] him try to explain it” is a “beautiful, beautiful thing.”⁴⁸⁴ Even defenders who have no animus toward the police—who may indeed appreciate the difficulty of their job—still see

479. See HENNING ET AL., ADJUDICATORY STAGE, *supra* note 396, at ix-xxiv (outlining in its table of contents all the constitutional bases for challenging the state at trial or before).

480. See WEISS, *supra* note 466, at 112-13. But some defenders, on the other hand, are so pessimistic about the possibility of succeeding in protecting the Constitution that they see any effort to do so as futile:

I'm not a guardian for the system. The system is fucked! Are you kidding? There's no presumption of innocence. Reasonable doubt? No! You start arguing reasonable doubt, you lose. It's not enough. If your guy's guilty, you have to say he didn't do it. You can't argue against this fucked up system. The system is designed to put people in jail. You can't argue the Constitution. That's some people's answer. Not mine.

Id. at 158-59; see also *id.* at 250 (quoting a defender who argues that the Fourth Amendment “really doesn't exist,” judges “let everything in,” then “figure out some rationalization for it . . . I could die. It could kill me every time you lose all those things.”).

481. See *id.* at 185. Defender comments can indeed express horror at prosecutors and police acting in ways that the defenders see as respectively inconsistent with the duties to do justice and to enforce the laws within the bounds of the law:

I mean, I'm constantly shocked—maybe I shouldn't be—but I'm constantly shocked at the things that people will do. The prosecutor's office, what different prosecutors will do, what police officers will do—because they believe in a conviction, or they believe that a person is guilty over that person's rights, or they'll pull something shady by not turning something over which otherwise might help vindicate our client in some way. So, those kinds of things keep spurring me on.

Id. at 159. See generally Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 633-42 (1999) (analyzing the prosecutors' duty to do justice); EDWIN J. DELATTRE, CHARACTER AND COPS: ETHICS IN POLICING (6th ed. 2011) (addressing in depth the ethical obligations of the police); JULIE B. RAINES, ETHICS IN POLICING: MISCONDUCT AND INTEGRITY 147-62 (2010) (addressing the factors that promote and undermine police integrity).

482. See WEISS, *supra* note 466, at 164-65.

483. See *id.* at 165-69.

484. *Id.* at 165.

too many police as lying too often.⁴⁸⁵ Such perjury not only distorts fact-finding if not revealed,⁴⁸⁶ but it also allows police to get away with the arrogance of power.⁴⁸⁷ For such police, defenders take particular joy in publicly putting them in their place⁴⁸⁸—what some might describe as reminding them that they work for the people rather than ruling over them.⁴⁸⁹ To humiliate a lying cop or to expose officer incompetence is, thus, a righteous task for the defender.⁴⁹⁰

Defenders also seek to encourage judicial and prosecutor integrity by making its lapses apparent.⁴⁹¹ Judges who, in the defenders' views, pretend to believe lying officers, or prosecutors who are too lazy or cowardly to investigate officer claims, fail to act with the diligence and impartiality (for the judge) or justice-seeking (for the prosecutor) that their roles require.⁴⁹² If a defender can expose, with absolute clarity, officers' lies, the defender hopes to touch the judicial and prosecutorial conscience—to do the right thing.⁴⁹³ Doing so in a courtroom, especially in front of a jury, also helps to

485. See PAUL B. WICE, PUBLIC DEFENDERS AND THE AMERICAN JUSTICE SYSTEM 128-29 (2005).

486. See SIMON, *supra* note 83, at 33, 48, 231 n.38, 232 n.48 (noting that police misconduct was involved in 44% of the false convictions in one study and may involve police lying, “suppression of exculpatory evidence, undue suggestiveness, evidence fabrication, coercion of witnesses, and coercion of confessions”).

487. See Taslitz, *People's Peremptory Challenge*, *supra* note 293, at 1694-1701 (discussing the importance of reducing law enforcement arrogance and condescension to the people they serve).

488. See WEISS, *supra* note 466, at 164.

489. Cf. Taslitz, *People's Peremptory Challenge*, *supra* note 293, at 1694-1701 (discussing the importance to democracy of putting law enforcement in its place).

490. See WEISS, *supra* note 466, at 164.

491. See *id.* at 165 (“A common [defender] complaint is that officers routinely ignore the legal standards required to justify their searches and [seizures].”); *id.* at 168 (“I am the only buffer, the only protection between the defendant and the lying police officer. And if I can show that the officer is lying, I have not only done my client a great service, I have done society a great service, and I take that seriously.”); SKIP ANDREWS, MORALS AND ETHICS: CHARACTER AND GOVERNANCE 69 (2012) (“Integrity as it applies to our own principles or laws requires complete fidelity to those principles. For a person who is lacking in morals to claim that he has moral integrity is either hypocrisy or dishonesty.”).

492. See WEISS, *supra* note 466, at 166, 222-23, 227-30, 246, 248, 250.

493. See *id.* at 207, 225, 226, 234-35, 241 (noting varied attitudes toward prosecutors, with some defenders seeing prosecutors as having no conscience, most being too inexperienced to do justice, arrogant, naive, lazy, and abusive, but others acknowledging that there are fair-minded prosecutors, “definitely decent prosecutors out there who do the right thing,” treat defendants fairly “more often than not”). One defender stressed that some, usually more experienced, prosecutors—“at least the ones that have some kind of soul—begin to see that it’s not all black and white, it’s not all good and bad. There are many . . . shades to it.” *Id.* at 234. Another defender acknowledged that there are prosecutors who respond to justice concerns directly, “who are concerned with defendants, who are concerned with drug abuse or mental health issues.” *Id.* at 235. A third defender was likewise optimistic that at least some prosecutors “really do get it. They get that sometimes people are wrongfully accused. Sometimes, even if they’re rightfully accused, they shouldn’t really be punished for it, more than making them come to court once. And I think there are more of them than the other kind.” *Id.* at 235; see also *id.* at 245-57 (recounting defender views that judges are often pro-prosecution, mere adjuncts of law enforcement, biased, lawless, too political, too afraid of the press, too tolerant of police lies, and yet it is still possible sometimes to win before them); EMMELMAN, *supra* note 473, at 30 (“[J]udges and juries are generally

educate the public, which too readily accepts prosecutorial and police judgment without adequate criticism.⁴⁹⁴ Moreover, remember that portraying the system as hopelessly corrupt is a way to overcome status quo bias.⁴⁹⁵ Using law enforcement failings to portray them as fitting just such a picture of the powerful tainted by self-interest and arrogance can thus help to open juror eyes to considering alternative understandings of the world.

Defenders further seek to expose instances of what they see as little more than police or prosecutor advantage taking of the vulnerable.⁴⁹⁶ For example, police might use a junkie as an undercover buyer, thus exposing her to danger.⁴⁹⁷ Later, the police turn on her, arresting her if she becomes—even in the smallest way—a seller. That sends the junkie further down the path of ruin, turning her own addiction against her and against her community, rather than seeking to help her.⁴⁹⁸ Some officers also might use wide street sweeps, arresting everyone in an area, making no real effort to distinguish the guilty from the innocent, or releasing the innocent only after suffering the indignity of arrest.⁴⁹⁹ That is not merely taking the easy way out. It is doing wrong because you know you can get away with it. Says one defender, “I truly believe power breeds corruption, and when the police get away with this stuff . . . , they are emboldened.”⁵⁰⁰ Such bullying outrages the defender.⁵⁰¹ Another example of intolerable bullying is the officer who, facing someone protesting improper police behavior, arrests the protestor for “resisting arrest.”⁵⁰² Defenders seek to expose law enforcement bullying when possible, perhaps to wound officer credibility, perhaps to obtain grounds for a suppression motion or affirmative

regarded [by defenders] as social conformists who sustain conventional viewpoints, or, the viewpoints of the status quo. In effect, they *are* the status quo.”); GIVELBER & FARRELL, *supra* note 347, at 116-18 (noting that judges in bench trials nevertheless do acquit defendants sometimes and, in federal court, this acquittal rate is higher for judges than juries).

494. See *supra* text accompanying notes 112-21 (concerning the public’s embrace of the same sort of law and order philosophy as is often displayed by prosecutors and judges). See generally Andrew E. Taslitz, *Slaves No More! The Implications of Informed Citizen Ideology for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709 (1999) (explaining how courtroom revelations help to educate the citizenry).

495. See *supra* text accompanying notes 257-58.

496. See WEISS, *supra* note 466, at 171 (noting several defenders “express remarkably similar complaints about the police preying on the vulnerabilities of drug addicts . . . to secure arrests they likely would not otherwise obtain”); *id.* at 238 (discussing a defender who “argues that because the American social and economic structure exploits poor people and minorities, prosecuting criminal defendants is something that is morally unjustifiable”).

497. See *id.* at 171-72 (quoting a defender recounting this example).

498. See *id.*

499. See *id.* at 173-75.

500. See *id.* at 177 (discussing another set of examples, albeit involving racial profiling).

501. See *id.* at 184, 190.

502. See *id.* at 186.

defense.⁵⁰³ But, police incompetence also offends the defender.⁵⁰⁴ Incompetence reflects an indifference to the plight of those subject to your power. It, too, is an abuse.⁵⁰⁵ If officer incompetence results in arresting the innocent, violating the Constitution, or unnecessarily humiliating a citizen, even if those harms are “unintended,” the vulnerable suffer just the same.

Defenders seek to challenge prosecutor bullying and incompetence too. “[P]rosecutors [are] persecutors,” one defense-sympathetic academic has declared.⁵⁰⁶ Many defense attorneys see prosecutors as liars and as too willing to tolerate lies from police or other state witnesses.⁵⁰⁷ Defenders complain too of prosecutor vindictiveness if their authority is challenged.⁵⁰⁸ For them, prosecutors are ruthless people who take delight in torturing others and care only about winning.⁵⁰⁹ Prosecutors are also too afraid of public opinion, too unseasoned to challenge their superiors, hiding behind the skirts of office policy rather than daring to use judgment.⁵¹⁰ In short, prosecutors are cowardly.⁵¹¹ Most prosecutors are young and, in this view, naïve, it being easier to believe police stories than to challenge them.⁵¹² Likewise, some defenders see prosecutors as lazy, unwilling to do the investigation to revisit the guilt, or at least the degree of culpability, suggested by the police or alleged by earlier prosecutors.⁵¹³ Yet, prosecutors have enormous power⁵¹⁴—power they are often all too willing to exercise to threaten vulnerable defendants into waiving rights or

503. See *supra* text accompanying notes 391-401 (discussing “testilying” in Fourth Amendment suppression motions and defender efforts to impeach officers); PODGOR ET AL., *MASTERING CRIMINAL LAW*, *supra* note 323, at 309-12 (discussing the elements of the affirmative defense of entrapment, including showing police inducement of an otherwise innocent person into committing a crime).

504. See WEISS, *supra* note 466, at 192-93 (discussing defenders who view police lies or misconduct as sometimes stemming from forgetfulness, sloppy record-keeping, simple human weakness, shoddy practices, and difficulty in making legal judgments).

505. Cf. Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1291-92 (2000) (explaining why indifference to another’s plight can be morally reprehensible); Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381 (2005) (explaining why negligence can indicate indifference, a morally reprehensible state of mind sometimes meriting even criminal punishment).

506. Randy Bellows, *Notes of a Public Defender*, in PHILIP B. HEYMAN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 69, 97 (1988).

507. See WEISS, *supra* note 466, at 198.

508. See *id.* at 199 (quoting a defender viewing prosecutors as “feeling that they’re over there and really going after people with this blind will to do them harm”).

509. See *id.* at 198 (“Because [the prosecutors] feel they *must* win the case and will do anything to win . . .”); *id.* at 200 (“It almost comes across as a [prosecutor] delight in torturing other people.”).

510. See *id.* at 199, 216-27.

511. See *id.* at 222 (“A lot of them are scared to do the right thing. I have very little respect for that . . .”).

512. See *id.* at 224-29.

513. See *id.* at 229.

514. See *id.* at 207.

accepting harsh plea deals.⁵¹⁵ These prosecutors lack compassion, seeing most defendants as but faceless perps to be cleansed from the earth.⁵¹⁶ They thus see defendants as categories: murderer, rapist, thief, not as individuals, not as real human beings.⁵¹⁷ Moreover, prosecutors are simply insensitive to the situational factors that may prompt an otherwise good, or at least not reprehensible, person to do wrong.⁵¹⁸ The combination of prosecutorial incompetence, cowardice, and insensitivity may have the consequence of the hiding of exculpatory material, the overcharging of less culpable offenders, the cutting of plea deals doing more social harm than good.⁵¹⁹

To the extent that there is any truth in this picture, active defense can work to remedy prosecutorial wrongs and deter future ones. *Brady* motions to order prosecutors to produce exculpatory evidence, motions for sanctions against prosecutors who hide information to which the defendant is entitled, aggressive discovery, and internal appeals to line prosecutors' more senior supervisors can sometimes succeed.⁵²⁰ Revelation of serious wrongdoing can also taint a judge's attitude toward a prosecutor, soften a prosecutor's previously harsh stance as a way of escaping further humiliation, and prompt office supervisors toward better prosecutor training.⁵²¹

The sheer power of the state and the risk of its abuses has led some commentators to agitate for a particularly oppositional form of lawyering.⁵²² Law professor and former Assistant Public Defender Abbe Smith,⁵²³ along

515. See Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations: "Voluntary" Waivers of Constitutional Rights*, 23 CRIM. JUST. 14, 25 (2008).

516. See WEISS, *supra* note 466, at 201 (discussing prosecutors' inability to see defendants as human beings); *id.* at 204 ("And the prosecutor's office says poverty exists because the people who are poor choose to be that way. And should be punished for it.")

517. See *id.* at 218; Taslitz, *Myself Alone*, *supra* note 266, at 18 (discussing how assembly-line criminal justice practices de-individualize justice).

518. See WEISS, *supra* note 466, at 202-03, 205.

519. See *id.* at 214-16; ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 19-60, 130-32 (2007) (offering a detailed analysis of these issues by a former Executive Director of the District of Columbia Public Defender Service); Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1961, 1961 (2010) (collecting articles analyzing the scope and effectiveness of *Brady* disclosure obligations and discussing *Brady* problems with prosecutors).

520. See Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 438-39, 443-50 (2010) (discussing currently available *Brady*-violation remedies and their flaws, proposals for improved internal prosecutor office remedies for such violations, and proposing a consciousness of case-weakness instruction as a new remedy for intentional *Brady* violations).

521. See John R. Emshwiller, *Suit Slams Prosecutors over Evidence*, WALL. ST. J. (July 10, 2012, 7:27 PM), <http://online.wsj.com/article/SB10001424052702303292204577519133131619136.html>.

522. See Stanley A. Goldman, *Foreward: First Thing We Do, Let's Kill All the Defense Lawyers*, 30 LOY. L.A. L. REV. 1, 2 (1996) (arguing that criminal defense lawyers are "bulwarks against the possible overreaching of a sometimes too eager and powerful government").

523. See Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 83 (2003) [hereinafter Smith, *Difference It Makes*]; Charles J. Ogletree, Jr., *Beyond*

with her intellectual forbear, Professor Monroe Freedman,⁵²⁴ thus, willingly embrace an ethic of what some have called “superaggressive lawyering.”⁵²⁵ Smith, thus, apparently defends such practices as delaying a case to frustrate government witnesses, arguing inferences known to be false, and seeking to embarrass victims.⁵²⁶ Smith rejects arguments that the state and the defense are evenly matched and that criminal cases are not so different from civil ones.⁵²⁷ Smith focuses on the many ways that the State has greater resources than the defense, even if it does not always seem that way to prosecutors.⁵²⁸ Concludes Smith, “In terms of power, prosecutors wield both demonstrable procedural and psychological advantages. The outcomes tell it all: defendants are rarely acquitted.”⁵²⁹ For Smith, it is, thus, not sufficient to keep prosecutors and police honest.⁵³⁰ More aggressive tactics are needed because the state will never give the defendant a fair shake, and simple law enforcement integrity is insufficient to balance the scales.⁵³¹

Justification: Seeking Motivations to Sustain Public Defenders, 106 HARV. L. REV. 1239, 1242 (1993) (discussing this view of the defense lawyer as zealous advocate).

524. See Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1717 (2002); Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 9 (2006) (“Freedman’s criminal defense lawyer is unabashedly adversarial because there is no other avenue that will achieve her necessary ends.”).

525. Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 167, 177 (1996).

526. See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 524 (1999) (“The defense lawyer who is guided by fidelity will do all sorts of things to protect the client from harm, including employing various strategies to produce delay, manipulating jury selection to obtain the most favorable jury, using evidentiary rules to prevent the admission at trial of information damaging to the client, rigorously cross-examining a truthful or sympathetic witness, and attempting throughout a trial to move the jury and stir its passions on the client’s behalf.”). Smith and Montross continue, declaring that

[t]hose who attack the ethics of criminal defense lawyers in this regard often decry three practices: (1) rigorously cross-examining or impeaching a witness the lawyer knows to be truthful, (2) knowingly presenting perjured testimony by the defendant or defense witnesses, and (3) forcefully arguing something the lawyer knows is untrue.

Monroe Freedman has consistently—and, in our mind, effectively—argued that these practices are not unethical.

Id. at 525; see also *id.* at 529 (“Sometimes it is necessary to ‘go after’ the victim aggressively—to destroy the victim’s credibility or even reputation—when the alternative is that the client will be hurt. Here again, fidelity would permit the attack on a complainant; fidelity to client would trump justice toward an alleged victim.”).

527. See Smith, *Difference It Makes*, *supra* note 523, at 96-97.

528. See *id.*

529. *Id.* at 111.

530. *Id.* at 97.

531. See generally Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995) (explaining the benefits of aggressive lawyering).

C. Protecting the Innocent

Most defenders likely believe that most of their clients are guilty.⁵³² But they certainly also believe that *some* of their clients are factually innocent—meaning they did not commit the criminal act at all—even if defenders are uncertain which of their clients fit that bill.⁵³³ Moreover, defenders embrace a lawyerly idea of guilt: guilt is what can be proven beyond a reasonable doubt.⁵³⁴ If the state cannot meet that burden, the client is legally “not guilty” and cannot, and morally should not, be subjected to the state’s ultimate power of criminal punishment.⁵³⁵ Furthermore, by keeping the state on its toes—insisting that the state prove guilt by trustworthy methods⁵³⁶—defenders ensure that society can justifiably have confidence in a conviction, even if defenders of course prefer to avoid any conviction whatsoever.⁵³⁷ The many instances of wrongful convictions of the factually innocent buttress the need for defense counsel to serve this social role.⁵³⁸

When defenders succeed on motions to suppress eyewitness identifications as made via unduly suggestive procedures—if such procedures were indeed used⁵³⁹—they help to minimize the risk of wrongful conviction.⁵⁴⁰ Likewise, when they successfully exclude a coerced confession, they help to prevent a mistaken verdict of guilty.⁵⁴¹ Even if we cannot say with certainty that poor procedures resulted in fingering an innocent man—the guilty might, for example, be identified by lucky guesses—a nation that values freedom should be uncomfortable with

532. See Smith, *Difference It Makes*, *supra* note 523, at 116 (“The reality is that most criminal defendants are guilty of something, if not the precise charges they face.”).

533. See WEISS, *supra* note 466, at 182 (“I’d say most people are guilty but . . . maybe 10 to 20% . . . are not guilty of anything, and then I’d say there’s more like 30 or 40% who are not guilty as charged, but are guilty of something less and are overcharged.” (quoting a defender)).

534. See EMMELMAN, *supra* note 473, at 43-44.

535. See *id.* at 47-52 (explaining how defenders assess not-guilty likelihood); WEISS, *supra* note 466, at 246-53 (discussing defenders’ views of judges as political animals too ready to ignore the presumption of innocence); GIVELBER & FARRELL, *supra* note 347, at 61-63 (discussing empirical data concerning factors raising the likelihood of a not-guilty verdict).

536. See EMMELMAN, *supra* note 473, at 43-44 (discussing defenders’ own concept of sufficiency of evidence of guilt as being based on “untainted, unbiased information”).

537. See generally BRIAN FORST, *ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES* 3, 66-133 (2004) (discussing ways in which police and prosecutor behavior can lead to “errors of justice,” “errors in the interpretation, procedure, or execution of the law—typically, errors that violate due process, often resulting in the conviction of innocent people”).

538. See generally BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011) (documenting and analyzing the scope and causes of wrongful convictions).

539. See TASLITZ ET AL., *CONSTITUTIONAL CRIMINAL PROCEDURE*, *supra* note 395, at 227-30, 910-12 (discussing this ground for the suppression of flawed eyewitness identification evidence).

540. See FORST, *supra* note 537, at 88-89.

541. See *id.* at 90.

procedures raising undue risks of error.⁵⁴² Research firmly establishes that juries give enormous weight to both eyewitness identifications and confessions.⁵⁴³ Jurors are simply reluctant to believe that a witness was wrong or that an innocent man confessed.⁵⁴⁴ If suppression motions fail, defenders can vigorously cross-examine police, produce lay counterwitnesses, turn to expert testimony, or request cautionary jury instructions to help jurors give the evidence its appropriate weight.⁵⁴⁵ Defense counsel's efforts press to make the system better, whether or not that is counsel's goal. This pressure can unsettle the status quo toleration of questionable procedures for determining guilt⁵⁴⁶ and the status quo assumption that a person who is arrested is almost by definition guilty.⁵⁴⁷

But guilt is a complex notion. A defendant might be guilty of a crime, but not of a crime of the severity of the one charged. In fact, defenders often accuse prosecutors of "overcharging"—proceeding on more serious charges than the evidence, or at least than "justice," supports.⁵⁴⁸ Seeking to dismiss the highest offenses can help to calibrate guilt to the proper

542. See, e.g., Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. JUST. 36, 40-45 (2003) (discussing the likelihood of a certain percentage of correct eyewitness identifications of the culprit in laboratory experiments as merely being the result of lucky guessing).

543. NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 194 (2007) ("Judges and legal scholars have recognized . . . for over a century . . . that jurors frequently accord eyewitness identification evidence too much weight."); RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 266 (2008) ("Juries . . . allow the power of confession evidence to bias their judgments, and they tend to selectively ignore and discount evidence of innocence in false confession cases. . . ; consequently, 'confessions appear to be such powerful evidence of guilt that they almost automatically trigger tunnel vision and confirmation bias among the criminal justice officials and jurors who must evaluate confessions, blinding them to the possibility of error.'").

544. See JAMES MICHAEL LAMPINEN ET AL., *THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION* 237 (2012) ("[L]aboratory research has shown that participant jurors are insensitive to the factors that affect eyewitness memory and show an overreliance on factors that are not always strongly predictive of accuracy."); VIDMAR & HANS, *supra* note 543, at 193 ("It may seem difficult to believe that innocent defendants would confess to something they did not do."); LEO, *supra* note 543, at 3 ("Most people—even many police and criminal justice officials— . . . do not understand how interrogation can distort a suspect's perceptions and lead him to make incriminating statements against his self-interest.").

545. See LAMPINEN ET AL., *supra* note 544, at 248-54 (cataloguing such safeguards in the eyewitness identification context, though concluding that expert testimony is the most likely one to be effective). Defenders, especially those informed about the relevant science, can also help to improve the fairness of identification procedures in the first place, even though the defender's goal in doing so is, of course, the hope that no identification will occur at all. See Jennifer L. Devenport et al., *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification*, in *EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION* 51, 53 (Brian L. Cutler ed., 2009).

546. See *supra* text accompanying notes 391-94.

547. WEISS, *supra* note 466, at 247 ("Several [defenders] argue that in practice, judges often fail to afford defendants the presumption of innocence and assume defendants are guilty."); see *supra* text accompanying notes 492-95.

548. See WEISS, *supra* note 466, at 215-16.

offense.⁵⁴⁹ Yes, the defendant is guilty of a crime, but he is innocent of the highest crime sought.⁵⁵⁰

Guilt, as noted earlier, can also turn on value judgments, particularly in connection with proving mental states and their “reasonableness.”⁵⁵¹ A client who admits to shooting the victim may have done so in self-defense or by accident.⁵⁵² A client admitting both the act and the mental state, with the mental state being an element of the crime, may have an affirmative defense of legal insanity, duress, or entrapment.⁵⁵³ Vigorous investigation to uncover evidence to support these defenses, plus careful witness preparation and organization of related legal arguments, can lead to a deserved not guilty verdict—one permitted by the legislation drafted by our elected representatives and consistent with the proper purposes of criminal punishment.⁵⁵⁴

D. Combatting Racism

Many defenders see the criminal justice system as deeply racist.⁵⁵⁵ Some of that racism may be overt, but much of it may be unconscious.⁵⁵⁶ But it persists. Racism may manifest itself in police disproportionately arresting minorities,⁵⁵⁷ in minorities being more easily convicted,⁵⁵⁸ or in

549. *See id.*

550. *See id.*

551. *See supra* text accompanying notes 320-24.

552. *See* PODGOR ET AL., CRIMINAL LAW, *supra* note 320, at 316-22 (recounting elements of self-defense).

553. *See id.* at 309-12, 356-57, 362-65 (recounting the elements of these defenses).

554. *See* GIVELBER & FARRELL, *supra* note 347, at 43-45 (discussing the factors increasing the chances of acquittal); EMMELMAN, *supra* note 473, at 73-76 (discussing investigation and witness preparation).

555. *See* WEISS, *supra* note 466, at 159-61, 205-06 (“A number of public defenders are mistrustful because they regard the criminal justice system as racist in structure and intent.”); EISENSTEIN & JACOB, *supra* note 471, at 156 (noting that the Detroit Defender’s Association believed “that many black defendants were ill-treated by society in general and the legal process in particular . . . formed the core of the office view. Underlying most components of the defender’s viewpoint was the belief that widespread and deep-seated racial prejudice shaped much of what happened.”).

556. *See* WEISS, *supra* note 466, at 205-06. *See generally* Taslitz, *Racial Blindsight*, *supra* note 329 (explaining how criminal justice system actors can be consciously blind to their own racism).

557. *See* John David Reitzel, *Race, Crime, and Policing: The Impact of Law Enforcement on Persistent Race-Differentiated Arrest Rate*, in DISPROPORTIONATE MINORITY CONTACT, *supra* note 82, at 159, 170.

558. *See, e.g.*, SHAUN L. GABBIDON & HELEN TAYLOR GREENE, CRIMINOLOGICAL PERSPECTIVES ON RACE AND CRIME 154-55 (2005) (arguing that whites do better in the plea-bargaining process than blacks); NATIONAL CRIMINAL JUSTICE COMMISSION, THE REAL WAR ON CRIME 112 (Steven R. Donziger ed., 1996) (discussing a study of almost 700,000 criminal cases in California over nearly a decade concluding that “at virtually every stage of pretrial plea bargaining whites were more successful than minorities. All else being equal, whites did better than African-Americans and Hispanics at getting charges dropped, getting cases dismissed, avoiding harsher punishment, avoiding extra charges, and having their records wiped clean.”).

minorities receiving harsher sentences than whites.⁵⁵⁹ But even when minority group members are convicted and “properly” punished within the law, the law itself may be unduly harsh, subjecting minor offenders to criminal convictions and the resulting stigma, reducing job opportunities and limiting freedom, or imposing sentences so long as to be contrary to what truly reasoned, neutral lawmaking would require.⁵⁶⁰ Because these unjust laws disproportionately ensnare so many members of minority communities,⁵⁶¹ which are often racially segregated,⁵⁶² the effect can hobble those communities by destroying formerly intact families, robbing children of fathers, and robbing young men of the chance to grow out of their youthful foolishness and give back to their communities.⁵⁶³ In this way, the system hurts innocent minorities. Moreover, it fosters a contamination effect that makes it harder for middle class, or struggling working class, minority group members to attain the status or opportunities they deserve because they become unconsciously associated with a dangerous group.⁵⁶⁴

There are numerous ways defense lawyers can fight the racial status quo. They can, under *Batson*, challenge a prosecutor’s use of peremptory challenges to exclude racial minorities from a jury.⁵⁶⁵ Defenders can also proffer evidence of police racial bias to attack officer credibility,⁵⁶⁶ or they can try to push the envelope on constitutional or other law to suppress evidence on grounds of racial profiling.⁵⁶⁷ Additionally, defenders might

559. See William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 352 (2005) (concluding that sentencing harshness is linked to the extent of the defendant’s “Afrocentric features” as distinct from skin color).

560. See WEISS, *supra* note 466, at 213-15, 218, 221, 253, 259-60, 266-67, 269 (summarizing views of defenders along these lines).

561. See MICHAEL H. TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 4-5, 104-15 (1995) (arguing that harsh criminal justice policies starting in the 1980s, especially the War on Drugs, permitted a dramatic and unjustified increase in the racially disparate effect of the criminal justice system, particularly on African-Americans and their communities).

562. See Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47, 67 (2007).

563. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 470-75 (2010).

564. See Reitzel, *supra* note 557, at 169-70 (noting that media coverage of crime stories, racial politics, and the “cultural glorification of inner city urban violence” has “led to the legitimization and even reification of negative stereotypes about African Americans” and casts suspicion on individual members of that group by virtue of their skin color); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 64-72 (2007) (discussing some of the racially skewed ill effects of having a criminal record, primarily in the employment context).

565. See *Batson v. Kentucky*, 476 U.S. 79, 100 (1986).

566. See Taslitz, *An African-American Sense of Fact*, *supra* note 318, at 219.

567. See *supra* text accompanying notes 469-80 (discussing pushing the envelope); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2324-25 (2002) [hereinafter Taslitz, *Stories of Fourth Amendment Disrespect*] (discussing ways to do so in the context of racial profiling); Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, in *IDEOLOGY, PSYCHOLOGY, AND LAW*, *supra* note 26, at 81, 102-03 (discussing jury selection as a way to combat system justification).

call experts on the “own-race bias”—the greater likelihood of witnesses making errors when their identification is of an alleged offender of a different race.⁵⁶⁸ At least in North Carolina, defense counsel can challenge death sentences, or seek to prevent them in the first place, if there is evidence of a local history of racially discriminatory capital-punishment imposition.⁵⁶⁹ Defenders may even see themselves as protecting public safety by trying to cabin the sort of resistance against unbearable oppression that can spark chaos, which ultimately hurts everyone. Police use of excessive force against young black men, as one defender explained, is an apt example:

And if it's another young black kid, unarmed, getting killed, I think [the riots that] happened in Cincinnati [after a police shooting of an unarmed African-American] could happen here. I think it could happen in just about any city at any time. It happened in Cincinnati and I think it could happen here.⁵⁷⁰

Such efforts to combat the dominant racial order should not be seen as serving primarily a palliative function, however, of keeping oppressed racial groups under control. Defenders go further in their dreams, seeing every act of exposure of racial abuse as one small chink in the armor protecting a racially unjust status quo.⁵⁷¹ Violence helps no one, but protest, challenge, and verbal and legal combat just might.

E. Challenging Status Disadvantage Generally

The poor, especially poor racial minorities, are at the bottom of the social status ladder.⁵⁷² Low status can be psychologically painful and can make it harder to gain access to material and other resources.⁵⁷³ Defenders challenge this status-relations status quo in several ways.

568. See LAMPINEN ET AL., *supra* note 544, at 96-108 (summarizing the research on own-race bias).

569. See Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2031 (2010). This task is harder to accomplish, however, under the recent amendments to the Act. *Id.*

570. WEISS, *supra* note 466, at 186; see also Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 L. & CONTEMP. PROBS. 221, 239-48 (2003) (discussing the Cincinnati riots and their causes).

571. Cf. Rebecca Marcus, Note, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 220 (1994) (arguing that racism in the criminal justice system is necessarily worsened if public defenders are underfunded).

572. Jacqueline Johnson, *Mass Incarceration: A Contemporary Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301, 308 (2012).

573. See TASLITZ, RAPE AND THE COURTROOM, *supra* note 9, at 112.

First, defenders can treat their clients as human beings rather than as monsters.⁵⁷⁴ That can be hard to do, given that many clients are distrustful of their lawyers, rude to them, and have, indeed, done some very bad things.⁵⁷⁵ Likewise, clients may simply not be helpful to their own cause.⁵⁷⁶ Nevertheless, defenders can treat their clients with dignity by attentively listening to their stories, displaying empathy (such as by recognizing their fear or anger), visiting them in jail, answering their phone calls, and keeping in touch with their family members.⁵⁷⁷ Defenders try not to reduce clients to one (or even many) bad acts, but to treat them as complex, multifaceted human beings. “I am able to say that [your crime was] a really yucky thing to do, but I can look into your eyes and say you’re a human being and you should be treated as a human being,” declares one defender.⁵⁷⁸ Moreover, lawyers can show their clients respect by trying to help them so that “it’s not just this pure intellectual defending the Constitution and all that. Because I do it for clients. It’s indigent clients. It’s good to help people get out of a jam if you can.”⁵⁷⁹

Second, the poor have relatively little power, often including lacking the power of knowledge.⁵⁸⁰ Explaining how the system works, what are its strengths and weaknesses, what the law is and its logic, and how this knowledge can help the client at least gives clients the power of more informed choice and of exercising the rights that the system purports to grant them.⁵⁸¹ Thus, this defender explains that he likes

empowering people who don’t know what their rights are. Because that’s what we, as attorneys, do. We give them choices that they don’t know exist. We try to help them understand the situation that they’re in. Or, we try to help them understand the law, and why society says you shouldn’t do these things. But, a lot of people just don’t understand.⁵⁸²

Says another defender, “There are rules and regulations that the average person doesn’t know. . . . [They] come through the system . . . , and

574. Compare WEISS, *supra* note 466, at 117-26 (noting defenders say they make every effort to do so), with Kennedy, *supra* note 118, at 858 (describing a belief that offenders must be thought of as evil).

575. See WEISS, *supra* note 466, at 24-25, 120-21.

576. See *id.* at 27 (“[D]efendants themselves often . . . concoct stories that reasonably thorough investigation can expose as partially or fully contrived.”).

577. See *id.* at 123.

578. *Id.*

579. *Id.* at 118.

580. See TASLITZ, RAPE AND THE COURTROOM, *supra* note 9, at 112 (noting that low-status persons lack access to power resources); cf. Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 39 TEX. TECH L. REV. 1383, 1387-88 (2007) (making the case that accurate knowledge is critical to empowering ordinary citizens facing potential invasions of their Fourth Amendment rights).

581. See WEISS, *supra* note 466, at 128.

582. *Id.*

it's the most frightening thing in the world. . . . Someone has to help them navigate through the system and I'm glad I can do that."⁵⁸³

Another way lawyers can empower clients is by helping them to tell their stories.⁵⁸⁴ Uneducated clients having mitigating or exculpatory stories may not be articulate or able to speak in the way that effectively conveys their tale to others.⁵⁸⁵ The clients may be used to authority figures not hearing the clients' pain, not understanding their situation.⁵⁸⁶ Sometimes telling a story requires vigorous cross-examination or calling witnesses other than the defendant.⁵⁸⁷ Other times, if there are, for example, no downside (or worthwhile downside) risks—such as may stem from the client's having a criminal record—the client may himself take the stand with the lawyer's aid in making the tale intelligible to the jury.⁵⁸⁸ Defenders can try to minimize the credibility handicap their clients will face because of their dress and demeanor.⁵⁸⁹ They can counsel them to come to court in a suit (if they have one), to be clean-shaven and generally well

583. *Id.*

584. See EMMELMAN, *supra* note 473, at 71, 87-93.

585. See STEVEN LUBET, NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON'T, CAN'T, AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH 11-25 (2001) (illustrating, through "Biff's tale," how a lawyer helps a client to craft a story that better conveys the client's tale than would the client's lawyer-unaided testimony); Luke T. Dokla, *Section 3E1.1 Contrition and Fifth Amendment Incrimination: Is There an Iron Fist Beneath the Sentencing Guidelines' Velvet Glove?*, 65 ST. JOHN'S L. REV. 1077, 1103 n.106 (1991) ("Traditionally, the Supreme Court has been zealous in protecting the rights of poor and uneducated criminal defendants because otherwise they would be defenseless against the majoritarian processes of government.").

586. See LOIS G. FORER, "NO ONE WILL LISSEN": HOW OUR LEGAL SYSTEM BRUTALIZES THE YOUTHFUL POOR 12 (1970) (recounting a conversation in which the author, in dealing with innocent black children, asked them why they had not explained what happened, to which one child replied, "No one will listen"); Mary Maxwell Thomas, *The African American Male: Communication Gap Converts Justice into "Just Us" System*, 13 HARV. BLACKLETTER L.J. 1, 15-16 (1997) (arguing that language and experiential differences make it hard for poor racial minorities to communicate effectively with authority figures, particularly in the criminal justice system).

587. See EMMELMAN, *supra* note 473, at 71-77 (discussing defender methods for preparing for storytelling at trial); Jennifer Brown, *Cross-Examining the Difficult Witness: Tips for Women Defenders Navigating Gender Dynamics in the Courtroom*, 35 CHAMPION 20, 20 (2011) ("Cross-examination is often the most well-honed, trusted, and useful tool for criminal defense lawyers. As well as forwarding the theory of the case already established in voir dire and opening statements, there are times that cross-examination can serve as a game changer.").

588. James Farragher Campbell, *Ethical Concerns in Grooming the Criminal Defendant for the Witness Stand*, 36 HOFSTRA L. REV. 265, 267-69 (2007) (suggesting ethical ways to improve a criminal defendant's testimony in preparing him for trial); Edward Roslak, Comment, *Game Over: A Proposal to Reform Federal Rule of Evidence 609*, 39 SETON HALL L. REV. 695, 695 (2009) (discussing the dilemma facing a criminal defendant considering testifying, but who may thereby open himself up to cross-examination about his prior criminal record).

589. See WICE, *supra* note 485, at 136-38 (discussing client communication and demeanor problems and other ways clients can be their own worst enemy); Campbell, *supra* note 588, at 273-74 (discussing importance of efforts to improve a criminal defendant's demeanor when testifying at trial); EMMELMAN, *supra* note 473, at 25-26 (noting credibility problems facing poor criminal defendants).

kempt, and to be courteous when spoken to by others.⁵⁹⁰ They can do what they can to help to counteract the client's looking dangerous in the jury's eyes just because of his race or class.

In some instances, the defendant's story is itself an overtly political one.⁵⁹¹ That story may be told to a judge in a suppression hearing or to a jury at trial.⁵⁹² The story may be told by the defendant or by his lawyer as his surrogate. For example, a defendant may feel the need to protest police abuses.⁵⁹³ The lawyer's aid in simply making real the client's right to testify,⁵⁹⁴ or in articulating for the client the bases for objection to how he was treated,⁵⁹⁵ can permit expression of an essentially political protest via avenues the client has otherwise lacked.⁵⁹⁶ In one lawyer's words, concerning in particular the need to challenge police abuses,

Well, it's empowering them because it gives them a voice when they don't have one. It gives them a voice in front of people who have a great deal of power over them. It's almost like it allows them an avenue for resisting what's being done to them, especially with regard to the drug crimes or crimes where the cops are basically stopping people on the street and searching them and then worrying about what the probable cause will be later.⁵⁹⁷

Third, the poor already have suffered so much pain by the time they enter the system.⁵⁹⁸ The state just wants to enhance that pain.⁵⁹⁹ Defenders

590. Cf. EMMELMAN, *supra* note 473, at 23-25, 46-47, 63-64, 68 (discussing how class and gender biases affect defendant credibility because of most defendants' different demeanor and appearance from what middle class values ordinarily dictate).

591. Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 L. & CONTEMP. PROBS. 93, 128 (2008) (illustrating the use of the Duke lacrosse case to advance "more-general political agendas").

592. See TASLITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE, *supra* note 395, at 227-30, 910-12 (explaining suppression hearing procedures); HENNING ET AL., ADJUDICATORY STAGE, *supra* note 396, at 229-54 (summarizing trial procedures).

593. See generally Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 567 (telling historical tales with political messages about the cry for respect voiced by oppressed groups but implicating constitutional issues of search and seizure, including racial profiling).

594. See HENNING ET AL., ADJUDICATORY STAGE, *supra* note 396, at 347-50 (concerning the constitutional right of a criminal defendant to testify).

595. Cf. LUBET, *supra* note 585, at 11-25 (illustrating how a lawyer's preparation of a client can improve the client's voice when testifying at trial).

596. Cf. TASLITZ, RAPE AND THE COURTROOM, *supra* note 9, at 134-45 (discussing how a trial can be an opportunity for the expression of group voices on essentially political matters).

597. See WEISS, *supra* note 466, at 194-95.

598. See generally DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (addressing class-based inconsistencies in the criminal justice system).

599. See Taslitz, *Tinkerbell*, *supra* note 277, at 426-31 (noting that criminal trials cause suffering and that criminal excuses are justified by pleas for compassion—the desire to reduce or eliminate the degree of that suffering).

try to save their clients from suffering or reduce their extra suffering as much as possible. An acquittal reduces that pain, leaving the involved defender delighted because “you . . . saved someone. . . . You get close to the clients, you know their families. . . . And if it works out . . . you walk out of there, and he’s walking with you, [and] that’s the greatest feeling.”⁶⁰⁰ To a lesser extent, similar delight should follow a conviction involving only probation or a short jail sentence when a longer one’s possibility loomed large.⁶⁰¹

Fourth, defenders may seek to equalize the material disadvantages stemming from low social status.⁶⁰² In effect, the defenders become social workers.⁶⁰³ They help their clients get help in earning a high school graduate-equivalency diploma, they get their clients into drug rehabilitation programs, or they help them to get jobs.⁶⁰⁴ These efforts of course help clients get some support from prosecutors interested in rehabilitation and may result in lesser sentences upon conviction.⁶⁰⁵ But if they succeed, these efforts can prevent recidivism and offer clients more of a real opportunity to climb the social ladder, or at least to try to do so with fewer handicaps.⁶⁰⁶ Relatedly, defenders may at least implicitly understand that lower status means relative political disempowerment, thus leading to criminal laws that unfairly target or affect society’s most vulnerable.⁶⁰⁷ Drug laws aimed at users, laws that in application vastly disproportionately affect the poor and racial minorities, are an example.⁶⁰⁸ Defenders are offended by the laws themselves as unjust, but also by law enforcement’s unfair application of those laws.⁶⁰⁹ Acquittals of the factually guilty in such cases thus strike a

600. See WEISS, *supra* note 466, at 129.

601. Cf. Taslitz, *Tinkerbell*, *supra* note 277, at 426-30 (noting that compassion can serve to mitigate rather than completely end suffering caused by criminal punishment or its prospect).

602. See TASLITZ, *RAPE AND THE COURTROOM*, *supra* note 9, at 112 (discussing those material disadvantages).

603. See WEISS, *supra* note 466, at 129-30; Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 405-06 (2001) (giving examples of public defenders in the role of social workers by using problem-solving approaches to assist criminal defendants).

604. Clarke, *supra* note 603, at 407 n.19 (explaining that public defenders address personal aspects of clients’ lives, such as drug use or mental health issues, to keep clients from recidivating).

605. Federal Public Defender’s Office, *Federal Sentencing Resource Manual: Using Studies & Statistics to Redefine the Purposes of Sentencing* (Sept. 2008), http://www.fd.org/docs/select-topics---sentencing/Fed_Def_Resource_Manual.pdf.

606. See WEISS, *supra* note 466, at 130-31 (recounting defenders’ hopes that they can aid these good outcomes).

607. See *id.* at 171-72, 174.

608. See *id.* at 171-72, 257; TONRY, *supra* note 561, at 104-15 (discussing racial biases built into the current drug laws and their system of enforcement).

609. See WEISS, *supra* note 466, at 172.

blow against injustice wreaked on the weak by a system stacked against them.⁶¹⁰

Finally, defenders can work to overcome observers', particularly judges' and jurors', views of defendants as mere categories: stereotypes rather than individuals with unique life situations.⁶¹¹ The tendency of criminal justice system actors in a world of assembly-line justice to treat those accused stereotypically is well-documented and is amplified by status quo bias.⁶¹² The defense lawyer's job is, in part, to humanize his client, to point out his good side, and to ask that he be judged as an individual.⁶¹³ So portraying the client might help in encouraging a desirable plea deal from a prosecutor otherwise not so inclined.⁶¹⁴ It can help to overcome a jury's willingness to view the offender as yet another dangerous young black man.⁶¹⁵ Individualizing the client can particularly help at sentencing.⁶¹⁶ Such individualization can justify departing from sentencing guidelines, can convince a sentencing judge that the offender will not likely recidivate, and can prod a capital jury to exercise a modicum of compassion toward the accused.⁶¹⁷ But apart from these practical benefits, seeing a person as a full, multifaceted individual in unique circumstances shows him the respect that all people crave, recognition of the sense that I am "MYSELF, MYSELF alone."⁶¹⁸

F. Wrapping Up

That defenders often see themselves as combatants against the status quo, and that all criminal defense lawyers are amply able to serve that role, does not, of course, mean that they do so in practice. To the contrary, an ample literature documents the failings of underpaid defense counsel, in an under-resourced world, to do what their job requires.⁶¹⁹ I need not repeat

610. See *id.* at 175.

611. See Taslitz, *Myself Alone*, *supra* note 266, at 18-20.

612. See *id.* (discussing the criminal justice system); *supra* Part IV.

613. See WEISS, *supra* note 466, at 218.

614. See *id.*; Bradley A. MacLean, *Effective Capital Defense Representation and the Difficult Client*, 76 TENN. L. REV. 661, 666 (2009); 31 HOFSTRA L. REV. 913, 1021 (2003) (publishing ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003)).

615. See *supra* Part II.A.1.

616. See WEISS, *supra* note 466, at 257 (discussing defender frustration when judges will not individualize punishment).

617. See Josephine Ross, "He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt, 65 U. PITT. L. REV. 227, 274 (2004).

618. See Taslitz, *Myself Alone*, *supra* note 266, at 3 (quoting WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 29-30 (1978)); EMMELMAN, *supra* note 473, at 11-13 (discussing prosecutor personalities); WEISS, *supra* note 466, at 145-61 (discussing prosecutors' general rebellion against the judicial system).

619. See Joel Jay Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1120 (1973).

that literature here. I have sought only to document the need for defense counsel to play this important social role. That they too often fail to do so requires remedies, not despair. I will briefly outline a few potential remedies. But, I want to be clear that I am writing about what defense counsel's social role *is*, not whether that role is being well played in most cases. Indeed, some writers argue that many defense attorneys are so overburdened, incompetent, and unmotivated that they are accomplices to the system's ills rather than opponents of them.⁶²⁰ These defense lawyers become part of non-adversarial courtroom "working groups" that keep the system working smoothly without doing anything to change it.⁶²¹ The right to counsel, thus, becomes a form of hypocrisy—the trappings of adversarial fairness without the substance. To the extent that this is often so, it is at least not always so. One writer has in particular identified the District of Columbia's Public Defender Service as a properly resourced and aggressive model of sound defense lawyering to be emulated by other jurisdictions.⁶²² It is possible to do things right. It is the political will that is too often lacking.⁶²³

VI. CONCLUSION

My primary goals in this Article have been first, to establish that there is a status quo bias that benefits the state while simultaneously hamstringing the performance of police and prosecutors, and second, that the right to the effective assistance of counsel should be re-envisioned as an important part of providing a counterweight to this system-justifying bias.⁶²⁴ It would take at least another Article to defend the reforms implied by this re-envisioning. But, I do here want briefly to mention some potential reforms to highlight the importance of this project.

First, many of the limitations on the scope of the constitutional right to the assistance of counsel seem misguided. For example, there is no right to counsel at a photo spread.⁶²⁵ Yet photo spreads are the dominant method

620. See Sheila Martin Berry, "Bad Lawyering": How Defense Attorneys Help Convict the Innocent, 30 N. KY. L. REV. 487, 491 (2003).

621. Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 267 n.5 (1987) (noting the "irrepressible tendency toward cooperation among members of the courtroom work group," allowing them to serve their "mutual interest in avoiding conflict, reducing uncertainty and maintaining group cohesion"); see also EISENSTEIN & JACOB, *supra* note 471, at 20 (discussing and defining the courtroom work group).

622. See Ogletree, *supra* note 523, at 1294.

623. See generally Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123 (2004) (explaining public defenders' resistance to change in lawyering).

624. See *supra* Parts I.A-B, IV.A.7.

625. See TASLITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE, *supra* note 395, at 907-09.

used today for eyewitness identifications.⁶²⁶ Similarly, the right to counsel does not apply to live lineups if they occur before a complaint or indictment has been filed.⁶²⁷ But the status quo bias will be equally strong at any identification procedure, whether it occurs pre- or post-complaint, whether done by photo spread or other methods.⁶²⁸ Indeed, where defense counsel is not present, the witness will be alone with the police or prosecutors under circumstances in which they are seeking the bad guy. Threat triggers, such as the assailant being of a minority race, may also be present.⁶²⁹ Under such circumstances, the status quo bias logically should be quite strong. The need for counsel to counter this bias is, thus, particularly great.

Second, the psychological barrier to balanced attention to evidence created by the status quo bias suggests that defense counsel must be properly resourced and trained to be capable of countering this powerful bias.⁶³⁰ The Court's minimal standards for the constitutional competence of counsel are unlikely to create proper incentives for state and federal governments to limit defense caseloads and increase their resources adequately.⁶³¹ Governments certainly currently frequently avoid taking these actions like they were the plague.⁶³²

Third, the right to counsel should no longer be understood solely as a right of the defendant. Instead, it is also a right that benefits the system and the people as a whole by increasing the fairness of procedures and the community's confidence in them.⁶³³ The right to counsel can help to avoid wrongful convictions, protect central constitutional rights, and foster greater confidence that procedural justice has been done.⁶³⁴ Procedural justice in turn decreases disobedience to law and increases community assistance in solving crimes, bringing down the crime rate and bringing true offenders to

626. Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 459 (2012) (explaining that police have changed from using lineups, which are difficult and time intensive, to photospreads).

627. See TASILITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE, *supra* note 395, at 909-10.

628. See Garrett, *supra* note 626, at 457-63 (explaining identification procedures); *supra* text accompanying notes 242-264 (discussing the triggers for status quo bias).

629. See *supra* text accompanying notes 223-31.

630. See *supra* Part V.

631. See Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 537-38 (1988) (explaining that many public defender offices do not comply with the recommended number of caseloads). See generally Richard P. Rhodes, Jr., Note, *Strickland v. Washington: Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121 (1992) (arguing that the standard for effective counsel is overly broad and difficult to prove).

632. See Norman Lefstein, *Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate?*, 38 HASTINGS CONST. L.Q. 949, 969-70 (2011) (explaining that defenders rarely refuse new appointments).

633. Cf. Laura I. Appleman, *The Community Right to Counsel*, 17 BERKELEY J. CRIM. L. 1 (2012) (explaining that the Sixth Amendment right to counsel was historically interpreted as a collective right).

634. See Feygina & Tyler, *supra* note 111, at 351; *supra* text accompanying note 473.

justice.⁶³⁵ This, too, benefits the community. Understanding the obstacles that status-quo-bias presents to these social goods being realized by defense counsel underscores the need for a change in the system's attitude toward counsel.

Fourth, awareness of the status quo bias and how to combat it can alone improve defense counsel's performance. Defense counsel can engage in more informed jury selection, craft closing arguments to challenge the status quo bias, and be even more attentive to how issues of racial threat can undermine justice.⁶³⁶ Counsel can likewise better strategize about how to persuade judges in suppression or sentencing hearings.⁶³⁷ Knowledge is indeed power.

None of what I have said here, I want again to stress, should be taken as an assault on law enforcement's social role. It is appropriate that they usually defend the status quo. But law enforcement should itself be more attuned to how that defense can sometimes be so gripping as to bias them against making fair judgments, prodding them to seek precautions against such biases. It can also remind us, especially prosecutors, that sometimes the status quo is wise and just, but sometimes it is not. Discernment of when the latter circumstances arise surely must be one central feature of "doing justice."⁶³⁸

635. See Feygina & Tyler, *supra* note 111, at 351.

636. See *supra* text accompanying note 400.

637. See *supra* text accompanying notes 616-18.

638. See generally Ross Galin, Note, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 *FORDHAM L. REV.* 1245 (2000) (illustrating prosecutors' ethical duty to seek justice).