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“WHITES ONLY TREE,” HANGING NOOSES, NO CRIME?: LIMITING THE PROSECUTORIAL VETO FOR HATE CRIMES IN LOUISIANA AND ACROSS AMERICA

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I. INTRODUCTION

Democracy will not come / Today, this year / Nor ever /
Through compromise and fear.
I have as much right / As the other fellow has / To stand / On
my two feet / And own the land.
I tire so of hearing people say. / Let things take their course. /
Tomorrow is another day. / I do not need my freedom when I'm dead./
I cannot live on tomorrow's bread.
Freedom / Is a strong seed / Planted / In a great need.
I live here, too. / I want freedom / Just as you.¹

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I dedicate this article to my late grandfather, Seymour Hollier, an African-American native of Louisiana born in 1890, whose fearless fight for racial equality continues to inspire me.

1. LANGSTON HUGHES, *Democracy, in* THE COLLECTED WORKS OF LANGSTON HUGHES 415-16 (2001).

Langston Hughes' poem *Democracy* expresses an urgency for freedom that remains relevant today in America.² A government's respect for the rule of law and a citizen's belief in the legitimacy of the system that enforces that law is a prerequisite for freedom to genuinely exist within the democracy.³ Thus, the notion of true freedom is dependent upon a government's ability to ensure equal justice for all its citizens.⁴ The administration of criminal justice presents a stark example of the government's power to curtail one's freedom.⁵

2. "[I]n a democracy the ultimate source of all authority is the people." Melvin Urofsky, *Introduction: The Root Principles of Democracy*, U.S. DEPART. OF STATE (Nov. 2001), <http://usinfo.state.gov/publications>. In 2007, citizens from across the country marched in protest of the unequal treatment by law enforcement of the black students and white students of Jena High School. Peter Whoriskey, *Thousands Protest Blacks' Treatment—Six Students Who Were Prosecuted in Louisiana Town Garner Nationwide Support*, WASH. POST, Sep. 21, 2007, at A1. "Thousands of people from around the nation converged early Thursday on this rural town to protest what they consider the overzealous prosecution of six black high school students charged with beating a white schoolmate." *Id.* Citizens expressed their disagreement with the Executive's treatment of the six black youths charged with attempted murder and conspiracy to commit murder for what would normally be considered a "schoolyard fight," in addition to an attempt to "draw attention to what they believe is unequal treatment black people receive from the criminal justice system everywhere." *Id.* The nationwide protests embody President Lincoln's "best known definition of democracy in American History. . . government of the people, by the people, and for the people . . ." Urofsky, *supra* (internal quotation marks omitted). They demonstrate that the democratic spirit of *the people* trying to influence the government is still relevant today in America.

3. The Carter Center Democracy Program's definition of democracy the concept states that a healthy democracy should function in a manner that promotes the rule of law and allows "people [to have] a meaningful voice in how they are governed." The Carter Center Democracy Program, <http://cartercenter.org/peace/democracy> (last visited Jul. 21, 2008); see also THOMAS CHRISTIANO, PHILOSOPHY AND DEMOCRACY: AN ANTHOLOGY 39 (Thomas Christiano ed. 2003) ("After all, democracy implies commitments to equality, such as equality in voting power as well as equality of opportunity to participate in discussion."); see discussion *infra* Part IV (suggesting that the victims of targeted hate crimes and other members of the community should be given the opportunity to officially participate in enforcement decisions).

4. "Our justice system has failed if citizens can not expect equal protection of the law and equal application of the law." *State v. Bailey*, 969 So. 2d 610, 611 (La. 2007) (granting defendant's motion to recuse Jena's local prosecutor Reed Walters due to Walters's abusing his prosecutorial discretion by taking race into account when exercising his charging authority).

5. "The discretionary power exercised by the prosecuting attorney in initiation, accusation, and discontinuance of prosecution gives him more control over an individual's liberty and reputation than any other public official." Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1057 (1955) (citing Sam E. Hobbs, *Prosecutor's Bias, An Occupational Disease*, 2 ALA. L. REV. 40, 41 (1949)); Robert Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940). Also consider:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done

Competency and fairness within the American criminal justice system play an integral part in a citizen's concept of freedom.⁶ Citizens' confidence in the system is critical to the health and strength of democracy.⁷ This article argues that a citizen's concept of justice and freedom—the essence of the democratic spirit—is inextricably linked to the amount of *equity*⁸ that is manifested within the prosecutor's

to the tune of public statements and veiled or unveiled intimidations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.

Hans P. Sinha, *Prosecutorial Ethics the Charging Decision*, THE PROSECUTOR 32, 32 (2007) (quoting Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM JUD. SOC. 18 (1940)).

6. Valuing justice and freedom are foundational principals of American democracy and culture. See U.S. CONST. amend. IV, V, VI, VIII, and XIV; *In Re Winship*, 397 U.S. 358, 362–64 (1970) (holding that the most protective rights for a criminally accused are contained on the Bill of Rights and the highest proof requirements reserved for criminal matters); see also President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (“[T]his nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth.”).

7. Criminal sanctions, which allow the government to seize one's person or property, or both, as punishment for violations of the criminal law, accompany criminal laws. See generally U.S. CONST. amend. V (permitting deprivation of liberty only after due process of law). Citizens' liberty interests are at stake everyday within the American criminal justice system; therefore, the way the criminal justice system enforces its laws directly impacts citizens' notions of freedom within the American democracy. *Id.*

8. There are many ways to view and define equity. “Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by facility for adjusting and reconciling public and private needs.” *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955). However, in a conversation surrounding democratic governance one must consider the fundamental tenants of political equity contained in the political philosophy literature as well as concepts of legal equity as interpreted by the courts with regards to fairness and due process. In *An Argument for Democratic Equity*, Thomas Christiano asserts that the beliefs of the citizenry are crucial considerations regarding democracy and equity. While quoting Aristotle, Christiano notes:

As Aristotle says: “There are some arts whose products are not judged of solely, or best, by the artist themselves, namely those whose products are recognized even by those who do not possess the art; for example, the knowledge of the house is not limited to the builder only; . . . the master of the house will eve be a better judge than the builder . . . and the guest will judge better of a feast than the cook.” Thus, though citizens may not be the best judges of their interests in an unqualified way because they have little knowledge of how to satisfy them or the conditions under

exercise of discretion to criminally charge individuals for their unlawful conduct.⁹

When the government exercises its authority to pursue criminal sanctions uniformly and equitably, all citizens revere the law and its representatives and thus allow justice and freedom to thrive. However, when prosecutors administer their discretion arbitrarily,¹⁰ unequally, or based on biases or preferences,¹¹ perceptions of inequality besmirch the discretionary authority of the prosecutor, which lead to the compromise and deterioration of freedom and justice.¹² At this stage, citizens no longer revere the law; instead, they fear it and its representatives,¹³ apprehensive that injustice might befall them or anxious that they may be forced to take the law into their own hands to procure justice or protect their own freedom.¹⁴ In other words, an individual's "anxiety of injustice"¹⁵ arguably reaches different levels

which they can best be preserved, they are the best judges with regard to certain essential feature of their own interests.

CHRISTIANO, *supra* note 3, at 58–59.

9. District Attorney Reed Walters addressed an assembly of high school students in his jurisdiction stating that "with a stroke of a pen, I could end your life." See *infra* Part III (discussing the words, actions and charging decisions of District Attorney Walters and examining their impact upon the citizens that reside in Jena).

10. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 16 (2007) ("But even well-meaning prosecutors often fail because they exercise discretion arbitrarily and without guidance or standards . . .").

11. *State v. Bailey*, 969 So. 2d 610 (La. 2007) (finding a prosecutor to have abused his prosecutorial authority by taking race into account when exercising his charging authority).

12. This author asserts that the perception of fairness, fairness in the due process context, and actual fairness each are desperately needed in order for a healthy democracy to be maintained. In other words, not only is actual fairness required in order for the criminal justice system to be effective, but the perception of fairness is also necessary in order for citizens to have confidence and faith in the government's administration of justice.

13. Marshal Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 149–50 (1998) ("[I]ncidents involving excessive [police] force occur with disturbing frequency across the nation. Yet despite the seemingly pervasive nature of the problem, the legal response to police brutality incidents across the nation has been uniformly limited to retrospective relief."); see also John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 847 (2000) ("Incident after incident of police misconduct reinforces the conviction in minority communities that police may attack those whom they have a duty to protect, and that they can do it with impunity.").

14. See generally LEON WHIPPLE, *OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES* 144 (1927) ("[T]he most extensive and frequent losses of liberty are not due either to court or executive, but to the failure of the force of the government to protect men from violence and mobs. The history of liberty could almost be written in terms of mobs that got away with it, and were never punished—from the Tory hunters of 1778 to the Klu Klux Klan of 1927.").

15. The term "anxiety of injustice" captures the concept of a citizen's fear or anxiety that the government, through their agents authorized to enforce the laws, might treat him or her unfairly or based on some bias or prejudice. Langston Hughes' poem *Justice* underscores

of acuteness depending on many factors, including one's socio-economic status and political influence within the community as well as one's race or ethnicity.¹⁶

Minorities¹⁷ report an increased fear of law enforcement, including a strong distrust of the ethics and fairness of both police officers and prosecutors.¹⁸ Minorities may have this high “anxiety of injustice” because they are more often the victims of hate crimes.¹⁹

the reality that some experience flawed justice although all deserve true blind justice: “That Justice is a blind goddess/ Is a thing to which we are wise./ Her bondage hides two festering sores/ That once perhaps were eyes.” LANGSTON HUGHES, *Justice*, in *THE COLLECTED POEMS OF LANGSTON HUGHES* 31 (1996).

16. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 121 HARV. L. REV. 1255, 1258 (1994) (“[R]acial power is often most dramatically exercised, and most easily recognized in the enforcement of criminal laws. . . . No fancy theoretical conceptualization is necessary to explain how race figures in police brutality, in prosecutorial decisions, in jury selection, in conviction rates, and in the incarceration and capital sentencing of people of color in America.” (quoting Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2231 (1993))). See generally Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U. C. DAVIS L. REV. 1005 (2001).

17. For purposes of this article, *minorities* refers to racial minorities, primarily African Americans in the South. The reason this subsection of minorities is being highlighted here is to fully explore the dynamics of cases similar to the incidents recently experienced in Jena. The author recognizes that racial minorities are not the only “minorities” or groups that are targeted by hate crimes. Unfortunately, hate crimes target many based on various immutable characteristics that will not be fully addressed in this article.

18. Professors Ronald Weitzer and Steven A. Tuchat George Washington University conducted a study that found that “many minorities fear and distrust” police officers. Their study additionally found that “many black Americans, for example, reported being victimized or mistreated by police officers.” Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1194–99 (2008). Also consider:

Increasing attention is being paid to the collateral consequences of criminal justice policies—particularly high incarceration rates and long sentences—to high-crime, low-income, urban communities of color. Although this literature has not addressed the informant phenomenon, the logical conclusion is that like mass incarceration, heavy informant use in such communities imposes collateral harms: tolerance of informant criminality, erosion of personal relationships and trust, and the normative message conveyed when the state secretly permits criminals to evade punishment by snitching on friends and family.

Alexander Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 683–84 (2004); see also Delgado, *supra*, at 1194 (“In the black community, a campaign against snitching—complete with T-shirts, rap songs, and extra-official pressure—aims to secure total noncooperation with the police, especially regarding enforcement of the drug laws.”).

19. In response to the severity and volume of lynching [hate] crimes against Blacks, Ida B. Wells wrote:

The unilateral exercise of police²⁰ and prosecutorial discretion resulting in the under-enforcement of hate crimes further exacerbates certain citizens' ability to realize freedom.²¹ This scenario was vividly

Somebody must show that the Afro-American race is more sinned against than sinning, and it seems to have fallen upon me to do so. The awful death-roll that Judge Lynch is calling every week is appalling, not only because of the lives it takes, the rank cruelty and outrage to the victims, but because of the prejudice it fosters and the stain it places . . . [a]rouse the conscience of the American people to demand for justice to every citizen, and punishment by law for the lawless . . .

IDA B. WELLS-BARNETT, ON LYNCHINGS 26 (2002). Nationwide in 2006, law enforcement agencies reported 9,652 hate crime incidents. UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATIONS, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, HATE CRIMES STATISTICS 2006 (2006),

www.fbi.gov/ucr/hc2006/victims.html (last visited Aug. 1, 2008). 5,020 of these bias-motivated incidents were motivated by the victim's race, i.e. 52.1%. *Id.* Among the hate crime incidents that were motivated by race: 66.4% were motivated by anti-black bias; and 21% were motivated by anti-white bias. *Id.* Notably although the noose hanging incident at Jena High School occurred in August 2006 in La Salle Parish, Louisiana, La Salle Parish reported to the Department of Justice that they had no incidents of hate crime for the year 2006. *Id.* at Tbl. 14, available at <http://www.fbi.gov/ucr/hc2006/table14la.html> (last visited Aug. 1, 2008). A total of fourteen race-motivated incidents were reported for the state of Louisiana for 2006. *Id.* at Tbl. 13, available at <http://www.fbi.gov/ucr/hc2006/table13la.html>. Even more curious is the fact that La Salle Parish only reported three of the four quarters of the year to the Department of Justice for its annual statistical report in 2006. *Id.* Looking through the table of Louisiana jurisdictions reporting hate crimes statistics to the Department of Justice, many cities, counties, and universities report less than four quarters to the year, compared to the table for California, for example, wherein every city, county, university, reported four quarters of the year. *Id.* at Tbl. 14-California. It appears that some states have made hate crime reporting and the corresponding enforcement of the laws a priority. *Id.* California has been known as a leader in this area of the law since the 1980s, having established a Hate Crime Task Force in Los Angeles County in 1988. *Id.*

20. Police initially decide which cases will be investigated, documented and submitted with a request for prosecution. WAYNE R. LAFAVE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE POST-INVESTIGATION 185–86 (Thomson West, 2004). Not all incidents that generate a police report actually result in a request for prosecution or formal charges being filed. *Id.* This is based on police discretion. *Id.* “This police discretion is in a practical sense even less restricted than the prosecutor’s discretion, for it is exercised at an earlier and generally less visible stage of the criminal process. But in the eye of the law, discretion by the prosecutor is considered proper while discretion by the police is with rare exception viewed with disfavor.” *Id.* at 185–86. Also consider:

Police officers exercise expansive discretionary power as well [as prosecutors], and the arrest power can have a monumental effect on a person’s life. But without the prosecutor’s charging power, the arrest takes the individual no further than the police station. After the police officer makes the arrest, it is the prosecutor who decides whether that individual should face the criminal charges that lead to imprisonment.

DAVIS, *supra* note 10, at 22–23 (2007).

21. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2031 (2008) (explaining that discrimination can take the form of under-enforcement); see *infra* Part II.

depicted in Jena, Louisiana²² with the under-enforcement of the noose hanging incident,²³ of which the black students were the alleged victims, and the over-enforcement of the school-yard-fight of which the black students were the alleged perpetrators.²⁴ Disparity in the level of law enforcement of these two very different, yet related incidents, highlights issues of both perceived and actual discrimination that minorities experience in Jena and elsewhere. The extreme level of discretion built-in the American justice system further intensifies this enforcement problem. The government decision to punish or not punish particular conduct acts as a behavior modifier, as it either deters or encourages more of the same type of conduct.²⁵ Using the incident of the noose hangings from the "whites only tree" at Jena High School as an example of uncharged criminal conduct, this article emphasizes the unique impact that prosecutorial decisions have upon a community's ideas of acceptable and prohibited conduct, highlights the negative consequences of unfettered prosecutorial discretion with regards to hate crime prosecutions and poses suggestions to limit prosecutorial discretion for these types of criminal cases.

22. See *infra* Part III (describing the details of both of these incidents of criminal conduct and analyzing them in detail).

23. Kennedy, *supra* note 16, at 1259 ("Although the administration of criminal justice has, at times, been used as an instrument of racial oppression, the principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but *under-enforcement* of the laws."). See generally Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 443 (1988) (discussing the under-enforcement issue and urging that black victims should receive the same enforcement response as white victims).

24. *State v. Bailey*, 969 So. 2d 610, 610–11 (La. 2007) (outlining the criminal incidents in Jena, LA, and the prosecutor's decisions based on the race of the accused and the race of the victim.). Also consider:

Hate crimes are different from other crimes in that they give more power to police. The level of discretion that comes with the identification and charging of hate crimes differs substantially from that in other areas in that some bias incidents have the potential to have either extremely high or low visibility. Hate crime identification differs from, say the enforcement of traffic laws because it can occur under intense public scrutiny. Even if the media do not report it other members of the affected community are likely to know of some hate crimes and pressure police for a bias or nonbias classification.

JEANNIE BELL, *POLICING HATRED* 3–4 (2002) (citing James B. Jacobs & Barry J. Eisler, *The Hate Crime Statistics Act of 1990*, 29 CRIM. L. BULL. 99, 113 (1993)). See generally Donald Green, *Defended Neighborhoods, Integration, and Racially Motivated Crime*, 104 AM. J. SOC. 372 (1998); *infra* Part III (describing police and prosecutorial discretion in action regarding two incidents at the local high school wherein white juveniles received no punishment for their noose hanging activity and black students received aggressive and arguably an overzealous law enforcement response to their participation in a school-yard-fight).

25. See *infra* note 35.

The prosecutorial decision, also known as the prosecutorial *veto*,²⁶ encompasses the prosecutor's discretionary authority to file or not file criminal charges.²⁷ Referring to a prosecutor's action of declining to prosecute a case²⁸ as a *veto* gives a vivid reference to the prosecutor's extreme power in his or her executive capacity.²⁹ Moreover, the term further exhibits how the prosecutor can functionally overrule and overpower the legislature³⁰ on a routine basis through this simple exercise of discretion.³¹ Thus, notwithstanding the

26. See *infra* note 276.

27. The exercise of the prosecutorial veto is an action of under-enforcing laws in a manner inconsistent with the legislature's intent. See *infra* Part IV. The term captures the realism of the separation of powers between the legislative branch that enacts the laws, and executive branch that enforces the laws; as well as the monumental strength of the prosecutor's decision to select which laws to over-enforce and which laws to under-enforce, and even which laws to moderately enforce. *Id.*; see *Bailey*, 969 So. 2d at 611–12 (citing LSA-Cr.P. art. 61) (“The district attorney determines whom, when, and how he shall prosecute.”).

28. In many criminal courthouses across the United States, this is commonly referred to as “*nolle pros.*” WAYNE R. LAFAVE ET AL., *PRINCIPLES OF CRIMINAL PROCEDURE POST-INVESTIGATION* 190 (Thomson West, 2004). This phrase comes from the Latin phrase “*nolle prosequi*—an entry on the record by the record by the prosecutor declaring that he will not prosecute and conveys the common law view that a prosecutor was free to *nolle pros* even after formal charges had been filed.” *Id.*

29. See *infra* Part IV.

30. “[I]n a democracy the ultimate source of all authority is the people.” Urofsky, *supra* note 2.

31. As a result of the prosecutorial veto, the prosecutor has the power to circumvent legislative intent and neglect the enforcement of certain laws or the prosecution of certain perpetrators. Ronit Dinovitzer & Myra Dawson, *Family-Based Justice in the Sentencing of Domestic Violence*, 47 BRIT. J. CRIMINOLOGY 655, 657 (2007) (“[E]fforts at criminalization of [domestic violence] have been successful with many jurisdictions implementing mandatory charging policies, no-drop or pro-prosecution policies and specialized domestic violence courts.”). Modern legislatures have thus strictly limited the prosecutorial veto to under-enforced crimes with significant social harms, most notably in the area of domestic violence prosecutions. *Id.* For example, in Nevada:

If a person is charged with committing a battery which constitutes domestic violence pursuant to N.R.S. 33.018, a prosecuting attorney shall not dismiss such a charge in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for any other reason unless he knows, or it is obvious, that the charge is not supported by probable cause or cannot be proved at the time of trial. A court shall not grant probation to and, except as otherwise provided in NRS 4.373 and 5.055, a court shall not suspend the sentence of such a person.

NEV. REV. STAT. § 200.485(7) (2006 & Supp. I 2007).

Many states now require mandatory arrests and mandatory charging of domestic violence cases thereby eliminating the discretion of both the police and the prosecution from exercising discretion and declining to prosecute cases. *Id.* This trend in the domestic violence area began based on an outcry of the abuse of the prosecutorial veto and the under-enforcement or neglected-enforcement of crimes against women, namely domestic violence. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic*

legislature's proclamation that certain conduct is criminal and should be punished, the individual prosecutor may exercise his or her authority to decide, on a case-by-case basis, whether to charge the alleged criminal perpetrator to the maximum limit that the law proscribes, or decline to charge entirely and in essence *veto* the legislature through the legitimate exercise of prosecutorial discretion.³²

In criminal cases involving racial animus,³³ the prosecutorial *veto*³⁴ has a profound impact on the community since the prosecutor neither deters prohibited hate crime conduct³⁵ nor retributes the

Violence Policy, 2004 WIS. L. REV. 1657, 1672 (2004). See generally Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999); Alana Bowman, *A Matter Of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219 (1992); Cf. NEV. REV. STAT. § 207.010 (Legislatures may selectively control discretion in the criminal justice system. DUI laws provide one example in which prosecutorial discretion in charging is not limited yet judicial discretion in sentencing is constrained.).

32. Prosecutorial discretion is universally allowed with wide latitude provided the prosecutor does not make his or her discretionary decisions based on vindictive reasons or purposeful discriminatory reasons. R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 20 (Thomson West, 2005). Citizens may bring a writ of mandamus seeking to order the prosecution to file criminal charges in a specific case. *Id.* at 13. These writs are rarely successful. *Id.*; see also *Leeke v. Timmerman*, 454 U.S. 83 (1981) (a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (1973). Selective enforcement has also been constitutionally challenged. *Wayte v. United States*, 470 U.S. 598, 608 (1985). The United States Supreme Court generally upheld wide prosecutorial discretion and only forbade the exercise of prosecutorial discretion "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). However, purposeful discrimination on the part of the prosecutor is very difficult to successfully establish. See generally *United States v. Armstrong*, 517 U.S. 456 (1996); *Wayte v. United States*, 470 U.S. 598 (1985). Notwithstanding the courts allowing vast prosecutorial discretion, vindictive prosecution is not allowed. See generally *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969). However, even in those instances wherein the prosecutor possesses an ill motive behind his or her discretionary decision making, it is very difficult for the accused to prove or successfully challenge. *Armstrong*, 517 U.S. at 468. See generally *supra* note 5 ("While the prosecutor as his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.").

33. The same negative community perceptions can flow from cases wherein the alleged crime was actually bias-motivated and those cases where the alleged crime only resembles a bias-motivated act or appears to symbolically refer to or connect to historic notions of racial discrimination. See *infra* Part III.B.

34. The term *prosecutorial veto* encompasses the reality that the legitimate exercise of prosecutorial discretion allows the prosecutor to decline to prosecute. The Prosecutor is given unilateral authority over the allocation of his resources.

35. "General deterrence is the pressure that the example of one criminal's pain and suffering exerts on potential criminals to forgo their contemplated crimes." Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN.

victimization of the targeted group.³⁶ Due to the heightened social harm³⁷ of hate crimes and their ripple effect throughout the community, prosecutorial indifference here exacerbates the ordinary exercise of the prosecutorial *veto*.³⁸ A congressional report

L. REV. 1149, 1150 (1990). "Specific deterrence is the pressure that unpleasant memories of incarceration exert on a released convict, which cause him to obey the law." *Id.*

36. "Retribution is the intentional infliction of pain and suffering on a criminal to the extent he deserves it because he has willingly committed a crime." *Id.* Under retribution theory, perpetrators are punished not based on a theory of stopping others from committing the same crime; rather, the punishment is measured based on the idea that the accused gets what he or she deserves for the seriousness or time of crime he or she has committed. *Id.*

37. In criminal law theory, crimes are generally referred to as social harms. ROLLINS M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 12 (3d ed. 1982). Some scholars have opined it is the social harm and the societal condemnation of the harm which distinguishes crimes from torts. *Id.* Therefore, the ability to exert fairly uniform and consistent punishment against criminal actors is an important aspect of the theoretical underpinning of criminal law jurisprudence and its sanctions. *Id.*; see also Henry M. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 403–05 (1958) reprinted in CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW CASES AND MATERIALS* 3–5 (2005):

Thus far, it will be noticed, nothing has been said about the criminal law which is not true also of a large part of the noncriminal, or civil, law. The law of torts, the law of contracts, and almost every other branch of private law that can be mentioned operate, too, with general directions prohibiting or requiring described types of conduct, and the community's tribunals enforce these commands. . . . What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. . . . It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.

38. See Diversity Inc. Magazine, *Noose Watch*, available at <http://www.diversityinc.com/public/2588.cfm> (last visited Jan. 11, 2009) (chronicling 78 noose hanging incidents across the United States since the Jena High School incident) Within the months immediately following the national news coverage of the noose hanging incident at Jena High School, noose hangings were reported at other high schools, universities, and places of employment. See Corinne Shammy, *After Jena, Noose Found at N.C. School*, ABC NEWS, Sept. 22, 2007, available at <http://abcnews.go.com/US/story?id=3638457> (last visited Aug. 3, 2008)(a seemingly "copycat" noose hanging incident occurred at a North Carolina high school); Elissa Gootman & Al Baker, *Noose on Door at Columbia Prompt Campus Protest*, N.Y. TIMES, Oct. 11, 2007, available at <http://www.nytimes.com/2007/10/11/education/11columbia.html> (last visited Jan. 11, 2009) (a noose was found hanging on a black professor's office door, Professor Madonna G. Constantine, who teaches race, identity and multiculturalism at Columbia University's Teachers College); David Schoetz, *Campus Noose Sparks Hate Crime Probe: Lynching Symbol Discovered Outside University of Maryland Black Cultural Center*, ABC NEWS, Sept. 10, 2007, available at <http://abcnews.go.com/US/Story?id=3580350&page=1> (last visited Jan. 11 2009) (a three foot noose hung from a tree outside the University of Maryland's Black Cultural Center); *Gov. Rell Signs New Law Banning Use of Nooses to Threatened or Intimidate*, US STATE NEWS, May 11, 2008 (following nooses found at the U.S. Coast Guard Academy in New London and other incidents, new legislation was passed.); Joe Gould & Carrie Melago, *Noose Found Hanging in Long Island Police Station*, N.Y. DAILY NEWS, Sept. 30, 2007, available at <http://www.nydailynews.com/news/2007/09/30/2007-09->

characterized the unique nature of the community impact of hate crimes as isolating:

Every crime is, of course, a terrible event. . . . [Yet,] the hate crime atomized the individual, splitting the individual victim apart from his or her neighbors and community. It isolates the victim because of who he or she is. . . . [W]hen the attack is made because of the victim's religion, race, ethnicity, disability, or sexual orientation, it inevitably creates additional unease, not only on the part of the individual victim, but also all of those who are members of the same group. *For persons who are members of minority groups with a history of persecution or mistreatment, hate crimes cause an anxiety and concern for the safety that others take for granted.*³⁹

Hate crimes by definition cause anxiety to its victims since they are being targeted often for immutable reasons and therefore cannot prevent it. Consistent and aggressive enforcement of hate crimes would help to quell this anxiety.

The elimination of the prosecutorial *veto* for hate crimes is warranted and necessary, particularly because the neglected prosecution of hate crimes disproportionately impacts minorities in the community.⁴⁰ In other words, law enforcement's failure to condemn criminal conduct aimed at victims due to their race⁴¹ encourages the

30_noose_found_hanging_in_long_island_polic-1.html (last visited Jan. 11, 2009); see generally Darryl Fears, *In Jena and Beyond, Nooses Return as a Symbol of Hate*, WASH. POST, Oct. 19 2007, at A1.

39. The Hate Crime Statistics Act, S. REP. NO. 104-269, at 3-4 (1996). In 1990, Congress enacted the Hate Crimes Statistics Act, which was the first attempt to begin the process of criminalizing hate crimes. The Hate Crime Statistics Act, S. REP. NO. 101-21, at 3 (1989) reprinted in 1990 U.S.C.C.A.N. 158, 160. Congress intended the Hate Crimes Statistics Act, which required the systematic collection of hate crime data, to be a significant step in the process of criminalizing hate crimes, and send a message to hate groups that the United States government was increasingly concerned about these types of crimes. *Id.*

40. CRIMINAL JUSTICE STATISTICS CENTER, HATE CRIME IN CALIFORNIA 2007 3, 6 (2007) <http://ag.ca.gov/cjsc/publications/hatecrimes/hc07/preface07.pdf> (last visited Jan. 11, 2009) (For example, 1,426 hate crimes were reported and 330 prosecuted as hate crimes.); see also J. N. Sigmon and D. Rebovich, Inter-University Consortium for Political and Social Research, Survey of Prosecutorial Response to Bias-Motivated Crime in the United States, 1994-95 (2000), available at http://www.icpsr.umich.edu/cocoon/MDRC/XDLY/03009.xml?info_recip= (last visited Jan. 11, 2009).

41. Hate crimes are targeted at individuals for other reasons besides race, such as: religion, ethnicity or otherwise immutable characteristics. Criminal Justice Statistics Center, *supra* note 40.

existence of social harms that are repugnant to democracy and prevent full civic participation from the targeted or victimized group. Under-enforcement in this area of criminal justice stifles the freedom of the victimized group.⁴² It also allows the maintenance of an unacceptable level of oppressive power for hate crime perpetrators while the prosecutor portrays the role of the silent, but complicit, overseer of the status quo.⁴³ Moreover, the prosecutor is exerting an undue amount of power over the legislature by failing to effectively enforce the laws in this area.⁴⁴ To mend the racial divide,⁴⁵ change America for good and make hate crime a narrative of the past, prosecutors must not be allowed to turn a blind eye to hate crimes, but instead must be held accountable for redressing them.⁴⁶ Alternatively, the legislature should enact broad private prosecution statutes that would allow private entities to pursue these neglected cases.⁴⁷

The goal of this article is to shift the conversation of prosecutorial discretion beyond the federal constitutional minimum requirements of the Due Process and Equal Protection clauses, which seek to ensure a certain nominal fairness,⁴⁸ and beyond the deferential ethical rules or statutes that govern prosecutorial discretion.⁴⁹ Instead, this article advances the discourse surrounding the executive's decision to prosecute by promoting awareness of and accountability for his role and impact in framing societal norms of acceptable

42. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1267 (1994). "Racially invidious under-enforcement purposefully denies African-American victims of violence the things that all person legitimately expect from the state: civil order and, in the event that crimes are committed, best efforts to apprehend and punish offenders. For most of the nation's history, blacks were denied this public good." *Id.*

43. Ida B. Wells-Barnett believed that: "[t]hose who failed to take a stand against lynching, or remained silent and looked away, were as culpable as those committing the acts." Patricia Hill Collins, *Introduction to IDA B. WELLS-BARNETT, ON LYNCHINGS* 10 (2002) (1892). Although no one at Jena High School was actually lynched, the hanging nooses from the "whites only tree" made the threat of a lynching.

44. *Infra* Part V, *Limiting the Impact of the Prosecutorial Veto for Hate Crimes* (Limiting unilateral prosecutorial discretion "seems appropriate especially in a case where the community impact is great and the prosecutorial apathy is severe, continual and systematic.").

45. "The hate crime emphasizes the differences among our people, not as the strengths they are in this diverse country, but as a means of dividing American from American. It submerges the common humanity of all peoples." The Hate Crime Statistics Act, S. REP. NO. 104-269, at 3 (1996).

46. *Infra* Part III. E., *Public Scrutiny and Public Outcry Influence Prosecutors' Charging Decisions*.

47. *Infra* Part V, *Limiting the Impact of the Prosecutorial Veto on Hate Crimes*.

48. U.S. CONST. amend. V and XIV.

49. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2006) (Special Responsibilities of a Prosecutor).

conduct. The United States of America, as a nation, has entered an era in which status quo justice laced with latent racism can no longer be left unchallenged. It is time to break the cycle and change the historic narrative regarding the commission, tolerance, and punishment of hate crimes in America.⁵⁰ As a democratic nation, America cannot allow "pockets of stagnated freedom" to exist seemingly untouched by the progress of the civil rights movement or allow the civil liberties of some citizens to be unprotected due to the under-enforcement or neglected enforcement of the crimes to which they most often fall victim.⁵¹ This article suggests an extreme make-over for the exercise of prosecutorial discretion for hate crimes in both philosophy and function. Most significantly, it is urged that the unilateral nature of the prosecutor's authority be limited via legislative amendment mandating the incorporation of "community voices" within the decision-making process to blunt the impact of the prosecutorial veto.⁵²

Professor Angela J. Davis' recent and acclaimed book, *Arbitrary Justice: The Power of the American Prosecutor*,⁵³ exposed the public⁵⁴ to the notion that the prosecutor, with his largely unchecked authority, is the most powerful individual in the criminal justice system.⁵⁵ Professor Davis primarily focuses on disparities in the exercise of prosecutorial discretion by conscientious and ethical prosecutors who, although well-intentioned, make inconsistent decisions that collectively result in arbitrary justice.⁵⁶ Arbitrary justice is one significant problem with prosecutorial discretion; however, this article further tackles the racially unfair decision-making processes, whether well-intended or ill-intended, that work against achieving the deserved justice for the victims of hate crimes, who are most often

50. Although this article focuses on the hate crime incident in 2006 at Jena High School, the discussion targets correcting the enforcement model across America.

51. Howard Witt, 3 *Towns: The Past, The Present, The Future No Black-and-White Answers*, CHI. TRIB., Dec. 26, 2007, available at www.chicagotribune.com/services/newspaper/printedition/tuesday/chi-122607raceoda-story,0,404932.story (last visited Jan. 11, 2009) (Recent incidents in Paris, Texas, Linden, Texas, and Jena, Louisiana evidence stagnation in civil rights for minorities. For example in Paris, Texas, a fourteen-year-old black female student, Shaquanda Cotton, pushed a white hall monitor and was sentenced to up to 7 years in juvenile prison wherein the same judge sentenced a white juvenile convicted of arson of a home to probation).

52. See *infra* Part V, *Limiting the Impact of the Prosecutorial Veto for Hate Crimes*.

53. See ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* *passim* (2007).

54. Reynolds Holding, *Power Outage*, TIME, Aug. 6, 2007, at 51; Angela J. Davis, *They Must Answer for What They've Done Prosecutors Who Misuse Discretion or Abuse Power Should be Held Accountable*, LEGAL TIMES, Aug. 6, 2007, at 42.

55. DAVIS, *supra* note 53 at 15; see also Jackson, *supra* note 5.

56. DAVIS, *supra* note 53 at 39.

racial minorities.⁵⁷ This article does not single out random acts of discretion, but instead attacks the legal use of the unilateral prosecutorial *veto* where it creates injustice. It potentially exposes all prosecutors. Moreover, it analyzes a prosecutor's discretionary decision making in communities in which intentional racism, reminiscent of America's historic Jim Crow era, may still exist.

The events of Jena exhibit in dramatic detail the type of extreme and nearly unlimited discretion of a prosecutor in making the decision on whether to redress the social harms committed within the community he is authorized to protect and serve. This blatant inequity in the exercise of the prosecutorial function in Jena created a national outcry for justice.⁵⁸ This article proposes solutions to address the weakness that the unilateral, and often unequal, exercise of the executive's power, in the form of the prosecutorial *veto*, creates within the democracy. The danger of the prosecutorial *veto* is intensified in hate crime cases because the social harm of hate crimes expands beyond individual parties of the criminal incident into the depths of the entire community, both locally and nationally.⁵⁹ The cycle of hatred must be broken and the historic narrative of impunity changed regarding bias-motivated crimes. Hate crimes must be vigorously enforced to truly bring America forward, out of the strong-holds of its past and into a modern era, where Langston Hughes would be proud to reside.

Following this Introduction, Section II discusses why equity in enforcement is essential to breaking the generational cycle of hate crimes in America.⁶⁰ The Jena incidents are both striking and heart-breaking because they are incredibly reminiscent of past atrocities, perpetuating the routine intimidation and terrorism of minority groups coupled with impunity for the criminal conduct.⁶¹ In some ways, freedom remains stagnant in the town of Jena. Section II discusses why maintaining the status quo is hazardous to the democracy.⁶² This

57. See *infra* Part III, *Spotlight on Jena*.

58. Howard Witt, *On Blogs, Activists Get To Say It Louder: The Web Unites Today's Crop Of Black Advocates –But The Landscape Still Seems Separate And Unequal*, CHI. TRIB., June 7, 2008 (More than 20,000 protesters demonstrated in Jena. Jesse Jackson stated, "our struggle today is that we are free, but not equal").

59. Diversity Inc. Magazine, *supra* note 38.

60. *Infra* Part II, *Breaking the Cycle and Changing the Narrative*.

61. See William J. Stuntz, *Unequal Justice*, 121 HARV. L. J. 1969, 1983 (2008). In the South, "[p]rivate terrorism played roles that well-funded law enforcement agencies played in the North; the consequence was a strange mix of anarchy and authoritarianism. Black crimes against whites were punished brutally, often without the niceties of due process. White offenders who victimized blacks regularly went unpunished" *Id.*

62. *Infra* Part II, *Breaking the Cycle and Changing the Narrative*.

type of status quo embraces racial discrimination which ultimately represses the democracy.⁶³

Section III focuses on Jena and highlights the similarities and differences in the law enforcements' treatment of the noose hanging incident compared to the school-yard-fight incident.⁶⁴ This section addresses the exercise of prosecutorial discretion in its two opposite forms: (1) the filing of no charges against the white student noose hangers; and (2) the overzealous and aggressive filing of attempted murder and conspiracy to commit murder charges against the black students for what is commonly considered a school-yard-fight. This section also presents various suggestions for charging the noose hangers and exhibits how the public outcry in the Jena cases may have impacted the prosecutor's discretion and decision not to exercise his veto power.

Section IV defines the term “prosecutorial *veto*” and further explains its impact in the administration of American criminal justice.⁶⁵ Section V presents practical solutions to limit the prosecutorial veto for hate crimes and suggests that prosecutors be legislatively required to consult “community voice” before finalizing their charging decisions.⁶⁶ This section discusses the following potential ways to effectively utilize community input regarding hate crime prosecutions: (1) mandating grand jury input prior to the prosecutor declining prosecution; (2) creating a statewide “hate crimes task force committee” that the governor appoints and oversees; and (3) allowing a mechanism for private prosecution for neglected yet worthy hate crime prosecutions.

63. See The Incompatibility Between Democracy and Racism United Nations Commission on Human Rights, Res. 2003/41 (Apr. 23, 2003), *available at* [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.2003.41.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.41.En?Opendocument) (last visited Jan. 11, 2009):

Guided by the Universal Declaration of Human Rights, the Charter of the United Nations, the International Covenants on Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, . . . [the Commission on Human Rights] [r]emains convinced that political platforms and organizations based on racism, xenophobia or doctrines of racial superiority and related discrimination must be condemned as incompatible with democracy and transparent and accountable governance.

64. *Infra* Part III, *Spotlight on Jena*.

65. *Infra* Part IV, *The Prosecutorial Veto*.

66. *Infra* Part V, *Limiting The Impact of The Prosecutorial Veto on Hate Crimes*.

II. BREAKING THE CYCLE AND CHANGING THE NARRATIVE

Problems of inequity have long plagued the pursuit of criminal justice within American society.⁶⁷ In particular, progress is stagnant in the area of bias-motivated crimes stemming, in part, from an inadequate prosecutorial response.⁶⁸ Therefore, the freedom that Langston Hughes demanded decades ago has only been partially achieved because justice, even now, is not being equally administered due to prosecutorial reluctance toward charging “hate crime-type conduct.”⁶⁹

Hate crime is crime that greatly impacts the larger community, not just the individualized victim.⁷⁰ For example, consider how the legislature of the State of Washington articulated the issue of hate crime and its impact on the community:

67. See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 101, 158 (The New Press, 1999); see also Angela Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007); see also KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARRASSMENT AND OTHER MACROAGGRESSIONS* (New York University Press, 1998); see also Harvard Law Review, *Developments in the Law – Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988); see also DAVID HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (New Press, 2002); see also Tracy Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

68. CRIMINAL JUSTICE STATISTICS CENTER, *supra* note 40.

69. Three main types of hate crime laws exist: (1) laws proscribing intimidation of the victim intending to interfere with the victim's exercise of rights; (2) laws proscribing conduct historically associated with racial, religious, and ethnic hostility which are typically intended to induce fears of persecution in the members of the minority group; or (3) penalty enhancement statutes which simply increase the punishment for criminal conduct, the commission of which was motivated by bias. Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, 17 CRIM. JUST. 4, 5 (2002).

70. See AMERICAN PSYCHOLOGICAL ASSOCIATION, *HATE CRIMES TODAY: AN AGE-OLD FOE IN MODERN DRESS* (1998), http://www.lambda.org/apa_hate.pdf last visited January 9, 2009:

Hate crimes are message crimes, according to Dr. Jack McDevitt, a criminologist at Northeastern University in Boston. They are different from other crimes in that the offender is sending a message to members of a certain group that they are unwelcome in a particular neighborhood, community, school, or workplace . . . By far the largest determinant of hate crime is racial bias, with African Americans the group at greatest risk. In 1996, 4,831 out of 7,947 such crimes reported to the FBI, or 60%, were promulgated because of race, with close to two-thirds (62%) targeting African Americans. Furthermore, the type of crime committed against this group has not changed much since the 19th century; it still includes bombing and vandalizing churches, burning crosses on home lawns, and murder.

The legislature finds that crimes and threats against persons because of race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicaps are serious and increasing. The legislature also finds that crimes and threats are often directed against interracial couples and their children or couples of mixed religions, colors, ancestries, or national origins because of bias and bigotry against the race, color religion, ancestry, or national origin of one person in the couple or family. The legislature finds that the state interest in preventing crimes and threats motivated by bigotry and bias goes beyond the state interest in preventing other felonies or misdemeanors such as criminal trespass, malicious mischief, assault, or other crimes that are not motivated by hatred, bigotry, and bias, and that prosecution of those other crimes inadequately protects citizens from crimes and threats motivated by bigotry and bias. Therefore, the legislature finds that protection of those citizens from threats of harm due to bias and bigotry is a compelling state interest.⁷¹

The Washington legislature's explanation of why hate crime legislation represents a compelling state interest corresponds to the thesis of this article. If the legislature is enacting statutes, specifically hate crime legislation, based on the compelling state interest in protecting the health and safety of the community⁷² from bias-motivated crimes, the executive, invested with the duty to enforce the laws, has an obligation to pursue legitimate enforcement of those laws, including initiating hate crime prosecutions.⁷³ Yet, scholars consistently express that prosecutors give hate crimes inadequate

71. WASH. REV. CODE ANN. §9A.36.078 *reprinted in* LU-IN WANG, HATE CRIME LAWS 9-1, 2 (1996). Although most states, as well as the federal criminal law, include hate crime statutes, scholars still debate whether treating bias-motivated crimes differently than those crimes not motivated by bias is the most prudent approach. *Compare* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991).

72. U.S. CONST. amend. X.

73. *See* LU-IN WANG, HATE CRIME LAWS 10-5 (1993) (Legislature enjoys the right to enact statutes for the health, safety and welfare of the community under the Tenth Amendment; however, citizens have no right to the enforcement of those laws. Enforcement is within the discretion of the executive).

consideration and, therefore, neglect most cases.⁷⁴ Given the wide discretionary latitude prosecutors have in exercising their charging function, this kind of under-enforcement of certain disfavored cases largely goes unnoticed⁷⁵ and without remedy or redress.⁷⁶ Furthermore, the leniency in enforcement leads to more violations.⁷⁷

One of the justifications for allowing wide prosecutorial discretion in charging decisions is to provide for individualized justice.⁷⁸ In other words, wide discretion allows prosecutors to consider the facts unique to each alleged criminal or criminal incident.⁷⁹ This model of individualized justice is most appropriate for crimes in which the criminal conduct affects one victim. For example, consider a pick pocket case—generally a non-violent crime with no physical injury to the victim. This crime primarily impacts the victim.⁸⁰ In this type of situation, it may be appropriate to consider the

74. See FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 110 (Harvard University Press, 1999); see generally Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, 17 CRIM. JUST. 4 (2002).

75. Many cases are denied based on problems of proof. WAYNE R. LAFAVE ET AL., *PRINCIPLES OF CRIMINAL PROCEDURE POST-INVESTIGATION* 185–86 (Thomas West, 2004).

76. Many of the standard and acceptable reasons for declining prosecution often similarly apply to hate crimes cases. *Id.*; see also CASSIDY, *supra* note 32 (The United States Supreme Court has consistently affirmed wide prosecutorial discretion).

77. See David A. Love, *Hanging Hate: Backlash Against The Jena Six Case Sparks An Epidemic Of Public Nooses*, IN *THESE TIMES*, Dec. 10, 2007, available at http://www.inthesetimes.com/article/3443/hanging_hate/ (last visited Jan. 11, 2009) (listing 11 recent incidents of noose hangings since the Jena High School noose hangings that were not punished); see generally Diversity Inc. Magazine, *Noose Watch*, available at <http://www.diversityinc.com/public/2588.cfm> (last visited Jan. 11, 2009) (chronicling 78 noose hanging incidents across the United States since the Jena High School incident).

78. WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 681 (4th ed. 2003): Individualized treatment of offenders . . . is equally appropriate at the charging stage so as to relieve deserving defendants of even the stigma of prosecution. Decisions not to prosecute, when not motivated by doubts as to the sufficiency of the evidence, usually falls within one of these three broad categories . . . : (i) when the victim has expressed a desire that the offender not be prosecuted . . . (ii) when the costs of prosecution would be excessive, considering the nature of the violation . . . (iii) when the mere fact of prosecution would, in the prosecutor's judgment, cause undue harm to the offender . . .

See also WAYNE R. LAFAVE ET AL., *PRINCIPLES OF CRIMINAL PROCEDURE POST-INVESTIGATION* 185–86 (Thomson West, 2004).

79. See LAFAVE, *CRIMINAL PROCEDURE*, *supra* note 78; see also DAVIS, *supra* note 53 (Discretion is a necessary evil).

80. *Supra* note 70 ("Dr. Herek and his colleagues found that some hate crime victims have needed as much as 5 years to overcome their ordeal. By contrast, victims of nonbias crimes experienced a decrease in the crime-related psychological problems within 2 years of the crime. Like other victims of posttraumatic stress, hate crime victims may heal more

perpetrator's age, the amount of money stolen and the criminal record (or lack thereof) of the defendant as mitigating factors in determining whether to prosecute the clear theft crime.⁸¹ These types of factors are considered appropriate under the theory of individualized justice and represent a partial explanation for why wide prosecutorial discretion can ultimately be beneficial to achieving justice. However, in the hate crime scenario, individualized justice is wholly inappropriate and should possibly be considered an abuse of discretion.⁸² Individualized justice can be a double-edged sword depending on which factors are considered as "unique" to the crime or otherwise mitigating. Historically, individualized justice and the prosecutor's ability to discretionarily enforce the laws led to statistic neglect of crimes perpetrated against black victims.⁸³ Individualized justice is further

quickly when appropriate support and resources are made available soon after the incident occurs.").

81. Additional arguments have been made for harsher punishment for petty larceny, to more significantly impact deterrence. Further, some state legislatures have enacted recidivist statutes for petty thieves wherein habitual criminal type scheme kicks in to enhance the punishment of repeat offenders. See NEV. REV. STAT. ANN. §171.060 (2006).

82. See CASSIDY *supra* note 32.

83. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *McCleskey*, the Supreme Court considered whether a statistical study that Professor David Baldus conducted could prove discrimination under the Fourteenth Amendment against a defendant, McCleskey, facing the death penalty in Georgia. *Id.* Professor Baldus found discretion bias based on race on the part of both the prosecution in its charging decisions and the jury in its factual findings:

[T]he death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% in cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims...Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims. *Id.* at 286-87 (emphasis added).

While the Court ultimately ruled against McCleskey, affirming his conviction and sentence as valid under both the Eighth and Fourteenth Amendments, Justice Brennan's dissenting opinion noted the extreme correlation between race of the victim and discretion that the Baldus study illuminated:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 convicted of killing a white

problematic due to biases inherent within the prosecutorial discretionary process.⁸⁴ Some scholars have labeled the common practice of individual prosecutorial decision making⁸⁵ as arbitrary and unjust in its results.⁸⁶ The concept of individualized justice undermines deterrence and prevention which are both imperative to breaking the cycle of hate crimes in America. The “communal impact” of hate crimes, their disproportionate impact on the minority victims,⁸⁷ and the legislative rationale and purpose behind their proscription⁸⁸ necessitate strict and aggressive enforcement.

person would not have received the death penalty if their victims had been black, while among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are likely to result in a death sentence than cases featuring any other racial combination of the defendant and the victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died. . . . *Id.* at 321 (Brennan, J., dissenting).

84. Angela Davis refers to the seeming unconscious biased decisions prosecutors make in the attempt to “do justice,” which are biased nonetheless because of the inherent and improper biases that often times reside within the prosecutor himself or herself. *See* ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 16 (2007).

85. Angela Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 221 (2007) (suggesting that racial impact studies should be conducted and made public, not only to eliminate the problem, but also to help correct it).

86. Another motivation for targeting Black victims is not based on racial animus, i.e. hatred for blacks, but is instead based upon “opportunistic discrimination.” In cases of “opportunistic discrimination,” the perpetrator selects the black victim because (s)he is “‘easier’ to [assail] because of some perceived vulnerability” and because the case is less likely to be prosecuted if perpetrated against a black victim. *See* Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, 17 CRIM. JUST. 4, 7, (2002) *citing* FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* (1999) (discussing the “discriminatory selection” model versus the “racial animus” model of motivations for hate crimes). The federal appeals courts have also noted the discriminatory selection type of targeting black victims:

Not all attacks ‘because’ a victim is black are, however, racially motivated in the relevant sense. Thus a racially indifferent attacker (one who gets his kicks from assaulting victims regardless of race) might nonetheless pursue exclusively black victims in the belief that the police will be less likely to seek out or prosecute those who commit violent acts against blacks. *United States v. Nelson*, 277 F.3d 164, 188 n.21 (2nd Cir. 2002)(discussing the bias element in the federal civil rights law, 18 U.S.C. § 245(b)(2)(B)).

87. *See* CASSIDY, *supra* note 32.

88. U.S. CONST. amend. X.

Our criminal justice system needs a new legal, social and political approach to prosecutorial decision-making for hate crimes.⁸⁹ Politically, the health of the democracy is vulnerable to executive inaction.⁹⁰ The legislature proclaims a compelling state interest that needs protection to ensure the health and welfare of the citizenry; however, the executive is slow, if not impotent, to seek legitimate compliance with the statutes.⁹¹ As a result, the imbalances within the branches of government weaken the democracy and leave its citizens vulnerable to injustice through the overexertion of the prosecutorial *veto*.⁹² Socially, as long as civil rights enforcement remains stagnant, all citizens cannot enjoy freedom and the well-being of American society and culture cannot advance.⁹³ The cycle of hate crime must be broken to create a new narrative for America's future. True enforcement of hate crime laws will prevent a new generation⁹⁴ from growing up believing tolerance of hate crime intimidation and violence to be acceptable conduct.⁹⁵ With inconsistent enforcement, the idea of impunity for such conduct becomes the expected norm.⁹⁶

89. *State v. Bailey*, 969 So.2d 610, 611 (La. 2007) (“Our Justice system has failed if citizens can not expect equal protection of the law and equal application of the law.”); *see generally* *McCleskey v. Kemp*, 481 U.S. 279 (1987) (presenting equal protection challenge based on racial discrimination in the enforcement of laws.); *see generally* Angela Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007).

90. Stuntz, *supra* note 61.

91. *See* Jim Hughes, *Grand Jurors Hope to Go Public Congress to Decide in Rocky Flats Case*, DENVER POST, Mar. 14, 2004, at B-04 (grand jurors unsuccessfully attempted to demand the prosecutor to pursue the prosecution consistent with their indictment). *Cf.* *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (separation of powers doctrine prevents courts from interfering with the discretionary power of the prosecutor).

92. *Cf.* *Marbury v. Madison*, 5 U.S. 137 (1803) (speaking specifically of the importance of the separation of powers and the guidance of the Constitution in creating separate powers among the three branches of government).

93. *See* Kennedy, *supra* note 16.

94. Arguably youth is not an appropriate mitigating factor for hate crime prosecutions wherein, not only retribution, but deterrence and prevention are the primary goals. In other words, stricter enforcement of young violators may be necessary to break the pattern of historic discrimination and violence motivated by hate.

95. Tolerance of hate crimes contribute to a racist culture. *See* Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B. C. L. REV. 739, 758–65 (1999).

96. In a New York Times Op-Ed piece Jena, Louisiana's District Attorney Reed Walters stated that the noose hanging incident at the Jena High School “broke no law.” Reed Walters, Letter to the Editor, *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A0. However, the opinion of whether the conduct of hanging nooses from an alleged “whites only tree” on public school property is criminal is subject to interpretation; in other words, this decision is subject to prosecutorial discretion. *Id.* Walters stated in the New York Times piece that the U.S. Attorney Donald Washington agreed that there was no crime. *Id.* However, in his Congressional Hearing testimony Mr. Washington stated: “[y]es, hanging a noose under these

An examination of the real and recent events from Jena exposes the substance of the enforcement problem. The activities regarding this small Southern town are current events, occurring between 2006 and 2008.⁹⁷ However, phrases like “whites only” are still used to designate areas of the Jena High School campus, creating a social environment that is reminiscent of the Jim Crow era, an ugly part of American history.⁹⁸ White students hung nooses from a tree on school grounds to keep black students “in their place”⁹⁹ and maintain the status quo, while law enforcement and school officials turn a blind eye to this criminal conduct that victimized the entire population of black students on campus.¹⁰⁰ Yet, these same law enforcement and school officials exercise aggressive zeal to harshly punish blacks when one white student is injured.¹⁰¹ Although aggressive enforcement may be appropriate, it must be equally appropriate for both crimes with black victims and white victims, either one or many.

circumstances is a hate crime.” Howard Witt, *House Panel Demands Answers in Jena Case: Justice Department considers probe of racial bias*, CHI. TRIB., Oct. 17, 2007, at C-4. Washington testified that he exercised his discretion not to bring charges for the noose hanging incident because the perpetrators were juveniles. *Id.* Cf. *United States v. Jeremiah Munsen*, Criminal No. 08-00021 (W.D. La. 2008) (The indictment against Jeremiah Munsen states facts alleging violation of 18 U.S.C. § 241 (Conspiracy Against Rights) and 18 U.S.C. § 245(b)(2)(E) (Interference with Federally Protected Activity)). Munsen’s charges stem from an incident during the Jena 6 protest. *Id.* Munsen hung nooses from his pick-up truck and circled the protesters as they were waiting to take their bus back home to Tennessee. *Id.* Local Alexandria police officers originally arrested Munsen for inciting a riot. *Id.* He was later indicted for federal charges. Tony Norman, *Nooses are all the Rage*, PITTSBURGH POST-GAZETTE, October 30, 2007, at A-2; see LAFAVE, *supra* note 78 (others that have been arrested for hanging nooses include an incident in South Carolina where “on Nov. 13, a college student in Orangeburg, S.C. was arrested for hanging a noose in a classroom”).

97. Raquel Christie, *Double Whammy*, AM. J. REV., February/March 2008, <http://www.ajr.org/Article.asp?id=4454> (last visited Jan. 10, 2008).

98. In C. Vann Woodward’s study of racial relations in the United States, he quotes to Leon F. Litwack’s account of slavery in the North as follows: “[I]n virtually every phase of existence, [. . .] Negroes found themselves systematically separated from whites. They were either excluded from railway cars, omnibuses, stagecoaches, and steamboats or assigned to special “Jim Crow” sections; they sat, when permitted, in secluded and remote corners of theaters and lecture halls; they could not enter most hotels, restaurants and resorts, except as servants; they prayed in “Negro pews” in the white churches, and if partaking of the sacrament of the Lord’s Supper, they waited until the whites had been served the bread and wine. Moreover, they were often educated in segregated schools, punished in segregated prisons, nursed in segregated hospitals, and buried in segregated cemeteries[.]” C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 19 (3d ed. 1974).

99. Keeping black students from exercising their freedom to sit, congregate, or associate wherever and with whomever they choose on campus. *Infra* note 130; see also U.S. CONST. amend. I.

100. See WHIPPLE, *supra* note 14; see also *supra* note 5.

101. See Kennedy, *supra* note 16.

As America seeks to heal the scars of its past, it must affirmatively address the inequities of its current law enforcement system that still perpetuates injustice¹⁰² and impedes freedom¹⁰³ frequently along racial lines.¹⁰⁴ The often clandestine issue is the role that prosecutorial discretion plays in undermining a citizen's belief of fairness within the justice system. Crimes of racial terrorism are one category where perpetrators have historically been ignored or treated¹⁰⁵ with a light penal hand.¹⁰⁶ Minority citizens within the community must feel secure that justice is equally available for them as crime victims or criminally accused defendants. The Jena scenario emphasizes the negative ramifications when confidence in neither exists.

To break the cycle and change the narrative, the prosecutorial "radar" to enforce the law should be alerted in criminal cases that exhibit classic oppressive narratives and perpetuate cycles of historical racism specifically aimed at limiting the freedom and justice available for minority groups.¹⁰⁷ Allowing unpunished criminal actions of this type ultimately contaminates the democracy for all members of society.¹⁰⁸ Law enforcement officers, specifically prosecutors, which are at the head of our criminal justice system, must be encouraged, if not mandated, to take affirmative steps toward enforcing violations and crime prevention campaigns aimed at this specific type of hate crime conduct. This effort will redress a significant social harm, protect the public's general safety and welfare,¹⁰⁹ and shelter important

102. See Holding, *supra* note 54.

103. *Id.*

104. State v. Bailey, 969 So. 2d 610, 613 (2007) (Supreme Court of Louisiana recused Reed Walters, local District Attorney of LaSalle Parish, Jena, Louisiana, for improperly taking race into account when exercising his charging authority).

105. Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, 17 CRIM. JUST. 4, 6 (2002) ("Yet, [the question of whether the conduct is a hate crime] often falls to law enforcement, the prosecution, and the defense to dispute and determine, for it is implicated in decisions concerning how cases are prosecuted and defended, albeit often in ways that are not noticed because the question is subsumed into matters of trial strategy and choice of narrative.") (emphasis added).

106. Fair distribution of justice is most vitally needed for crimes in which justice has historically been underserved. Arguably, the black students of Jena have no confidence that the executive official District Attorney Walters or any of his local counterparts will redress their victimization.

107. See *supra* note 14 & 73.

108. "But alas! even crime has power to reproduce itself and create conditions favorable to its own existence." IDA B. WELLS-BARNETT, ON LYNCHINGS 28 (2002) (quoting Frederick Douglass' letter to Ida Wells).

109. Virginia v. Black, 538 U.S. 343, 359–62 (2003) (It is not unconstitutional to proscribe hate crime conduct, even if said conduct may constitute "speech" if committed with *mens rea*.)

principles of our democracy.¹¹⁰ The power to exercise the prosecutorial *veto* is virtually limitless and the Supreme Court of the United States has endorsed the unilateral autonomy of this executive function.¹¹¹ However, beyond the constitutional floor that the Supreme Court established, one must still investigate and correct the imbalance in the exercise of the prosecutorial *veto* to protect the health of the American culture of which concepts of freedom reinforce its foundation.

III. SPOTLIGHT ON JENA

The exercise of prosecutorial discretion is seldom the subject of major news stories and even less often do prosecutorial decisions receive national media coverage.¹¹² Interestingly, in the case of Jena, although the criminal conduct was egregious and the facts unfolding at the local high school contained many newsworthy issues, the story remained uncovered for nearly a year.¹¹³ The chronology of the Jena events demonstrates the absence of contemporaneous media attention or true public scrutiny of the decisions of the local high school administrators and the local law enforcement officials.

Through an effort of grassroots journalism and activism, the events at Jena High School became national news.¹¹⁴ Some first learned of the Jena cases through a short documentary published on the popular Internet website *YouTube*.¹¹⁵ This documentary was

110. *Supra* note 14.

111. *Infra* note 274.

112. The general public is often not aware of the daily decisions made by law enforcement officials in their communities. *See generally* DAVIS, *supra* note 53. Unless the offender is a celebrity, public official, or other personality in the public eye, or the criminal conduct itself is particularly egregious, most law enforcement actions and prosecutorial decisions are not reported or followed by the media. *Id.*

113. Justin Purvis asked to sit under the whites' only tree in September 2006. CNN did not start covering Jena until after Mychal Bell had been tried and convicted. *See* Christie, *supra* note 97 (highlighting the presses were "largely silent" through the noose hanging and arson incidents at Jena High School as well as a series of black on white, white on black crimes that occurred seeming in response to the heightened racial tensions in Jena, Louisiana). The first newspaper article appeared in May 2007 in the Chicago Tribune. The major news coverage did not begin until July 2007 and the protest march in September 2007. Susan Roesgen, *High School Beating Case* (2007) available at <http://www.cnn.com> (last visited Jan. 10, 2009) (Perform video search with the phrase, "High School Beating Case").

114. Notably, by the time national media began to cover the story, nearly a year had passed since the nooses were hung in the trees at Jena High School and, Mychal Bell, one of the "Jena Six", had already been convicted as an adult for aggravated battery. *See* Christie, *supra* note 97.

115. YouTube, <http://www.youtube.com/watch?v=YuoiZnr4jLY> (last visited Oct. 23, 2008). Nearly 1.5 million people have viewed this documentary. *Id.*

circulated via email to many lawyers, legal scholars and other interested organizations. Before long, *CNN* shows like *Paula Zahn Now*¹¹⁶ and other major news outlets covered the story.¹¹⁷ Additionally, popular black radio shows such as the *Tom Joyner Morning Show*¹¹⁸ and *Steve Harvey*¹¹⁹ began discussing the case on-air. As news spread, outrage grew and the public outcry demanded a change.¹²⁰

What was so outrageous about Jena?¹²¹ What sparked thousands of people to leave their homes and travel to this small, otherwise unknown, Southern town in Louisiana and protest?¹²² The public's demand for an end to the classic narrative of racial intimidation and discrimination, which has long plagued America, drove protest efforts.¹²³ For many observers, the cause of the injustices in Jena appeared rooted in America's historic problems with racial inequality in the South—an era that most believed to have passed long ago.¹²⁴ A large and diverse segment of the national population publicly vocalized and insisted¹²⁵ upon the freedom Hughes believed America promised every citizen.¹²⁶ The need for Hughes' “freedom” (i.e. equality) was urgent.¹²⁷ The Jena story forced a national spotlight on a

116. On June 25, 2007, CNN was the first national television news outlet to report on Jena High School on *Paula Zahn Now*. See Christie, *supra* note 97.

117. *Id.*

118. See Witt, *supra* note 58 at C-1.

119. See *id.*

120. Largely protesters wanted Mychal Bell released from jail and the white students that hung the nooses charged with crimes. See *id.*

121. Unequal enforcement of the law based on race seemed to outrage most. It was summed up by one citizen in the following way: “[i]f [the local prosecutor] can figure out how to make a schoolyard fight into an attempted murder charge, I’m sure you can figure out how to make stringing nooses into a hate crime”. Reed Walters, Letter to the Editor, *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A0.

122. See Whoriskey, *supra* note 2.

123. See Witt, *supra* note 58 at C-1.

124. Howard Witt, *Jena 6 Defendant Out of Jail: Prosecutor Credits Divine Intervention for Orderly Protest*, CHI. TRIB., Sept. 28, 2007, at C-4 (“This shocking case has focused national and international attention on what appears to be an unbelievable example of separate and unequal justice that was once commonplace in the Deep South,” the group of 43 lawmakers said in a letter to Acting Attorney General Peter Keisler.”).

125. See Whoriskey, *supra* note 2. Over twenty thousand people marched in Jena. Witt, *supra* note 58, at C-1.

126. HUGHES, *supra* note 1.

127. *Id.* (“I do not need freedom when I’m dead.” Hughes’ poem spoke of an urgent need for freedom). Jena is a type of Democracy in Action. Not only is Jena an unchecked and biased exercise of governmental authority, it is also an example of grassroots politics that moved a nation into action – marching, protesting, holding Congressional hearings, lobbying for gubernatorial clemency, executive explanation and legislative changes.

very important issue—the discretionary power of the prosecutor’s office and its lead role in achieving justice.¹²⁸

A. Which Came First? The Tree or the Noose

On August 31, 2006, Justin Purvis, a black male student at Jena High School, asked a school official for permission to sit under a particular tree on campus, a tree unofficially known as the “whites only tree.”¹²⁹ The school official reportedly told Justin Purvis that, “he could sit wherever he liked.”¹³⁰ However, Justin Purvis’ need to first ask permission to sit under the tree indirectly exemplifies the elevated level of racial oppression and discrimination that ubiquitously existed at Jena High School.¹³¹ In the words of Langston Hughes, Justin Purvis merely “wanted freedom, just as you.”¹³² He wanted the same

128. See Witt, *supra* note 124 (District Attorney Reed “insisted that he had treated all of the Jena 6 defendants ‘fairly and with dignity’... [and furthermore] he had not been swayed by the demonstrators or the national attention”).

129. It has been reported that the tree was unofficially a “whites’ only”—rule that the white high school students apparently enforced. See generally *Case of the “Jena Six”: Testimony before the Comm. on H. Judiciary*, 110th Cong. (2007) (testimony of Charles Ogletree) (“First, no public school in the United States should have a policy, either written or implicit, that reserves sections of the grounds for students of a certain race.”). The high school officials, even prior to the noose-hanging incident, told the black student who asked, that yes, he was allowed to sit wherever he wanted, even under the tree. *Id.* However, the fact that the black student felt the need to ask if he could sit there, and the following repercussions from sitting there, hanging nooses from the tree the next day, evidence that the black students were not mistaken in their belief that they were intentionally excluded from this area of the campus where the tree stood. *Id.* Following all the national media attention of Jena High School the tree has been totally removed from the high school’s campus. Yet, there appears to have been no corresponding action within the school itself to address the apparent racial disparities/inequities. Cf. Craig Franklin, *Media myths about the Jena 6: A local journalist tells the story you haven’t heard*, CHRISTIAN SCIENCE MONITOR, October 24, 2007 available at www.csmonitor.com/2007/1024/p09s01-coop.htm (last visited Jan. 10, 2009) (Craig lists 12 “myths” about Jena that had been reported by others and instead reports additional facts that negate the common factual understanding of the events that took place at Jena High School. For example, Franklin reports that there was no “whites only tree” and the “nooses” hanging from the tree were not targeted at the black students, they were directed at the perpetrators white friends on the school’s rodeo team. However, Franklin’s report also confirms that some “myths” were not myths at all, such as “Myth 9: Mychal Bell’s All-White Jury. While it is true that Mychal Bell was convicted as an adult by an all-white jury . . . the jury selection process was completely legal . . .” *Id.* So, it is not a myth that the jury was an all-white jury.) However, there were many conflicting facts in the news reporting of the Jena story. See Christie, *supra* note 97.

130. Christie, *supra* note 97.

131. To discuss the necessary legal and policy issues contained in the analysis of racial motivated crimes, it is imperative to capture the character of the landscape and its historical context. See American Psychological Association, *supra* note 70.

132. HUGHES, *supra* note 1.

freedom that his fellow white colleagues were experiencing at Jena High School—the ability to sit under any tree.¹³³ Unfortunately, Justin Purvis did not have the simple privilege of resting under the shade of a nice tree of his choice on a hot Louisiana afternoon without consequences or backlash.¹³⁴ The next day,¹³⁵ in response to the black students sitting under the “whites only tree,” someone found three nooses in school-colors hanging from that same tree.¹³⁶ School officials discovered that three white students hung the nooses.¹³⁷ Although the school principal initially wanted to expel the white students, the school administration ultimately was unsympathetic to the black students’ and their parents’ grievances.¹³⁸ Billy “Bulldog” Fowler, a member of the LaSalle Parish School Board, stated that he believed the hanging nooses were a prank.¹³⁹ Due to this attitude

133. Federal civil rights laws proscribe conduct that limits freedom. 18 U.S.C. §§ 241, 242, 245 & 247 (2006); *see also* 42 U.S.C. § 3631 (2000); Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, 17 CRIM. JUST. 4, 5 (2002):

[S]everal states have enacted civil rights legislation following the federal model. The key element under civil rights laws is that the defendant intended to intimidate the victim in or to interfere with the free exercise of rights under the Constitution or laws of the United States or the particular state; these laws may or may not also require that the defendant acted because of the victim’s race or other protected status.

Cf. LA. REV. STAT. ANN. § 14:107.2 (2001) (Hate crimes Criminal Code of Louisiana).

134. *See* State v. Bailey, 969 So. 2d 610, 610 (La. 2007) (examining the use of prosecutorial discretion).

135. That is, the day after Justin Purvis and a couple of his fellow black friends sat under the “whites’ only tree.”

136. *See* Christie, *supra* note 97.

The turmoil in Jena, Louisiana, began in late August 2006, when a black student asked at an assembly if he could sit under what some refer to as the “white tree” at Jena High School. The next day, nooses were strung from that tree -- black and gold nooses, school colors. The students responsible for the nooses were disciplined but not expelled. *Id.*

137. *See also* Franklin, *supra* note 129:

Myth 2: Nooses a Signal to Black Students. An investigation by school officials, police, and an FBI agent revealed the true motivation behind the placing of two nooses in the tree the day after the assembly. According to the expulsion committee, the crudely constructed nooses were not aimed at black students. Instead, they were understood to be a prank by three white students aimed at their fellow white friends, members of the school rodeo team. *Id.*

138. Jay Malcolm Garcia, *A Product of this Town*, 84 VA. Q. REV. 44, 44 (2008).

Three white students were quickly identified as responsible, and the principal recommended that they be expelled. But Jena’s school superintendent Roy Breithaupt, who is white, intervened and ruled that the nooses were just an immature stunt. He suspended the students for three days, angering those who felt harsher punishment were necessary.” *Id.*

139. Amy Goodman, *Ugly Tradition Revisits Louisiana Town*, SEATTLE-POST INTELLIGENCER, Sept. 20, 2007, available at <http://seattlepi.nwsourc.com/opinion/>

amongst the school board members,¹⁴⁰ the white students were not seriously punished for their noose hanging conduct.¹⁴¹ The black students at Jena High School staged an impromptu sit-in¹⁴² under the “whites only tree” continuing to assert their right to freely assemble¹⁴³ on campus and in response to school administrators and law enforcement not taking their victimization seriously.¹⁴⁴

Due to the noose hanging incident and the black students’ protests, local police asked District Attorney Reed Walters to speak at the high school assembly.¹⁴⁵ When he addressed the student body at

332326_amy20.html (last visited Jan. 10, 2008) (“This is the deep South, and [older] black people know the meaning of a noose. Let me tell you something – young people don’t.”).

140. District Attorney Reed Walters, who was also the general counsel for the school board, influenced the school board’s decisions regarding the noose hanging students. *Id.* Considering the Louisiana Supreme Court’s opinion of Walters judgment regarding racial matters, it is more than troubling that he was also advising the school board on this delicate matter which requires sensitivity to the victims and the community, as well as the responsibility of condemning the perpetrators actions, if not with criminal punishment, with some type of restorative justice remedy. *Id.*

141. See Darryl Fears, *In Jena’s Aftermath, a Recurrence of an Ominous Symbol*, WASH. POST, Oct. 19 2007 (Rather than expel the offenders, in accordance with the wishes of the principal and the black parents, the superintendent and school board members, all white, voted to suspend the students for three days and force them to attend a week of disciplinary classes.).

142. See David Person, *Jena Needs Love The Most*, HUNTSVILLE TIMES, September 28, 2007, 8A; see also Kathy Chaney, *Local Students Protest For Their Peers In Jena, Louisiana*, CHICAGO DEFENDER, September 12, 2007, Vol. 102, issue 72; see also DeWayne Wickham, *‘Jena Six’ Case Awakens Civil Rights Movement*, USA TODAY, September 18, 2007, 11A.

143. U.S. CONST. amend. I (right to free assembly and free association.). Under federal hate crime and civil rights laws, it is criminal to intimidate or interfere with the free exercise of one’s constitutional rights. 18 U.S.C. §§ 214, 242, 245, 247, 248 (2006); and 42 U.S.C. § 3631 (2000). See generally Wang, *supra* note 105, at 6 (discussing “three key assumptions about hate crimes”).

144. See Fears, *supra* note 141.

145. It is also been reported that several uniform police officers, maybe even a dozen, were present at the high school assembly when Walters made his comments. Friends of Justice, *Ineffective Assistance of Counsel: What Blane Williams should have known*, <http://friendsofjustice.wordpress.com/2007/07/02/ineffective-assistance-of-counsel-what-blane-williams-should-have-known/> (last visited Oct. 27, 2008). In conjunction with Walters commentary, it is easy to see how the black students would feel even more threatened and intimidated by law enforcement’s show of force regarding them asserting their constitutional rights, compared to no law enforcement response when nooses were hung threatening them for sitting under a tree. See generally *id.* Cf. Franklin, *supra* note 138:

Myth 4: DA’s Threat to Black Students. When District Attorney Reed Walters spoke to Jena High students at an assembly in September, he did not tell black students that he could make their life miserable with “the stroke of a pen.” Instead, according to Walters, “two or three girls, were chit-chatting on their cellphones or playing their cellphones right in the middle of my dissertation. I got a little irritated at them and said, “Pay attention to me. I am right now having to deal with an aggravated rape case where I’ve got to decide whether the death penalty applies or not.” I said, “Look, I can be your best friend or your worst enemy. With a stroke

Jena High School, he proclaimed that, “[w]ith a stroke of a pen, I could end your life.”¹⁴⁶ These words indicated that he could vigorously prosecute any wrongdoing of the black students that occurred at Jena High School. Walters had already made clear that he was not interested in prosecuting Jena High white students’ criminal conduct.¹⁴⁷ Three white students had already committed chargeable crimes¹⁴⁸ on campus, yet Walters had made no attempt to investigate or prosecute the noose hanging threats, despite knowing the identity of the students who committed the acts.¹⁴⁹ Walters was also not reconsidering his decision to not prosecute the noose hanging incident when he spoke to the students at the assembly.¹⁵⁰ His words and

of a pen I can make your life miserable so I want you to call me before you do anything stupid.”

146. Richard Cohen & John Tye, *The Stroke of a Pen: Double Standard in Jena*, Southern Poverty Law Center available at <http://www.splcenter.org/news/item.jsp?aid=286> (last visited Jan. 10, 2009) (“After black students staged a sit-in under the contested tree, Walters came to the school and, according to numerous witnesses, ominously told the student body that if they did not settle down, ‘With a stroke of my pen, I can make your lives disappear.’”).

147. See Walters, *supra* note 121, at A0 (District Attorney Reed Walters articulated in the New York Times Op-Ed piece that the noose hanging incident at Jena High School “. . . broke no law. I searched the Louisiana criminal code for a crime that I could prosecute. There is none.”). In comparison civil rights lawyers have also combed the statutes, as Mr. Walters calls it, and found applicable law authorizing charging a crime. *E.g.*, Cohen, *supra* note 146. “Louisiana Revised Statute 14:107.2 creates a hate crime for any institutional vandalism or criminal trespass motivated by race.” *Id.* Additionally, it appears that the noose hanging students could have been charged under a disturbing the peace statute, LA. REV. STAT. ANN. §14:103 (1942), a terrorizing statute, LA. REV. STAT. ANN. §14:40.1 (1978), an extortion statute LA. REV. STAT. ANN. §14:92.2 (1962), an inchoate crimes of conspiracy statute, LA. REV. STAT. ANN. §14:26 (1977), and/or an attempt statute, LA. REV. STAT. ANN. §14:27 (1970); see *infra* Part III.C. *Is Hanging A Noose Criminal?*

148. See generally LA. REV. STAT. ANN. § 14:40.1 (1978) (“Terrorizing is the intentional communication . . . with the intent of causing members of the general public to be in sustained fear for their safety . . .”); LA. REV. STAT. ANN. §14:107.2 (“It shall be unlawful for any person to select the victim of the following offenses against person and property because of actual or perceived race . . .”).

149. Instead District Attorney Walters advised the school board against expelling the students that hung the nooses, and they received an even lighter punishment of three days suspension. See generally Goodman, *supra* note 139 (interviewing a school board member that voted to uphold the expulsion of the black students solely under the advice of Walter, the school board’s lawyer).

150. District Attorney Walters maintains there is no chargeable crime, i.e. no criminal statute in the State of Louisiana, under which the white students’ conduct could be charged. See Walters, Letter to the Editor, *supra* note 121, at A0. See also United States v. Jeremiah Munsen, Criminal No. 08-00021 (2008) (discussing Jeremiah Munsen’s arrest for hanging nooses from his truck and circling the Jena Six protesters awaiting buses in Alexandria, Louisiana, a nearby city). Ultimately, Munsen was federally indicted under 18 U.S.C. § 241 (Conspiracy Against Rights) and 18 U.S.C. § 245(b)(2)(E) (Interference with Federally Protected Activity). All discretionary prosecutorial decisions are open to interpretation, but ultimately the question goes back to the willingness of the prosecutor to redress the social

underlying message was as direct and specifically targeted as the nooses themselves towards the black students of Jena High School.¹⁵¹ Walters had no desire or intention of “ending the lives” of the three white students; however, he promised an all too different fate for any black student who dared violate the law.¹⁵²

However, another explanation is that Walters was simply puffing to quell the tension at the school and help return the environment to normal. Yet, even if his comments are stretched into that interpretation, his conduct was unethical and inappropriate as the prosecuting District Attorney in the jurisdiction. The District Attorney should neither make such threats to students, especially when they are the victimized group, nor give speeches regarding the intended use or misuse of authority. Certainly such conduct is unconstitutional, unethical and unjust.¹⁵³

The story of criminal activity at Jena High School continued beyond the noose hanging incident, to include an alleged arson, for which the perpetrator was never identified,¹⁵⁴ and physical injury to a white student Justin Barker,¹⁵⁵ which was originally alleged as an

harm committed and the victimization suffered within his community. District Attorney Walters' record on the noose hanging incident at Jena High School is clear – he was unwilling to prosecute. *See generally* Howard Witt, *3 Towns: The Past, The Present, The Future: No Black-and-White Answers*, CHI. TRIB., Dec. 26, 2007, at C-1 (discussing the evolution of racism in Jena, La. up to the present day Jena Six occurrence); *see also* Snyder v. Louisiana, 128 S. Ct. 1203, 1208 (2008) (Equal protection claim in a jury trial case wherein the prosecutor used the preemptory challenges to remove all five African American jurors to accomplish having an all white jury).

151. Randall Kennedy, *Symposium: Changing Images of the State: The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1267 (1994) (“Throughout American history, officials have wielded the criminal law as a weapon with which to intimidate blacks and other people of color.”).

152. Pursuing “ending the life” of the criminally accused is not only a unique and unacceptable way in which to view one’s prosecutorial duty, it reeks of unconstitutional exercise of discretion in charging and pursuing criminal sentencing. *Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (vindictive prosecution violates due process); *see also* *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (vindictive sentencing violates due process); *see also* *North Carolina State Bar v. Nifong*, 06 DHC 35 (Jul. 24, 2007), Amended Findings of Facts, Conclusions of Law and Order of Discipline, *available at* <http://www.ncbar.cm/orders/06dhc35.pdf> (last visited Oct. 28, 2008) (North Carolina prosecutor was disbarred for improper conduct during the prosecution of a rape case that members of the Duke University Lacrosse Team allegedly committed).

153. *Blackledge*, 417 U.S. at 27.

154. Bill Sumrall, *December 27, 2006: Jena High Fire, Racial Tension Dominate News in LaSalle Parish*, *available at* <http://www.thetowntalk.com/article/99999999/NEWS/70916022> (last visited Oct. 27, 2008).

155. Darryl Fears, *LA. Town Fells “White Tree,” But Tensions Run Deep*, WASH. POST, Aug. 4, 2007, at A03.

attempt murder and conspiracy to commit same,¹⁵⁶ in the case that is infamously called “the Jena Six” – referring to the six black students charged. The Jena Six consist of Robert Bailey, Mychal Bell, Carwin Jones, Bryant Purvis, Theodore Shaw, and Jesse Ray Beard.¹⁵⁷

Looking at this series of criminal events at Jena High School, one must consider the argument that state and federal law enforcement officials failed the citizens of Jena. They failed the high school students in particular. The lack of aggressive law enforcement response to the first criminal incident, the noose hanging, helped fuel an environment of lawlessness and vigilante justice. It is probable that swift and efficient governmental remedial action could have deescalated the racial tension, victimization and entitlement, instead of creating an environment for resentment, frustration and vigilante violence to fester. Perhaps it is too simplistic to boil the Jena story down to a straightforward case of cause-and-effect. At a minimum, the question must be considered: why did law enforcement essentially condone, or at least forgive, the white students for hanging nooses?¹⁵⁸

156. The original charges of attempt murder and conspiracy to commit attempted murder where amended by the prosecutor before trial to allege instead aggravated battery and conspiracy to commit aggravated battery. Howard Witt, *Charge Reduced in 'Jena 6' Case – Change Made On Day Jury Was To Be Picked*, CHI. TRIB., Jun. 26, 2007, at C4. Mychal Bell, was charged as an adult, and was the first of the defendants to go to trial. *Id.* He was convicted of all charges. Abbey Brown, *September 5, 2007: Judge Throws Out One of Bell's Convictions: Charges Reduced For Two More in 'Jena Six' Case*, Oct. 27, 2007, available at <http://www.thetowntalk.com/article/99999999/NEWS/399990022> (last visited Jan. 10, 2009). His conviction was overturned on appeal and his case remanded for juvenile adjudication. *Id.* Notwithstanding the reversal Bell remained in-custody which was a point of controversy and protest. *Id.* Bell served ten months in-custody prior to his release. *Id.* Ultimately Bell pled guilty. *Id.* Charges against the other five defendants are still pending. *Id.*

157. *Bailey*, 969 So. 2d 610, 610 n.1.

158. Law enforcement hardly responded to the hanging nooses or to the threats or intimidation they symbolized. They made no arrests and filed no charges against the white students for their conduct of hanging nooses from the tree. *Id.* Due to law enforcement apathy and/or the incorrect prosecutorial decision not to hold the white students accountable, Jena is regrettably reminiscent of the historical tradition of impunity given to whites who threaten blacks, which condones, instead of condemns, this type intimidation. It is unclear from the news reporting whether the local Jena police department submitted a request for prosecution of the noose hanging incident. However, the Louisiana Supreme Court opinion in *State v. Bailey* references the fact that the Jena police requested Reed Walters speak at the Jena High School assembly. *Bailey*, 969 So.2d at 611. This request seems to suggest that the police were aware of the noose hanging incident at Jena High School and may have submitted police reports regarding it. Notwithstanding, District Attorney Walters has been consistent on his view that no chargeable crime stemmed from the noose hanging incident. Walters, *supra* note 121. The FBI did investigate the noose hanging incident and did submit request for prosecution to the federal prosecutor which was denied. See Cohen & Tye, *supra* note 146. In a congressional hearing investigating this case the federal prosecutor submitted a report in justification of his decision not to prosecute. See *Case of the Jena Six: H. Comm. on the Judiciary*, 109th Cong. (2007)(Statement of Lisa M. Krigsten Counsel to the Assistant

The black students at Jena High School in 2006¹⁵⁹ were experiencing violent threats for exercising their right to sit freely and peacefully under a shade tree.¹⁶⁰ The black students' parents were outraged,¹⁶¹ yet were politically powerless to effect a change.¹⁶² Tina Jones, Bryant Purvis' mother expressed her feelings as a victim,¹⁶³ stating that:

To Black people [hanging nooses are] offensive because you know over the years, black people were hung in trees. So I mean we felt like the white people were saying, 'Well, if you sit under this tree, we're

Attorney General, Civil Rights Division, Department of Justice; see also Faryl Ury, Jena Six Congressional Hearing Stirs Emotional Debate, Medill Reports Washington, Oct. 19, 2007, available at <http://news.medill.northwestern.edu/washington/news.aspx?id=66233> (last visited Jan. 10, 2009). It did not include the fact that there was no chargeable crime, instead the federal prosecutor's focus was on the level of seriousness of the incident and that the case was perpetrated by juvenile offenders, a type of case the federal prosecutors rarely charge. Notably, following all the media coverage of this uncharged case, federal prosecutor later charged a very similar case involving hanging nooses in Alexandria, Louisiana wherein the alleged perpetrator was eighteen years old.

159. In 2006, the seemingly modern era of school desegregation and abolition of Jim Crow restrictions, one might assume a climate of intolerance for the traditional impunity given individuals that threatened blacks. See generally *Brown v. Board of Education*, 347 U.S. 483 (1954) (pivotal United State Supreme Court decision that made "separate but equal segregation" unconstitutional). After *Brown*, Louisiana school districts resisted complying with the ruling. Joel Wm. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing Brown's Mandate*, 78 TUL. L. REV. 2207, 2251 (2004) (reporting that eleven years after *Brown* less than one percent of Louisiana's black students were enrolled in integrated schools); see generally *Davis et al. v. E. Baton Rouge Parish Sch. Bd.*, 347 U.S. 686 (1982) (a school system in Eastern Baton Rouge did not integrate until the 1980s).

160. Wang, *supra* note 69.

161. Darryl Fears, *In Jena's Aftermath, a Recurrence of an Ominous Symbol*, WASH. POST, Oct. 19 2007.

162. As of July, 2007, the population of Jena was 2,864 people. City-Data, <http://www.city-data.com> (last visited Oct. 28, 2008) (search Jena, LA for population). The population is racially divided as follows: 84.9% white, 12% black. *Id.* The prosecutor Reed Walters, who also serves as the legal counsel to the school, is white. All but one of the members of the school board is white. The school superintendent is white and the school's principal is white.

163. Notably, proof of crimes cannot be based solely upon how the alleged conduct made the victim feel. Instead, the requisite criminal element that must be established is the defendant's *mens rea* (i.e. defendant's criminal intent, beyond a reasonable doubt). Although circumstantial evidence can properly be used to prove the defendant's intent, the defendant's intent cannot be presumed. See *Virginia v. Black*, 538 U.S. 343, 363 (2003) (United States Supreme Court reversed a conviction for cross burning wherein the statute improperly presumed that "any burning of a cross shall be prima facie evidence of an intent to intimidate"). Cf. *Williams v. New York Housing Authority*, 154 F. Supp. 2d 820, 823 (2001) (ruling that "[t]he hangman's noose remains a potent and threatening symbol for African-Americans, in part because the grim specter of racially motivated violence continues to manifest itself in present day hate crimes[']").

going to hang you.’ That’s how us, as Black people felt, even though the white people said it was a prank. How could it be a prank when something like that was done to black people over the years?¹⁶⁴

The events of Jena High School are troubling for many reasons; however, the “whites only tree” and the corresponding nooses expose only part of the Jena story, its local high school, its local history and its local prosecutor. One of the most significant issues highlighted in these facts is the exercise of prosecutorial discretion in light of the type of conduct that has been widely recognized as having great potential to produce future retaliatory crime.¹⁶⁵ In this “post-hate-crime-legislation” era, bias motivated crimes, also known as hate crimes, create a distinct and more problematic social harm and, therefore, warrant special attention.

B. Symbols, Words, and Actions Have Power

Symbol: Hanging Noose

Words: “Simply a prank” -School board members

Action: No expulsion; no prosecution; under-enforcement of hate crime conduct of the white students

Symbol: The show of force by the prosecutor and armed police officers

Words: “With the Stroke of Pen I could end your lives”
-District Attorney Reed Walters

Action: Attempt murder prosecution; over-enforcement of the battery conduct of the Jena Six

Words can heal, wound, deescalate and infuriate. Additionally, despite the varied reactions individuals have to spoken words, words definitely have power.¹⁶⁶ Like words, symbols can convey powerful

164. Alice Woodward, *The story of the Jena 6*, Issue #123 (Sept. 23, 2007), <http://rwor.org/a/102/jena-story-en.html> (last visited Nov. 02, 2008).

165. Sumrall, *supra* note 154.

166. See Blecker, *supra* note 35.

messages.¹⁶⁷ Universal symbols associated with hate, such as the swastika, the confederate flag, a burning cross,¹⁶⁸ as well as a hanging noose, have been historically used to strike fear of discriminatory violence in its victims.¹⁶⁹ Modern lawmakers are well aware of this type of conduct and have proscribed it criminally to protect the health and welfare of the community.¹⁷⁰

The act of hanging a noose from a tree conveys a universally understood and unmistakable threat.¹⁷¹ Targeted racial animus and racial superiority motivate this type of threat.¹⁷² Moreover, hanging a noose from a tree sends a particularly terrorizing message because it implies a type of vigilante oppressive group violence that has

167. See Blecker, *supra* note 35.

168. *Virginia v. Black*, 538 U.S. 343, 362 (2003):

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, . . . a State may choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.

169. See *id.* at 388 (Thomas, J., dissenting). "In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred . . . , and the profane. I believe that cross burning is the paradigmatic example of the later." *Id.*

170. Hate speech, which is protected by the First Amendment, has clearly been distinguished from hate crimes which enjoys no such protection, and instead can be criminally sanctioned. See *id.* at 362 (noting that punishing cross burning, when committed with the intent to intimidate, "does not run afoul of the First Amendment"). See also U.S. CONST. amend I ("Congress shall make no law...abridging the freedom of speech...").

171. *Williams v. New York City Housing Authority*, 154 F. Supp. 2d 820, 824 (2001) (In this federal employment discrimination case wherein African-American employees were subjected to a hostile work environment including hanging nooses, the court stated that "the noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence[']"). The noose was a power and historic symbol of violence against Blacks in Louisiana. Some of the most violent and vengeful lynchings were reported in Louisiana. IDA B. WELLS-BARNETT, *ON LYNCHINGS*, 72 (Humanity Books 2002). For example, in November 1892, in Jonesville, Louisiana, the lynching of a fourteen-year-old and sixteen-year-old sister and brother, along with their father, were all lynched on the allegation that the father had killed a white man. *Id.* First the children were hanged and their bodies filled with bullets, then their father was hanged. *Id.*

172. Sometimes lynching was used as a means of criminal sanction for alleged violations, yet at other times lynching was used as a way to keep Blacks "in their place" and as a means of social oppression. WELLS-BARNETT, *supra* note 171 (citing *Free Speech*, May 21, 1892, an Afro-American journal published in Memphis). Often Black men were falsely accused of raping white women to justify lynching and violence against them. *Id.* "Nobody in this section of the country believes the old threadbare lie that Negro men rape white women." *Id.*

historically been above law.¹⁷³ The symbolism of a hanging noose conveys to the black students at Jena High School that "it does not matter what any school administrator told you, you are not allowed to sit under our "whites only tree," and there may be heavy consequences to pay for your continued violation of the social order we [white students] have established here at Jena High School."¹⁷⁴ Threats are commonly treated as criminal acts under the law, even threats by juveniles. The noose hanging incident begs the question of whether the conduct of the white students was criminal, and, furthermore, who determines the answer. Section III.C. answers the easier of the two questions as to whether the conduct qualifies as a crime, and Section IV explains that it is within the prosecutor's discretionary power to initially decide the penalty, if any, of one's alleged criminal conduct.

C. Is Hanging A Noose Criminal?

District Attorney Reed Walters' actions cannot be fully analyzed nor critiqued by solely examining one side of the Jena story. In other words, the charging documents actually filed against the Jena Six for the on-campus fight alone, months after the noose hanging incident, does not fully inform whether their charges were appropriate or, more importantly, whether Walters' decision to prosecute was equitable. Instead, Walters' conduct should be analyzed more thoroughly before reaching an opinion. He must be held accountable for both his inaction and his action concerning the following: (1) his decision not to exercise his law enforcement authority to seek criminal redress for the direct threat crimes perpetrated against the black students when exercising their right simply to sit under a tree on-campus; and (2) his arguably overzealous charging of attempted murder for a simple school-yard fight.¹⁷⁵ This section explores both situations and argues that Walters' failure to prosecute the white students' racially motivated conduct of hanging nooses in the "whites only tree" created, or at least allowed, an environment wherein white students believed that they could victimize their black counterparts

173. Historically, the hanging noose symbolized "the law" because it was above the law and operated in total disregard of the law. Lynch mobs executed their victims without trial or concern of the judicial process. JAMES H. MADISON, *A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA* 18 (2001)

174. *Id.*

175. See generally Witt, *supra* note 156, at C4; Brown, *supra* note 156 (discussing both the inaction of Walters to criminally charge the students who hung the nooses and his actions of overzealously charging the black students involved in the physical altercation- only later to reduce the charges before trial).

with impunity.¹⁷⁶ The current students of Jena High School were experiencing what the older citizens of Jena had long established: a historical second-class status for blacks within the town of Jena.¹⁷⁷

Because of this known history in the region, the analysis must appropriately start at the default position that the government must act to enforce the law that punishes hate crimes.¹⁷⁸ The noose incident is exactly the type of conduct that law enforcement is designed to respond to, investigate and prosecute vigorously to deter other like-minded individuals in the community and to prevent future violence.¹⁷⁹ Additionally, law enforcement officials should have responded to this type of incident swiftly and aggressively to put the victims at ease that they will not need to take matters into their own hands, preventing the type of lawlessness the American ordered system of justice is designed to avoid. A strong law enforcement response to threats—especially threats motivated by racial, ethnic, or religious animus—is imperative to care for the general public safety of the community and ensure the protection of minority groups within the community.¹⁸⁰

1. *Charging Hanging Nooses as a Hate Crime*

The Louisiana State Legislature, like most modern state legislatures,¹⁸¹ has enacted hate crime legislation to supplement its

176. See generally Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 292 (1988) (noting that the *Broken Windows* theory first articulated by James Q. Wilson and George L. Kelling in 1982 supports the idea that the lack of enforcement of even minor disorders signal to potential criminals that delinquent behavior will not be reported or prosecuted and further no one is “in charge.”). The *Broken Windows* theory is somewhat comparable to the “whites only tree” in that the white students were allowed to control the social order and exclude the black students from several areas on campus with impunity because they feared no enforcement of the violation of the black students’ rights.

177. See generally *Jena 6 and the Role of Federal Intervention in Hate Crimes and Race-Related Violence in Public Schools*, Testimony before the Comm. on H. Judiciary, 110th Cong. (2007) (testimony of Charles Ogletree) (transcript available at <http://www.charleshamiltonhouston.org>) (last visited Jan. 10, 2008) (“First, no public school in the United States should have a policy, either written or implicit, that reserves sections of the grounds for students of a certain race[.]”).

178. See *id.*

179. See Blecker, *supra* note 35, at 1150.

180. *Id.*; see also Harcourt, *supra* note 176.

181. Approximately forty state legislatures have enacted hate crime laws; however, they are not received without controversy. 57 AM. JUR. 3D, *Hate Crimes and Liability for Bias-Motivated Acts* §2 (2008). In most states challenges to hate crime convictions have been unsuccessful and further confirmed by the United States Supreme Court in *Mitchell v. Wisconsin*, *infra*, that it is constitutional to punish an action, rather than speech. See generally *In re Joshua H.*, 13 Cal. App. 4th 1734, 17 Cal. Rptr. 2d 291 (6th Dist. 1993), *State v. Stalder*, 630 So. 2d 1072 (Fla. 1994); *Dobbins v. State*, 605 So. 2d 922 (Fla. Dist. Ct. App. 5th Dist.

criminal code. Louisiana Revised Statutes Section 107.2(A) proscribes hate crime conduct as follows:

It shall be unlawful for any person to select the victim of the following offenses against person and property because of actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property or because of actual or perceived membership or service in, or employment with, an organization: first or second degree murder; manslaughter; battery; aggravated battery; second degree battery; aggravated assault with a firearm; terrorizing; mingling harmful substances; simple, forcible, or aggravated rape; sexual battery, second degree sexual battery; oral sexual battery; carnal knowledge of a juvenile; indecent behavior with juveniles; molestation of juvenile; simple, second degree, or aggravated kidnapping; simple or aggravated arson; placing combustible material; communicating of false information of planned arson; simple or aggravated criminal damage to property; contamination of water supplies; simple or aggravated burglary; criminal trespass;¹⁸² simple, first degree, or armed robbery; purse snatching; extortion;¹⁸³ theft; desecration

1992), decision approved, 631 So. 2d 303 (Fla. 1994); *People v. Richards*, 202 Mich. App. 377, 509 N.W.2d 528 (1993); *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S. 2d 815 (N.Y. City Crim. Ct. Aug. 17, 1988); *State v. Plowman*, 314 Or. 157, 838 P.2d 558, 22 A.L.R. 5th 835 (1992); *State v. Talley*, 122 Wash. 2d 192, 858 P.2d 217 (1993); *cf. State v. Wyant*, 64 Ohio St. 3d 566, 597, N.E. 2d 450 (1992), cert. granted, judgment vacated, 508 U.S. 969, 113 S. Ct. 2954, 125 L. Ed. 2d 656 (1993) and opinion vacated, 68 Ohio St. 3d 162, 624 N.E. 2d 722 (1994).

182. Attorney Richard Cohen, Director of the Southern Poverty Law Center, stated that criminal trespass was another charge that could have been filed for the noose hanging conduct: “Louisiana Revised Statute 14:107.2 creates a hate crime for any institutional vandalism or criminal trespass motivated by race.” Cohen & Tye, *supra* note 146.

183. Extortion is arguably a viable charge and under Louisiana statute is defined as: “the communication of threats to another with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description. The following kinds of threats shall be sufficient to constitute extortion: (1) A threat to any unlawful injury to the person or property of the individual threatened or of any member of his family or of any person held dear to him; ... (5) a threat to do any other harm.” LA. REV. STAT. ANN. §14:66 (2008). The crime of extortion is intended to cover all types of threats: threats to person, to property and to do any other harm. *Id.* The Louisiana Supreme Court has addressed challenges to the extortion statute on void-for-vagueness and overbreadth grounds. *State v. Felton*, 339 So. 2d 797, 799–800 (La. 1976). Not only did the Louisiana Supreme Court find that the statute was

of graves; institutional vandalism; or assault by drive-by shooting.¹⁸⁴

Upon exercise of the prosecutor's discretion, the students' conduct of hanging nooses in the "whites only tree" could have been criminally charged with any combination of the following crimes discussed within Section III. C.¹⁸⁵ First, under the Louisiana Hate Crime Statute LSA-RS 14:107.2, charges for Terrorizing and/or Institutional Vandalism¹⁸⁶ fit the facts and criminal charges could have

neither unconstitutionally vague nor overbroad, it further articulated the scope of the extortion statute "is to prohibit the use of threats to cause the victim to part with his property or to do an act, or refrain from doing an act, to the advantage of the threatener, who could not without the threat otherwise lawfully secure such advantage willingly from the victim." *Id.* at 800. Further, the harm or injury threatened need not be physical harm. *Id.* However the harm that is be threatened in this instance of the hanging noose is physical harm. *Id.* In the Jena incident, the symbolic communication of the hanging nooses would qualify as a threat wherein the perpetrators were intending to obtain performance or nonperformance of a substantial act, without the threat, the perpetrators could not obtain. In other words, the threat of the hanging nooses was intended to obtain the advantage that the black students would no longer sit under the "whites only tree," and/or otherwise force, via the threat, the victims to relinquish their right to freely associate under the tree, neither of which could be obtained without the threat. Although the charge of extortion gains some support from the limited case law in Louisiana, the persuasive authority of cases outside the jurisdiction may, on balance, weigh against charging this crime in light of the other more viable options. *See generally* Scheidler v. National Organization for Women, Inc., 126 S. Ct. 1264 (2006) (The charges unsuccessfully alleged that threats by pro-life activists at abortion clinics constituted extortion and violation of the Hobbs Act, which defined "extortion" in similar language as the Louisiana statute. The Hobbs Act describes extortion as an act "necessarily including the improper obtaining of property of another"). In *Scheidler*, the "property" alleged to be improperly obtained was "a woman's right to seek clinic services and the rights of clinic staff to perform their jobs and of clinics to provide care free from wrongful threats, violence, coercion, and fear." *Id.* at 1266. On balance, the Court analyzed that such threats to "property" fell outside the permissible boundaries of the "extortion" statute and the alleged Hobbs Act violation ultimately failed as well. *Id.*

184. LA. REV. STAT. ANN. §14:107.2(A) (2008).

185. *See* ANGELA DAVIS: ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 58 (Oxford University Press 2007). One well-known prosecutorial strategy is to charge the alleged criminal conduct under alternative theories and allow the jury, as the finder of fact, to determine which theory best fits the facts as they unfold at trial. *See id.* The charging document merely places the accused on notice of the possible charges he could face. *See id.* Some prosecutors "over-charge" as a matter of practice in order to avoid procedural bars regarding notice requirements or to allow plea bargaining room. *See id.* Defense attorneys and legal scholars have criticized the practice of "over-charging," but such conduct is within the prosecutorial discretion if there is sufficient factual probable cause. *See id.*

186. Other civil rights attorneys have also opined that the students' conduct of hanging nooses qualifies for treatment as a crime under Louisiana law and could have been charged as a hate crime. *See* Fears, *supra* note 141.

been appropriately filed against the students alleging their juvenile delinquency on those grounds.¹⁸⁷

The legislature proscribes institutional vandalism¹⁸⁸ as “knowingly vandalizing, defacing, or otherwise damaging the following: . . . [a]ny school, educational facility, or community center.”¹⁸⁹ The hanging of the nooses can be considered vandalism and defacement of the school’s public property, specifically the tree on the school campus grounds. This charge of institutional vandalism requires some proof of damage.¹⁹⁰ In this case, the actual damage may be relatively low. However, the trier of fact may calculate the damages to include the cost of repair or replacement of the lost or damaged property. The cost of the high school maintenance staff to remove the hanging nooses and the tree itself may be considered as damage for this criminal incident.¹⁹¹ Moreover, if the prosecutor charged institutional vandalism under the hate crime statute, he must prove the motive of the crime beyond a reasonable doubt.¹⁹²

Institutional vandalism is a crime under Louisiana law LSA-RS 14:225 and proscribed as a hate crime under LSA-RS 14:107.2.¹⁹³ The government must establish that the defendants selected “the victim . . . because of the actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property or because of the

187. The Louisiana Children’s Code grants original jurisdiction to the juvenile courts over delinquency proceedings. LA. CHILD. CODE ANN. art. 303 (2004). Art. 804(3) of the Code defines a “delinquent act” as “an act committed by a child of ten years of age or older which if committed by an adult is designated an offense under the statutes or ordinances of this state.” *Id.* at art. 804(3). Furthermore, Art. 804(8) of the Act states that a “‘misdemeanor-grade delinquent act’ means any offense which if committed by an adult is other than a felony and includes the violation of an ordinance providing penal sanction.” *Id.* at art. 804(8).

188. It is debatable which of these two crimes would be a more appropriate charge under the facts. However, the most applicable from those listed within the hate crime statute, would be Institutional Vandalism. LA. REV. STAT. ANN. §14:107.2 (2008). Institutional Vandalism may also be the more appropriate choice because it is the easiest among the charges to prove.

189. LA. REV. STAT. ANN. §14:225(A)(3) (2008).

190. The amount of damage determines whether or not the charge would be treated as misdemeanor or felony conduct. *Id.* at §14:225(B).

191. If the damage totals less than \$500, the conduct qualifies under Louisiana Revised Statute §14:225(B)(1) as a misdemeanor, eligible to be punished with a fine not more than \$500 or imprisoned for not more than six months or both. LA. REV. STAT. ANN. §14:225(B)(1) (2008). If the damages exceeded \$500, the conduct would be classified as a felony. *Id.* However, the students charged are juveniles and would still receive punishment as delinquent misdemeanants under the juvenile code. LA. CHILD. CODE ANN. art. 303 (2004).

192. LA. REV. STAT. ANN. § 14:107.2 (2008). *See Apprendi v. New Jersey*, 530 U.S. 466, 484–85 (2000) (holding that motive must be proven beyond a reasonable doubt in order for the judge to apply the hate crime enhancement penalty in a hate crime prosecution).

193. LA. REV. STAT. ANN. §§ 14:225(A)(3), 14:107.2 (2008).

actual or perceived membership or service in, or employment with, an organization”¹⁹⁴ In this case, to satisfy the necessary element that the alleged defendants’ criminal acts were motivated by the type of bias articulated in LSA-RS 14:107.2, the government must prove that the alleged defendants vandalized and defaced the Jena High School tree to target the black students because of their race and their occupancy on the school grounds.

In addition to institutional vandalism, terrorizing is another crime under Louisiana’s hate crime statute that may have been charged for the noose-hanging conduct. LSA-RS 14:40.1(a) defines the crime as:

[T]he intentional communication of information that the commission of a crime or violence is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist, with the intent of causing members of the general public to be in sustained fear for their safety; or causing evacuation of a building, a public structure, or a facility of transportation; or causing other serious disruption to the general public.¹⁹⁵

The noose hanging incident may well satisfy the requisite elements of the crime of terrorizing under Louisiana law. The students at Jena High School, particularly the black students, and their parents, found the hanging nooses on the school grounds to communicate a sense of fear for their safety. Other concerned members of the Jena community feared for the well-being of the black high school students as well as many parents stated that the hanging noose conveyed fear.¹⁹⁶ One of the main elements of the crime is a fear for public safety.¹⁹⁷ The students, their parents, and other community members would qualify as members of the general public for the purposes of satisfying this statutory element.¹⁹⁸

194. LA. REV. STAT. ANN. § 14:107.2 (2008).

195. LA. REV. STAT. ANN. § 14:40(1)(a) (2008). An older version of this statute required that information be false information in order to constitute terrorizing. However, as of 2006, the statute did not require the information or communication to be intentionally false communication. *Id.*

196. Bill Sumrall, *Jena High Noose Incident Triggers Parental Protests*, ALEXANDRIA DAILY TOWN TALK, September 6, 2006 at 06A.

197. LA. REV. STAT. ANN. § 14:40.1 (2008).

198. *State v. Brown*, 966 So. 2d 1138, 1143 (La. Ct. App. 2007) (citing LA. REV. STAT. ANN. § 14:40.1 (2008)) (holding that the defendant’s threats over the phone to the police, as opposed to citizens, was insufficient to establish that the defendant had an intent to place the

Further, the crime of terrorizing requires proof beyond a reasonable doubt that the threat of violence was imminent. Previous Louisiana cases have charged juveniles with the crime of terrorizing based on threats made at school.¹⁹⁹ Some have failed to establish enough evidence to prove the imminence element.²⁰⁰ However, a brief factual review of two previous terrorizing prosecutions illustrates how the Jena High School noose hanging incident would present sufficient factual evidence to meet the government's burden of proof. In *State ex rel. RT*,²⁰¹ the juvenile defendant made statements to a classmate regarding his intent to conduct a shooting in biology class.²⁰² The evidence at trial showed that the classmate did not believe the juvenile defendant was serious about the threat, that the classmate did not report the incident to anyone, and that the classmate was not fearful.²⁰³

In another case, *State ex rel. J.S.*,²⁰⁴ the juvenile defendant wrote on the school wall "everyone will die May 28, 1999. Be ready."²⁰⁵ However, in that case, no testimony was elicited to demonstrate that anyone was fearful or that it caused disruption to the public.²⁰⁶ When comparing the facts in *State ex rel. RT* and *State ex rel. J.S.* to the Jena High School noose hanging incident, the Jena facts provide substantially more evidentiary support for the imminence prong than was present in the other school threat cases. For instance, the black students at Jena High School did immediately report the noose hanging incident, which occurred in response to black students exercising their rights.²⁰⁷ The black students, their parents, and other members of the community believed this conduct was a serious and real threat. The incident did cause major disruption in the town and high school. The black students at the high school staged sit-ins under the tree from which the nooses previously hung. In response to the hanging nooses incident, school officials called a special assembly where several armed police officers were present.²⁰⁸ Moreover, school

"general public" in fear. Had the threats been made to defendant's neighbors, for example, as opposed to the police, such a threat would have fit within the requisites of the statute.).

199. See generally *State ex rel. J.S.*, 808 So. 2d 459 (La. Ct. App. 2001); see also *State ex rel. RT*, 781 So. 2d 1239 (La. 2001).

200. See *State ex rel. J.S.*, 808 So. 2d at 462–63; see also *State ex rel. R.T.*, 781 So. 2d at 1246–47.

201. 781 So.2d 1239 (La. 2001).

202. See *id.* at 1241–42.

203. See *id.* at 1244.

204. 808 So. 2d 459 (2001).

205. *Id.* at 461.

206. See *id.* at 463.

207. *Supra* note 143.

208. *Supra* note 143.

officials reported an attempted arson of the school in response to the upheaval. These facts would likely satisfy the statutory requirement that the terrorizing conduct created "serious disruption to the general public."²⁰⁹ Based on the widespread knowledge of the noose hanging incident, it would be relatively easy to find a witness that could testify to these facts.

In addition to the aforementioned elements of the terrorizing crime, the government must further establish that the defendants "select[ed] the victim . . . because of the actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property or because of the actual or perceived membership or service in, or employment with, an organization"²¹⁰ In this case, to satisfy the bias-motive element, the government must prove that the alleged defendants hung nooses on the tree to terrorize the black students because of their race and occupancy on the school grounds.

On balance, after reviewing the Louisiana hate crime statute, District Attorney Reed Walters could have charged the noose hanging juveniles with a hate crime for their conduct. However, Walters, like many prosecutors, may argue that hate crime charges are too difficult to prove because of the bias-motive requirement, the racially charged nature of the case and the possible juror apathy for the charges. Although legal practitioners may disagree, some prosecutors might instead elect to charge the noose hanging conduct as a non-hate crime.

2. *Charging Hanging Nooses As A Crime, But Not A Hate Crime*

Beyond the hate crime statute, prosecutors may charge terrorizing and institutional vandalism as non-hate crimes under the Louisiana statutes LSA-RS 14:225 and LSA-RS 14:40.1 for the noose hanging conduct. Prosecutors may prefer charging terrorizing and institutional vandalism outside of the hate crime statutes because it is easier to prove than a hate crime. The proof requirement on the government is less of a burden for non-hate crime charges because the motive element is not required.²¹¹ Basically, a conviction could stand

209. LA. REV. STAT. ANN. §14:40(1)(a) (2008). *State ex. rel. J.S.*, 808 So. 2d 459 (2001) ("‘serious disruption’ means disorder or confusing that is grave, earnest, or causes worry.”)

210. LA. REV. STAT. ANN. §107.2 (2008).

211. Crimes do not require proof of motive. *Actus reus* and *mens rea* do not include motive as part of the requisite proof. BLACK’S LAW DICTIONARY 15 & 454 (3d ed. 1996).

without any showing of motive or explanation as to the reason why they targeted their victims.²¹²

In addition to terrorizing and institutional vandalism, the prosecutor could have raised other non-hate crime offenses against the noose hanging students, including disturbing the peace, criminal mischief, assault, obstruction or interference with educational institutions. Under LSA - RS 14:103, disturbing the peace is a crime applicable to the juveniles. LSA - RS 14:103(a)(2), (6) states:

[D]isturbing the peace is the doing of any of the offenses in such manner as would foreseeably disturb or alarm the public: addressing any offense, derisive, or annoying words to any other person who is lawfully in any street, or other public place; or call him by any offensive or derisive name, or make any noise or exclamation in his presence and hearing with the intent to deride, offend, or annoy anyone, or to prevent him from pursuing his lawful business, occupation, or duty; or interruption of any lawful assembly of people.

The charge of disturbing the peace is considered a minor misdemeanor and may be alleged as the basis for a delinquency action against juveniles.²¹³ The decision to charge the conduct as disturbing the peace is desirable because it avoids the more difficult to prove elements such as imminence of the threat. Additionally, this charge strikes a balance between those individuals viewing the noose hanging as a prank and those viewing it as a serious violent threat. It also sends the message that the conduct is not condoned. Most importantly, charging the incident as a minor crime would probably still have a deterrent effect on the juvenile community. The students' conduct of hanging nooses from the "whites only tree" disturbed the peace at Jena High School and within the entire Jena community. Moreover, the noose hangings interrupted the lawful assembly of the black students under the "whites only tree." The black students had a legal right to assemble under any tree on the school grounds. Interference with this right is a crime under Louisiana law.²¹⁴

212. LA. REV. STAT. ANN. §107.2 (2008). See *Apprendi v. New Jersey*, 530 U.S. 466, 484–85 (2000) (holding that motive must be proven beyond a reasonable doubt in order for the judge to apply the hate crime enhancement penalty in a hate crime prosecution).

213. See LA. REV. STAT. ANN. §14:103 (2008).

214. See *id.*

The prosecutor could have charged the students with criminal mischief under Louisiana statute LSA – RS 14:59(1) or (10). LSA – RS 14:59(a) states in part:

Criminal mischief is the intentional performance of any of the following acts: (1) Tampering with any property of another without the consent of the owner with the intent to interfere with the free enjoyment of any rights of anyone thereto or with the intent to deprive anyone entitled thereto of the full use of the property. . . . (10) Placing graffiti upon immovable or movable property whether publicly or privately owned without the consent of the owner by means of the use of spray paint, ink, marking pens containing a non-water soluble fluid, brushes, applicators, or other materials for marking, scratching, or etching. Graffiti includes but is not limited to any sign inscription design, drawing, diagram, etching, sketch, symbol, lettering, name, or marking placed upon immovable or movable property in such a manner and in such a location as to deface the property and be visible to the general public.

The white students' act of hanging nooses in the tree did interfere with the free enjoyment of the campus grounds and prevented the black students from freely sitting under the tree. This misdemeanor conduct qualifies as unlawful under the criminal mischief statute and could be the basis of a delinquency action against these juveniles.

The prosecutor could have also charged the students with assault under Louisiana statute LSA – RS 14:36. The statute defines assault as “an attempt to commit battery, or the intentional placing of another in reasonable apprehension of receiving a battery.”²¹⁵ Battery is an unwanted touching.²¹⁶ To establish assault, the prosecution must establish that the hanging of the nooses in the “whites only tree” put the black students, particularly those students who had just sat under the tree the previous day, in reasonable apprehension of harm. The

215. *Id.* §14:36 (2008).

216. *Id.* §14:33 (2008).

common meaning of a hanging noose is one indicating a threat of physical harm.²¹⁷

In interpreting assault cases, courts have said that the government does not have to demonstrate the present ability of the offender to complete the threatened battery.²¹⁸ For example, courts have affirmed assault convictions where the offender possessed an unloaded gun.²¹⁹ An assault crime occurs when the offender places the victim in reasonable fear of a battery.²²⁰ The *mens rea* for assault is intent-to-scare and that the offender's conduct would reasonably cause apprehension in the victim.²²¹ The factual analysis of the victims' perceived fear or apprehension that the hanging nooses caused is similar to the analysis for the aforementioned crime of terrorizing.²²² To prevail, the government must show that it was reasonable for the black students to fear the hanging nooses in the “whites only tree.” This element will probably not be difficult to prove when considering the historic and common meaning of a hanging noose, particularly in a Southern tree.

In addition to assault, the prosecutor could have charged the white juvenile students with prohibition of interference with educational process, obstruction or interference with members of staff, faculty, or students of educational institutions, trespass, or damage to property.²²³ LSA- RS 14:329.5(a) states, in pertinent part:

No person shall *on the campus or lands* of any university, college, junior college, trade or vocational-technical school, special school, elementary or *secondary school* in this state, hereinafter referred to as “institutions of learning”, or in any building or other facility thereof owned, operated or controlled by the

217. See Cohen & Tye, *supra* note 182. See also La. Rev. St. Ann. §14:40.5 (Louisiana's new anti-noose law enacted in 2008 criminalizing hanging a noose with intent to intimidate and defines a “noose” as something which “historically has been used in execution by hanging, and which symbolizes racism and intimidation.”)

218. LA. REV.STAT.ANN. §14:36 (2008) (*citing* Comm. v. White, 110 Mass. 407 (Mass. 1872) (assault with an unloaded gun).

219. Comm v. White, 110 Mass. 407 (Mass. 1872).

220. LA. REV.STAT.ANN. §14:36 (2008) (*citing* WILLIAM L. CLARK AND WILLIAM L. MARSHALL, TREATISE ON THE LAW OF CRIMES Fourth Edition (Callaghan 1940), §§ 195, 200, 248, 251: “Actual intent and ability to commit the threatened battery are not necessary”). Assault is a general intent crime. *Id.*; State v. Johnston, 20 So. 2d 741 (La. 1945).

221. State v. Blaise, 504 So. 2d 1092 (La. Ct. App.1987) (*citing* State ex rel Tatom, 463 So. 2d 35, 37 (La. Ct. App. 1985).

222. *Infra* Part III. C.1., *Charging Hanging Nooses as a Hate Crime*.

223. LA. REV. STAT. ANN. §14:329.5 (2008).

state of any of its agencies or political subdivisions, *willfully deny to students*, school officials, faculty, employees, invitees and guests thereof: (1) *lawful freedom of movement on the campus or lands*; or (2) *lawful use of the property*, facilities or parts of any institutions of learning; or (3) the right of lawful ingress and egress to and from the institutions physical facilities. (b) no person shall, on the campus of any institution of learning or in any building or other facility thereof owned, operated or controlled by the state or any agency or political subdivision thereof, willfully impede the staff or faculty of such institution in the lawful performance of their duties, *or willfully impede a student of such institution in lawful pursuit of his educational activities, through use of restraint, abduction, coercion or intimidation, or when force and violence are present or threatened.* (emphasis added)

The Louisiana State Legislature, specifically in sections 329.5 and 328, articulates protection for the students, faculty, and staff of educational institutions.²²⁴ The legislature made it a crime for individuals to impede movement, to threaten, or to restrain students in their educational pursuits.²²⁵ This statute also proscribes intimidation of students anywhere on the school's grounds, campus or lands.²²⁶ Unlike the institutional vandalism statute, the government does not have to establish that the hanging nooses were vandalism or defacement of the school under this charge.²²⁷ Moreover, unlike the requirements under the terrorizing or assault crimes, the government does not have to show imminence and fear. Here, the government would only have to establish that the hanging nooses in the "whites only tree" denied the black students lawful freedom of movement on the campus or intimidated them in a way that impeded their lawful pursuit of educational activities. The student protests and sit-in under the tree demonstrated the black students' belief that they were being unlawfully excluded from areas on the campus, intimidated, and

224. *Id.*; see also *id.* §14:328 (2008).

225. *Id.*

226. *Id.*

227. *Id.*

threatened at school. District Attorney Reed Walters could have alleged that the hanging nooses in the “whites only tree” unlawfully interfered with the educational process of the students at Jena High School and impeded the lawful movement of the students on the Jena High School campus as the basis for a delinquency action against the juveniles.

3. Charging Viable Inchoate Crimes for Hanging Nooses

a. Conspiracy

Under the Louisiana statute LSA – RS 14:63.4, conspiracy is a crime.²²⁸ Conspiracy exists when two or more people agree to commit a crime.²²⁹ The purpose of criminalizing conspiracy as a separate and additional crime to any underlying crime is that group criminality is a more serious and dangerous threat to the community’s safety than individual criminality.²³⁰ LSA-RS 14:26(a) states:

Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing *any crime*; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or a combination. If the intended basic crime has been consummated, the *conspirators may be tried for either the conspiracy or the completed offense*, and a conviction for one shall not bar prosecution for the other.²³¹ (*emphasis added*)

The prosecutor could have charged the white students with conspiracy to commit terrorizing, institutional vandalism, disturbing the peace, criminal mischief, assault, or obstructing or interfering with

228. LA. REV. STAT. ANN. §14:63.4 (2008).

229. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW FOURTH EDITION 457 (LexisNexis, 2006).

230. “According to advocates of conspiracy laws, two people united to commit a crime are more dangerous than one or both of them independently planning to commit the same offense: ‘[T]he strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer.’” *Id.* at 425 (*citing* *Krulewitch v. United States*, 336 U.S. 440, 448–49 (1949) (Jackson, J., concurring)).

231. LA. REV. STAT. ANN. §14:26(A) (2008).

the educational process.²³² Conspiracy simply proscribes the acts of conspiring or agreeing to commit a crime. The prosecutor would have to prove beyond a reasonable doubt that the students made an agreement to hang the nooses coupled with an act in furtherance of hanging the nooses to establish a conspiracy. The crime of conspiracy is punishable in addition to and separately from the underlying crime.²³³ Under the statute, “conspirators may be tried for either the conspiracy or the completed [underlying] completed offense.”²³⁴ Whether the crime of conspiracy is actually alleged or not, it is still important for the prosecution to seriously consider redressing group criminal conduct because the threat to the community’s safety is greater for criminals that act in groups.²³⁵ The conspiracy statute, however, just gives the prosecutor another avenue to sanction criminal behavior when individuals act in concert. The allegation of conspiracy can exist as the sole charge or in conjunction with additional charges. The Louisiana legislature has followed the traditional principle that group criminality (i.e. the crime of conspiracy) is an evil by itself even in the presence of an uncompleted underlying crime.²³⁶ For conspiracy, the prosecution must establish that the individual students hanging the nooses had specific intent to conspire and to commit the underlying offense.²³⁷ In this case, although reasonable minds can differ regarding which underlying criminal charge is appropriate, and whether any of the previously discussed underlying crimes were attempted or completed criminal acts, the allegation of conspiracy would nonetheless still be factually appropriate due to the group criminality aspect of the case. The conspiracy statute requires proof of

232. *Id.*; see also ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 39 (Oxford University Press, 2007).

233. LA. REV. STAT. ANN. §14:26(A)(2008).

234. *Id.*

235. ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 41 (2007). Compare, the Jena Six case, Mychal Bell et al.; all the defendants were criminally charged with conspiracy plus the underlying target crime, first attempted murder, and later amended to aggravated battery. In the school fight incident wherein Justin Barker was victimized, it was alleged that all six black students acted together to injure him, therefore giving rise to a potential conspiracy count. In the charging of the Jena Six, District Attorney Walters exercised his discretion to charge the additional inchoate crime of conspiracy for group criminality, yet in the instance of the white students acting in concert to hang the nooses from the white’s only tree determined instead “there was no crime in Louisiana” under which their conduct was criminal. It is this gross disparate treatment of the white students as compared to the black students that caused thousands to protest and assert that the exercise of prosecutorial discretion in Jena lacked equality and racial neutrality in its application.

236. LA. REV. STAT. ANN. §14:26(A)(2008); see also WAYNE R. LAFAYE, *CRIMINAL LAW* 612 (Thomson West 2003).

237. LA. REV. STAT. ANN. §14:26(A)(2008).

an overt act in furtherance of the conspiracy. In this case, the overt act of hanging the nooses from the tree would suffice.

b. Attempt

Under LSA – RS 14:27(a), an attempt is defined as:

[A]ny person who having a specific intent to commit a crime, does or omits an act for the purpose of intending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. (b)(1) mere preparation to commit a crime shall not be sufficient to constitute and attempt to

The students’ attempt to commit a crime was a crime in itself, even if they failed to successfully complete it. Treating an attempt as a crime separate from the completed underlying offense allows law enforcement to stop or deter criminal conduct when the perpetrator has exceeded mere thoughts or preparation and attempted a social harm, but ultimately failed to fully complete the intended social harm. The significance of the allegation of attempt as a prosecutorial tool, however, is that it allows the prosecutor to redress the conduct even in instances where the intended conduct of the perpetrator was unsuccessfully achieved, but was specifically intended and sufficiently serious as to warrant deterrence or punishment nonetheless. In the Jena case, the prosecutor could have charged the white students with attempted terrorizing, institutional vandalism, disturbing the peace, criminal mischief, assault, or obstructing or interfering with the educational process.

*D. No Crime Charged for Hanging Nooses at Jena High School –
Exercise of State and Federal Prosecutorial Discretion*

The use and abuse of prosecutorial discretion is a potential problem in every criminal case.²³⁸ Professor Angela Davis observed

238. See Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am Jud. Soc. 18, 20 (1940).

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. . . . A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen’s safety lies in the prosecutor who tempers zeal

that, “[p]rosecutors become so accustomed to the arbitrary exercise of their power and discretion at the charging stage that they, at best, honestly believe they are making evenhanded decisions, and at worst, engage in willful blindness.”²³⁹ Issues of ethics, justice, and community safety are embedded within a prosecutor’s decision to file criminal charges, to offer a lenient diversion program or plea bargain, or to take the case to jury trial and seek the maximum punishment.²⁴⁰ This sub-section considers the real dilemma between the prosecutorial responsibility to equitably enforce the law and the prosecutorial discretion to efficiently dispatch the government’s limited resources to achieve deterrence, rehabilitation and retribution.²⁴¹

District Attorney Reed Walters had various options available to him in charging crimes against the white juvenile students that hung nooses at Jena High School. Walters had the discretion to decide not to charge any criminal conduct against these students notwithstanding the fact that their conduct was criminal.²⁴² The prosecutor has the complete discretion to determine when to prosecute and criminally punish individuals for violation of the laws within the jurisdiction and when to refrain from charging.²⁴³ By not charging the noose hanging

with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility. *Id.*

239. DAVIS, *supra* note 235.

240. MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 49.

241. Criminal law’s purpose helps “to educate the public as to the proper distinctions between good conduct and bad- distinctions which...most of society will observe.” LAFAYE, *supra* note 236.

242. See DAVIS, *supra* note 235.

Prosecutors can and should exercise their discretion at the charging stage of the process to ensure that similarly situated victims and defendants are treated evenhandedly and to ensure outcomes that are consistent with the fair, effective, and efficient administration of justice. They should consider the principles of punishment, including notions of rehabilitation and mercy, and they must also consider practical issues such as caseloads, resources, and particular, unpredictable issues that may arise in individual cases. *Id.*

243. Civil rights attorneys, race and the law scholars, and others advocate that it is more appropriate in incidents involving juveniles, particularly incidents on school grounds, to only use criminal prosecution sparingly, as a last resort. In response to the Jena six incident, the Southern Poverty Law Center produced a pamphlet articulating the six lessons of Jena. Jennifer Holiday, *The Six Lessons of Jena*, Teaching Tolerance: A Project of the Southern Poverty Law Center (September 27, 2007) available at <http://www.tolerance.org/teach/activities/activity.jsp?ar=867> (last visited Jan 10, 2009) (advocating training of school administrators regarding how to handle these incidents to avoid excessive criminal prosecution of juveniles). See generally Ogletree, *supra* note 129 (noting that empirical data indicates that black juveniles are disproportionately prosecuted for crimes that occur on school grounds – advocating non-criminal administrative sanctions are preferable to criminal prosecutions for juveniles). Notwithstanding denouncing their denouncing the noose hanging conduct as

conduct, Walters did not make the optimal decision considering the community's safety interest and need to deter future violence and deescalate the tense and racial charged atmosphere at Jena High School and the surrounding community. A strong law enforcement response was necessary to specifically deter further noose hanging incidents and generally deter any other criminal activity at the high school. A strong law enforcement response was also essential to help the black students feel safe on campus and to eliminate the perceived need for vigilante justice.²⁴⁴ The fact that the white students' crimes were not charged at all fueled the public outcry of injustice²⁴⁵ in Jena. The prosecutor must administer aggressive enforcement of its laws equitably—charging both the white students' and black students' crimes. The health of the democracy is dependent on a fair and just executive. District Attorney Walters' false and misleading statements that the white students' conduct was not criminal in Louisiana undermined his credibility as being a fair and neutral official and highlights the historic frustrations which Langston Hughes references in his poem *Democracy*.²⁴⁶

When the government exercises its authority to pursue criminal sanctions uniformly and equitably, all citizens revere the law and its representatives, and justice and freedom can thrive. However, when prosecutorial discretion is administered arbitrarily, unequally, or based on biases or preferences, perceptions of inequality besmirch the discretionary authority of the prosecutor, which lead to the compromise and deterioration of freedom and justice. At this stage, citizens no longer revere the law; instead,

unacceptable, the Southern Poverty Law Center advocated against charging the noose hanging students with any criminal action. The idea being that it is more appropriate to treat juvenile criminal conduct at the school in an administrative way within the school. See Testimony of Richard Cohen, The Committee on the Judiciary, U.S. House of Representatives, October 16, 2007 available at <http://www.splcenter.org/news/item.jsp?sid=106> (last visited Jan. 10, 2008).

244. Arguably, the sentiment that "the police nor prosecutor are going to protect us [black students] at school" was allowed to fester and intensify due to the indifference that law enforcement exhibited with regard to the victimization the black students' were experiencing at Jena High School. See discussion *supra* Part III, *Spotlight on Jena*.

245. *State v. Bailey*, 969 So. 2d 610, 611 (La. 2007) (noting that "[t]he mild punishment received by the white students . . . sparked a series of confrontations between African-American [sic] students and white students, and heightened racial tension throughout the town of Jena, Louisiana.").

246. Walters inappropriate handling of the noose hanging incidents arguably led to the subsequent arson of Jena High School and aggravated battery against Justin Barker.

they fear it and its representatives, apprehensive that injustice might befall them or anxious that they may be forced to take the law into their own hands to procure justice or protect their own freedom.²⁴⁷

E. Public Scrutiny and Public Outcry Can Influence Prosecutors' Charging Decisions

For the Jena Six defendants, neither the public outcry of the black community in Jena, the national media nor the protesters changed the prosecutor's charging decisions made in the Mychal Bell case or the noose hanging incident.²⁴⁸ Outside criticism of Walters' decisions made him more determined to prove that his actions were correct and appropriate.²⁴⁹ Walters truly believed his decisions were right and that he was not going to change them or apologize for them.²⁵⁰ However, Walters incorrectly stated that no crime in Louisiana existed to charge the noose hanging conduct and that the federal prosecutor agreed with his assessment of the law.²⁵¹ Although the federal prosecutor, armed with concurrent jurisdiction to charge the noose hanging students' conduct himself,²⁵² exercised his discretion not to file charges, the justification for his decision was not based on the unavailability of an applicable criminal statute.²⁵³ Instead, he reasoned that the offense was minor—basically a misdemeanor—and

247. *Supra* Part I, *Introduction*.

248. Although District Attorney Walters was not swayed by public opinion, the Louisiana Supreme Court viewed the facts differently and may, in fact, have taken public sentiment into account while assessing the case. Bailey, 969 So. 2d at 613 (wherein the Court found abuse of prosecutorial discretion on racial grounds).

249. See Reed Walters, *Justice in Jena*, N.Y. TIMES, September 26, 2007, at A0.

250. See *id.*

251. See *id.*

252. The issue of overlapping prosecutorial authority of the federal and local agencies was famously commented on by Robert H. Jackson:

Another delicate task is to distinguish between the federal and the local in law-enforcement activities. We must bear in mind that we are concerned only with the prosecution of acts which the Congress has made federal offenses. Those acts we should prosecute regardless of local sentiment, regardless of whether it exposes lax local enforcement, regardless of whether it makes or breaks local politicians.

Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc. 18, 20 (1940) (Speech Delivered at the Second Annual Conference of the United States Attorneys, Washington, D.C., April 1, 1940, available at <http://www.roberthjackson.org/Man/theman2-7-6-1/> (last visited Jan. 11, 2008)).

253. See *id.*

the perpetrators were juveniles.²⁵⁴ It is one thing to exercise prosecutorial discretion based on a legitimate determination that the conduct, although criminal, is too minimal to warrant the commitment of limited governmental resources to redress it. Although it is arguable whether this type of individualized justice is appropriate in the hate crime context, it is well-settled that the reason why prosecutors are given such vast discretionary authority is to make the hard and calculated decision regarding which cases are the most worthy of prosecution. In other words, notwithstanding a difference of opinion regarding what factors make one case more worthy over another case, it is appropriate for a prosecutor to weigh the worthiness of potential cases in terms of the level of culpability of the perpetrators compared to the expenditure of government resources as it relates to the community's safety. This does not mean that all "minor crimes" are unworthy of prosecution. For example, seat belt violations are minor. Yet, many jurisdictions have taken the position that compliance with the seat belt laws is important for highway safety and the community's safety. Toward that end some jurisdictions have encouraged a strong enforcement response against seat belt violators to the point of even authorizing arrests based solely on the seat belt violation to "send a message" that the violation will not be tolerated and to deter future violations.²⁵⁵ However, in other jurisdictions, although recognizing the highway safety need for compliance with the seat belt laws, officials have discouraged a strong enforcement response by its officers because of the relative minor nature of the violation and potential danger of police officers abusing their discretion and racially profiling drivers.²⁵⁶ This is the type of exercise of discretion in which reasonable minds can differ, but the focus is correctly placed on the worthiness of prosecuting the case. Additionally, the community's outcry to prevent highway deaths as well as racial profiling and police abuse informs these two different public policy approaches to the same seat belt violation problem.

To misinform the community and condone criminal conduct as lawful and unregulated when the legislature has clearly proscribed it is a completely different matter. Reed Walters misinformed his community that the noose hanging activity was lawful and attempted

254. *See id.*

255. *See* Judge Warren Davis, *Should Georgia Change Its Misdemeanor Arrest Laws to Authorize Issuing More Field Citations? Can an Alternative Arrest Process Help Alleviate Georgia's Jail Overcrowding and Reduce the Time Arresting Officers Expend Processing Non-Traffic Misdemeanor Offenses?*, 22 GA. ST. U. L. REV. 313, 326 (2005); *see also* Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

256. *See* Davis, *supra* note 255.

to use the federal prosecutor's failure to prosecute as proof that he was correct. However, due to public outcry regarding the Jena incidents, the federal prosecutor adjusted his enforcement approach toward noose hanging conduct. Consider the subsequent noose hanging case.

On September 20, 2007,²⁵⁷ in Alexandria, Louisiana, a neighboring town to Jena, two young men were arrested for hanging nooses from their pickup truck and circling the protesters who had recently marched in Jena and were awaiting transport back to Tennessee. Initially, local Alexandria authorities arrested the suspects, Jeremiah Munsen and his juvenile²⁵⁸ passenger, for inciting a riot.²⁵⁹ However, in this instance of noose hanging conduct, the federal prosecutor's office decided to prosecute the case. Jeremiah Munsen, an eighteen-year-old²⁶⁰ resident of Alexandria, Louisiana, was ultimately prosecuted for federal hate crime and civil rights conspiracy charges for "his role in threatening and intimidating the marchers"²⁶¹ as the marchers attempted to return back to their home state of Tennessee. Munsen's indictment alleged conspiracy under 18 U.S.C. § 241 Conspiracy Against Riots:

[O]n or about September 20, 2007, in the Western District of Louisiana, defendant Jeremiah Munsen, along with a co-conspirator known to the grand jury, knowingly and willfully combined, conspired, and agreed to injure, oppress, threaten, and intimidate a group of African American citizens in the free exercise

257. This incident occurred almost one year after the Jena High School noose hanging incident.

258. The name of Munsen's juvenile passenger was not released.

259. Louisiana is politically sub-divided into parishes instead of counties. Alexandria, Louisiana is a city in the Rapides parish. Jena, Louisiana is a city in the LaSalle parish. Thus, the local law enforcement authorities in Alexandria are not the same individuals as those involved in Jena and do not have concurrent jurisdiction. However, federal law enforcement has concurrent jurisdiction with each local jurisdiction.

260. At eighteen years old, Munsen was not a juvenile. Charging Munsen would fit within the original criteria the federal prosecutor stated regarding the *nol pros* in the Jena cases. There is no indication that the juvenile passenger was charged with any federal crime. However, the passenger's agreement was part of the allegation underlying the conspiracy count against Munsen.

261. See generally *United States v. Jeremiah Munsen*, Criminal No. 08-00021, United States District Court for the Western District of Louisiana, Alexandria Division. The indictment against Jeremiah Munsen states facts alleging violation of 18 U.S.C. Sec. 241 (Conspiracy Against Rights) and 18 U.S.C. Sec. 245(b)(2)(E) (Interference with Federally Protected Activity). Munsen's charges stem from an incident during the Jena 6 protest. *Id.* Munsen hung nooses from his pick-up truck and circled the protesters as they were waiting to take their bus back home to Tennessee. *Id.*

and enjoyment of a right secured to them by the laws and constitution of the United States; that is the right of the United States citizen to travel freely between states. It was the plan and purpose of this conspiracy to threaten and intimidate the African American individuals by forming two hang-mans nooses and displaying them from the back of a pickup truck while repeatedly driving slowly past the gathered group.

In addition to the conspiracy charge, the federal indictment articulated the overt act that Jeremy Munsen committed as an act in furtherance of the conspiracy.²⁶² Specifically, the indictment stated:

Defendant Jeremiah Munsen and his co-conspirator talked about the Ku Klux Klan and how the Klan would react to the marchers in Jena and Alexandria (Louisiana). Defendant Jeremiah Munsen and his co-conspirator talked about making hang-mans nooses and going to Alexandria to drive around while displaying the nooses. Defendant Jeremiah Munsen asked his co-conspirator to make nooses. The co-conspirator fashioned large, life-size hangman's nooses out of extension cords and showed defendant Jeremiah Munsen how to make a noose. Defendant Jeremiah Munsen and his co-conspirator talked about the fact that they could get into serious trouble if they went to Alexandria and drove around the marchers while displaying nooses. Defendant Jeremiah Munsen or his co-conspirator attached the large extension cord nooses to the back of a pickup truck so that the nooses would be easily visible to any bystanders the truck passed. Defendant Jeremiah Munsen drove the truck slowly with the nooses attached past a group of African Americans gathered at a public bus depot in Alexandria. As the defendant Jeremiah Munsen drove past the group, the co-conspirator glared at marchers from the passenger window.

262. *Id.*

Defendant Jeremiah Munsen again drove slowly past the group of African American members, who were waiting to board busses to return to Tennessee.²⁶³

The second count in Jeremiah Munsen's federal criminal indictment alleged the noose hanging conduct as intimidation motivated by bias, i.e. a hate crime:

[D]efendant Jeremiah Munsen, by threat of force, while aided and abetted by another person known to the grand jury, willfully intimidated and interfered with, and attempted to intimidate and interfere with, African American civil rights marchers, because of the marchers' race and color and because they were and had been traveling in and using a facility of, interstate commerce, and because they were and had been using a vehicle, terminal, and facility of a common motor carrier; that is defendant Jeremiah Munsen, aided and abetted by another person, attempted to threaten and intimidate a large group of African American civil rights marchers, by displaying two hangman's nooses from the bed of a pickup truck and repeatedly driving slowly past the marchers as the marchers waited at a bus depot to board busses to return them to their homes in Tennessee.²⁶⁴

Evident in the Jeremiah Munsen case, with the public watching and widespread media scrutiny, the prosecutor's decision may be quite different. When the Jena High School incidents occurred and the prosecutor made his charging decisions, the case was not yet under public scrutiny. Although the prosecutor is not required to charge every case, prosecutorial inaction in this instance condoned intimidation, threats and impeding civil liberties. It also conveyed a message to the victims that their victimization was not a concern for the government.

263. *Id.*

264. *Id.*

IV. THE PROSECUTORIAL VETO

Discretion is embedded within the administration of criminal justice. When enforcing criminal laws, it is impossible to escape the “dilemma of discretion.”²⁶⁵ Discretion is always vulnerable to potential abuse.²⁶⁶ In criminal prosecution, it is purposely aimed at accomplishing an efficient allocation of limited governmental resources²⁶⁷ and ensuring that the appropriate constitutional protections are afforded to those criminally accused individuals.²⁶⁸ This type of discretion is widely seen as ultimately beneficial to justice.²⁶⁹ However, one must still be mindful of the negative effects of discretion, particularly the impact of limitless discretion on the community and criminal justice system.²⁷⁰

To minimize the myriad of inequities that arise from abuses of unchecked discretion, a critique is warranted of all prosecutorial discretion.²⁷¹ Although the exercise of discretion in a criminal matter

265. WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE 4TH EDITION 683 (Thomson West, 2004).

266. *Id.* at 696–98.

267. WAYNE R. LAFAYE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION 185 (Thomson West, 2004) (Discretionary enforcement is considered legitimate “when the cost of prosecution would be excessive considering the nature of the violation”).

268. U.S. CONST. amend IV, V, VI, and XIV.

269. *See* LAFAYE, *supra* note 267 at 184–85.

(1) Because of legislative “over criminalization; (2) Because of limitations in available enforcement resources; and (3) Because of a need to have individualize justice)). “[S]ituations in which prosecutors most commonly decline to prosecute . . . are: (i) when the victim has expressed a desire that the offender not be prosecuted; (ii) when the costs of prosecution would be excessive, considering the nature of the violation; (iii) when the mere fact of prosecution would, in the prosecutor’s judgment, cause undue harm to the offender; (iv) when the offender, if not prosecuted, will likely aid in achieving other enforcement goals, such as by acting as an informant; and (v) when the “harm” done by the offender can be corrected without prosecution.”

Id.

270. *Infra* Part V, *Limiting The Impact of The Prosecutorial Veto on Hate Crimes*.

271. Various scholars have critiqued prosecutorial discretion as being in various ways “unbalanced” within the American criminal justice system. *See* Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 51–52 (1998) (discussing the prosecutor’s power and discretion as both an advocate for the government and an administrator of justice); *see also* Bennet L. Gershman, *The New Prosecutor*, 53 U. PITT. L. REV. 393, 400 (1992) (discussing the enhanced prosecutorial power and reduced judicial supervision over grand jury investigations, giving prosecutors greater power to compel witnesses and the production of documents); *see also* James Vornberg, *Decent Restraint on Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523–45 (1981) (analyzing the accumulation of

can flow from multiple sources, such as the prosecutor, the judge, or the jury, the prosecutor wields the widest discretion within the criminal justice system²⁷² and is the individual whose discretionary decisions are without review,²⁷³ correction or redress.²⁷⁴ “The [United States

unreviewable prosecutorial power in recent years); see also Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996).

272. ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 22 (Oxford University Press, 2007); *The Federal Prosecutor*, *supra* note 252 (“[The federal prosecutor carries] immense power to strike at citizens, not with mere individual strength, but with all the force of government itself . . .”)

273. *Wayte v. United States*, 470 U.S. 598, 607 (1985):

This broad [prosecutorial] discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.

See generally *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2nd Cir. 1973) (holding that a prosecutor has discretion not to file charge; the court will not order prosecutor to investigate or to charge; court unwilling to substitute judicial discretion for prosecutorial discretion; and the court will review prosecutor’s decision only on due process or discrimination basis.); *United States v. Goodwin*, 457 U.S. 368, 384 (1982) (objective evidence needed to prove vindictive prosecution). *See also* *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (separation of powers doctrine prevents courts from interfering with the discretionary power of the prosecutor; selective prosecution is okay so long as it is not based on a constitutionally invalid reason.).

274. Elected prosecutors can be checked by the voters; appointed prosecutor’s can be checked by the executive officers authorized to appoint. However, even when a prosecutor is “checked,” or in other words relieved of his or her duties, there is no remedy for the victim of the crimes for the prosecutor’s decision not to prosecute a particular victim’s case. Generally there is no ability for those victims to seek a criminal sanction against the alleged perpetrator of the social harm. Essentially, the prosecutor’s discretionary decision not to charge a case, although it may have some political ramifications, or employment consequences, the decisions are largely unchallengeable by the citizens affected or the victims injured. In other words the prosecutor’s veto is not only unilateral it is usually final. *See* DAVIS, *supra* note 272 (“There is no legal requirement that federal prosecutors act in accordance with the U.S. attorney’s manual, nor are they accountable to anyone outside the Department of Justice if and when they fail to follow their own rules.”). Although rare, there are recent examples of the executive branch, through its own hierarchy, reprimanding U.S. Attorneys that failed to exercise their prosecutorial discretion in the manner that the Bush Administration saw fit. These prosecutors were in fact fired for cases they had not filed. *See generally* James Einstein, *The U.S. Attorney Firings of 2006: Main Justice’s Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219 (2008); John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265 (2008); *see also* *United States v. Navarro-Vargas*, 408

Supreme] Court is concerned that too much interference with the prosecutor's responsibilities might interfere with the enforcement of criminal laws, . . . because prosecutors might decline some prosecutions for fear of judicial reprisal. . . .”²⁷⁵ Thus, the exercise of prosecutorial discretion is unilateral when dealing with hate crimes cases – labeling it the prosecutor's veto.²⁷⁶

Prosecutors enjoy wide discretion in determining the cases to prosecute or deny.²⁷⁷ Scholars have criticized the breadth of the discretion, its unilateral nature, and its vulnerability to abuse.²⁷⁸ The concept of characterizing a prosecutor's lawful use of discretion as *veto* power highlights that the delicate balance among the governmental powers can become inappropriately imbalanced when a prosecutor consistently vetoes the enforcement of a certain type of case.²⁷⁹ Allowing the prosecutor to systematically ignore the legislature's intent regarding the prosecution of particular crimes is unsettling. In the context of hate crimes, state legislatures have made specific statements in their codes to indicate a compelling state interest

F.3d 1184, 1206 (9th Cir. 2005) (“[In a federal request for prosecution] the people have a check by bringing political pressure on the president, and, if the president seeks a second term, to offer a referendum vote at the ballot box on the president's judgment in enforcing the laws.”); *North Carolina State Bar v. Michael B. Nifong*, 06 DHC 35, at 24 AMENDED FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER OF DISCIPLINE, available at <http://www.ncbar.gov/Nifong%20Findings.pdf> (last visited Jan. 11, 2009) (holding that North Carolina prosecutor Michael Nifong abused his prosecutorial discretion and should be disbarred for his improper conduct during the prosecution of a rape case allegedly committed by members of the Duke University Lacrosse Team.).

275. DAVIS, *supra* note 272.

276. “Veto” is a term of art in Constitutional Law jurisprudence traditionally reserved for conveying the idea of bicameralism and presentment indicative of valid separation of power as well as checks and balances. See *Clinton v. City of New York*, 524 U.S. 417, 418 (1998). Veto is the constitutionally valid process by which the president can reject a law that has been approved by both houses of congress. See *id.* However, in this review, the term “veto” is used to highlight that the prosecutorial charging decision is largely unilateral and without appropriate checks and balances.

277. The prosecutorial discretion with regard to the charging decision is even greater for prosecutors in jurisdictions that do not mandate a grand jury's true bill for all felonies charges. See *Costello v. United States*, 350 U.S. 359 (1956).

278. See generally Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2000); Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion-Knowing There Will be Consequences for Crossing the Line*, 60 LA. L. REV. 371 (2000); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521 (1981).

279. Dinovitzer & Dawson, *supra* note 31. (Modern domestic violence prosecutions represent a unique example in which the legislature in many states, by statute, have removed almost all prosecutorial discretion in charging decisions for domestic violence cases. The new legislation came after years of neglected enforcement of crimes against women. Arguably mandatory charging statutes tip the imbalance in the opposite direction and give the legislature too much authority over the executive).

in the punishment of bias-motivated crimes over other non-bias motivated crimes,²⁸⁰ and increased the punishment available for individuals that commit hate crimes compared to those who commit non-hate crimes.²⁸¹

The prosecutorial *veto* prohibits enforcement of a valid law. When the President exercises his executive authority to veto a bill, Congress can redraft the proposed law, make amendments, and resubmit it for the President's signature. Congress can also override the presidential veto with a super-majority two-thirds vote of the House and Senate in favor of passing the law. Similarly, when the judiciary invalidates a law as improper or unconstitutional, the legislature can redraft the statute and make appropriate amendments to correct the error to allow valid enforcement. However, the prosecutorial *veto* has no redress. The victim²⁸² of the crime can neither review²⁸³ nor appeal²⁸⁴ the charging decision. The judiciary

280. See WANG, *supra* note 71 ("Therefore, the legislature finds that protection of those citizens from threats of harm due to bias and bigotry is a compelling state interest").

281. LU-IN WANG, HATE CRIME LAWS 10-5 (1993):

State legislatures that have chosen to punish bias-motivated offenses have done so by enacting one or more of three general types of laws: (1) statutes that create a new crime, often designated "ethnic intimidation" or "malicious harassment"; (2) statutes that automatically enhance the penalty for committing a crime where the offense was motivated by bias; and (3) statutes that authorize the sentencing court to impose an enhanced penalty if it finds that the defendant was motivated by bias or to consider the defendant's bias motive as an aggravating factor in imposing sentence.

282. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766 (2005) (holding that a private citizen does not have entitlement to enforcement of the law). See also *Inmates of Attica v. Rockefeller*, 477 F.2d 375, 381 (2d. Cir. 1973) (court has no authority to order a prosecutor to pursue a certain criminal prosecution). Even if the case has been found worthy in the eyes of the grand jury, the prosecutor cannot be forced to proceed. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965). See also Jim Hughes, *Grand Jurors Hope to Go Public and Ask Congress to Decide in Rocky Flats Case*, DENVER POST, March 14, 2004, at B-04 (grand jurors unsuccessfully attempted to demand the prosecutor to pursue the prosecution consistent with their indictment) Compare W.VA. CODE § 7-7-8 (West 2004) (allowing victims to petition the court to appoint a private prosecutor where the public prosecutor refuses to go forward with criminal charges). Neither the Louisiana statute nor the federal code contain a comparable statute to West Virginia which would have allowed the black student victims of Jena High School to request a private prosecution of the noose hanging incident. *Infra* discussion Part V. B, *Private Prosecution Model for Neglected Cases*.

283. See CASSIDY, *supra* note 32. Furthermore, there is no "modification" that can be made, to the law or the policy, by the judiciary or the legislature in order to ensure enforcement next time. Except that the legislature could amend the law to remove or eliminate prosecutorial discretion in certain types of cases, like domestic violence. See NEV. REV. STAT. § 200.485(7) (2006 & Supp. I 2007).

284. See *id.*

also cannot force the prosecutor to charge a case.²⁸⁵ The enforcement mechanism in the American criminal justice system is simply the executive's discretionary determination without hindrance from any of the other branches of government.²⁸⁶ Limiting the unilateral²⁸⁷ nature of this exercise seems appropriate especially in a case involving great community impact and severe, continual and systematic prosecutorial apathy. Injecting "community voices" into the prosecutor's charging decision-making process in the form of a grand jury, citizens' task force or private prosecution is necessary to limit the prosecutorial *veto*.²⁸⁸

Prosecutorial discretion in the charging function is largely viewed as positive because the criminal code is quite vast and arguably over-criminalizes conduct of ordinary citizens.²⁸⁹ Therefore, placing the charging decisions on prosecutors promotes efficiency because it does not drain the limited governmental resources reserved for law enforcement.²⁹⁰ However, when prosecutors abuse that discretion and ignore or not enforce certain laws, it creates an imbalance in the democratic powers.²⁹¹ The prosecutor's *veto* is within his authority and exercised without restraint or justification.²⁹² The prosecutor could base his decision not to charge on a bias for or against the statute itself, the case facts, the alleged perpetrator, or the victims of the crime.²⁹³ In

285. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379 (2nd Cir. 1973).

286. See R. MICHAEL CASSIDY, *PROSECUTORIAL ETHICS* 20 (Thomson West 2005) ("[P]rosecutors enjoy tremendous discretion to select their defendants and to select the charges against any particular defendant. To say that there is a constitutional constraint on "selective prosecution" is therefore a misnomer, because by nature all prosecutions are selective.").

287. The prosecutor's decision to file or not file criminal charges is considered unilateral because she is not required to "clear" her opinion with any other branch of government or any other related party to the case, including the victim, although it is considered good practice to consult with the victim in a criminal case. *Id.* The prosecutor's exercise of discretion in the charging function is considered appropriate, provided it is not based on a vindictive or discriminatory reason. *United States v. Goodwin*, 457 U.S. 368, 384 (1982); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

288. *Infra* Part IV, *The Prosecutorial Veto*.

289. See CASSIDY, *supra* note 286 ("The prosecutor's vast power in the charging area is heightened by the reality that legislatures often enact criminal statutes that overlap." The criminal code is often complex and broad.).

290. See *id.* ("In determining whether to charge a particular individual with a crime, the prosecutor must engage in a delicate calculus, having in mind the public's interest in effective law enforcement, the costs and benefits of the prosecution, and the rights of the accused.").

291. See generally U.S. ATTORNEY'S MANUAL, § 9-27.260 (1997).

292. See generally *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (1973).

293. See U.S. ATTORNEY'S MANUAL, *supra* note 291 (Section 9-27 of the federal prosecutor's manual discusses appropriate and inappropriate consideration upon which to base

some instances, the veto can signify a valid exercise of discretion, and in other instances, it may constitute abuse. In either case, the motives behind these decisions are clandestine.

In the case of District Attorney Reed Walters, the Louisiana Supreme Court determined that Walters inappropriately considered race in exercising his prosecutorial function.²⁹⁴ Although Walters' motives behind his decisions were improper, he is not unique in his conclusion to decline prosecution of a hate crime.²⁹⁵ Many prosecutors are reluctant to charge hate crimes due to the additional and complicated element of proving a biased motive.²⁹⁶ In an ordinary crime, motive is not a required element to sustain a conviction.²⁹⁷ In most cases, the prosecution's theory of the case includes an alleged theory of motive simply to make the case compelling to the jury.²⁹⁸ If the jury rejects the prosecution's proposed motive and the evidence otherwise satisfies the elements of the crime, a proper conviction stands.²⁹⁹ However, in a hate crime prosecution, if the jury rejects the evidence regarding biased motive, the hate crime prosecution fails.³⁰⁰ Thus, in some instances, prosecutors file charges based on other non-hate crime grounds to achieve some punishment.³⁰¹ However, in instances where the prosecutor declines to charge the social harm as criminal at all, either as a hate crime or as a non-hate crime, the victims and the community should have additional options in the charging decision in certain cases. Moreover, private prosecutors can "stand in the breach"³⁰² for the disenfranchised minority victims where

charging decisions. Section 9-27.260 lists inappropriate considerations as: "1. The person's race, religion, sex, national origin, or political association, activities or beliefs; 2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or 3. The possible effect of the decision on the attorney's own professional or personal circumstances."); *See also* CASSIDY, *supra* note 32.

294. *See* U.S. ATTORNEY'S MANUAL, *supra* note 291; *see also* State v. Bailey *supra* note 4.

295. Hate crimes suffer from low prosecution rates.

296. *See* LA. REV. STAT. ANN, *supra* note 236.

297. *See id.*

298. *See id.*

299. *See id.*

300. *See id.*

301. *Infra* Part V. B., *Private Prosecution Model for Neglected Cases*.

302. Ezekiel 22:30 (New Revised Standard Version) ("And I sought for anyone among them who would repair the wall and stand in the breach before me on behalf of the land, so that I would not destroy it; but I found no one."); Psalms 106:23 (New Revised Standard Version) ("Therefore he said he would destroy them- had not Moses, his chosen one, stood in the breach before him, to turn away his wrath from destroying them.")

the public prosecutors lack the political will or governmental resources to pursue a legitimate prosecution.³⁰³

As a general principal, discretion in the executive branch is essential³⁰⁴ and positive.³⁰⁵ To enforce laws equitably and justly, the branch must warrant a measured amount of discretion.³⁰⁶ Thus, although prosecutorial discretion is largely a necessary evil, the unique social harms that underlie hate crimes necessitate a new approach to the exercise of prosecutorial discretion and potentially expand the ways to redress such conduct.³⁰⁷ Increasing enforcement is essential to deter and ultimately prevent hate crimes.³⁰⁸ Diligent enforcement of even the most minor hate crimes will help break the cycle and change the continuous and repetitive narrative of hate crimes across the country and potentially the world.³⁰⁹

V. LIMITING THE IMPACT OF THE PROSECUTORIAL VETO ON HATE CRIMES

Due to the unilateral nature of the exercise of prosecutorial discretion, citizens have no official input into the decision-making process.³¹⁰ However, because hate crimes create an enormous impact upon the community as a whole, beyond the individual victim, the community should be given a formal role with regard to charging decisions for hate crimes. The legislature can statutorily incorporate community input into the prosecutorial decision-making process in one of two ways: (1) by mandating grand jury presentation prior to denial of charges; or (2) by authorizing community oversight of the enforcement of hate crimes laws through a statewide gubernatorial appointed hate crimes enforcement task force. Additionally, the legislature could statutorily allow a private prosecutor, with judicial

303. *Infra* Part V. B., *Private Prosecution Model for Neglected Cases*.

304. “Prosecutorial discretion is essential to the operation of our criminal justice system, despite the potential for abuse.” DAVIS, *supra* note 272; *see also infra* note 311 and accompanying text.

305. *See* DAVIS, *supra* note 272.

306. *See* LLOYD L. WEINREB, CRIMINAL PROCESS: PROCESUTION 620 (7th. ed. 2004).

307. *See* WANG, *supra* note 73.

308. *See* LAFAYE, CRIMINAL LAW 28–29 (4th ed.2003) (Under the theory of deterrence, punishing a defendant for a current crime will deter future crime.); *see also* Blecker, *supra* note 35; *see also* State *ex rel* R.T., *supra* note 201.

309. *See* State *ex rel* R.T., *supra* note 201.

310. *See generally* State v. Johnson, No C4-92-2517, 1993 Minn. App. Lexis 617, 4, 5 (Minn. App. June 9, 1993) (“The prosecuting attorney makes the decision to commence and maintain criminal prosecutions. A private citizen/victim[’s] . . . wishes regarding prosecution, although important, are not determinative.”).

approval, to pursue hate crime violators when the public prosecutor is unwilling or unable.³¹¹

One alternative model to limit the impact of the prosecutorial *veto* is to oblige consideration of "community voices" before declining prosecution in hate crimes cases. Through legislative amendment, prosecutors could be required to consult "the community," in some fashion, prior to making the final decisions in hate crimes prosecutions. As a practical matter, this process could take various forms. One form is to consult with the victims or the victims' family directly.³¹² A second form is a type of prosecutorial review board, such as a hate crime task force committee.³¹³ The third and more traditional form of receiving community input on charging decisions is to require the prosecutor to present the case to the grand jury.³¹⁴ These various forms to prosecutorial decision-making essentially advocate for limiting an individual prosecutor's ability to unilaterally veto enforcement of hate crimes violations.³¹⁵ Particularly, some novel approaches to reduce the unfettered discretion of the prosecutor include mandatory grand jury presentation, citizens' task force, and private prosecution.

311. *Infra* Part V.B., *Private Prosecution Model for Neglected Cases*; see generally W. VA. CODE ANN. Sec. 7-7-8 (2004) (under West Virginia law, victims may petition the court to appoint a private prosecutor where the public prosecutor refuses to go forward with criminal charges.)

312. See *Leeke v. Timmerman*, 454 U.S. 83 (victim cannot control prosecution); *supra* note 49 (The ethics rules reference that a prosecutor must proceed if justice mandates notwithstanding popular opinion). In the interest of justice, as well as to accomplish legitimate specific and general deterrence goals, plus secure the community's safety, many criminal cases require the prosecutor to proceed contrary to the wishes of the victim or the victim's family. See CASSIDY, *supra* note 32. See generally *State v. Johnson*, No C4-92-2517, 1993 Minn. App. Lexis 617, 4, 5 (Minn. App. June 9, 1993). For example, in some jurisdictions, material witness warrants are issued for uncooperative victims in domestic violence cases. See generally 18 U.S.C.A. §3144.

313. *Infra* Part V.B., *Private Prosecution Model for Neglected Cases*.

314. *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir. 2005) (grand jury, comprised of ordinary citizens, exercises discretion over the charging of a criminal case, independent of the prosecutor's discretionary function). Cf. *United States v. Cox*, 342 F.2d 167, 169-70 (1965) (the prosecutor can veto the grand jury by refusing to file charges even after the grand jury has found sufficiency of the evidence and expressed a desire for the case to be prosecuted by returning a true bill).

315. *United States v. Navarro-Vargas*, 408 F.3d 1184.

A. Community Input on Charging Decisions

1. Mandating Grand Jury Consideration Before Nolle Prosequi³¹⁶ For All Hate Crimes

The grand jury has traditionally been used to limit a prosecutor's ability to file criminal charges, not to force the prosecutor to file criminal charges on neglected cases. The Founding Fathers envisioned the grand jury as an institution that could refrain or constrain an oppressive prosecutor.³¹⁷ Particularly, the grand jury was a mechanism to limit government authority.³¹⁸ Always fearful of an oppressive government, the Founding Fathers wanted to officially enable “the people” to prevent unfair criminal prosecutions wherein one's liberty interest could be taken.³¹⁹ For this reason, the American criminal justice system already has a formal way to include “community voices” in the decision-making process of charging crimes.³²⁰

Much has been written about the grand jury and its “voice” in prosecutorial decision-making and enforcement of laws.³²¹ Scholars debate the true function of the grand jury as being neither purely judicial in deciding issues of probable cause³²² nor purely

316. LAFAVE, *supra* note 28.

317. In the federal criminal system “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .” and thus grand jury involvement is required. U.S. CONST. amend. V; FED. R. CRIM. P. 7. In the state criminal system, criminal charges may or may not require grand jury indictment. See LAFAVE, *supra* note 78 at 742–43. Eighteen states and the District of Columbia are “indictment jurisdictions.” *Id.* at 745. Four states require prosecution by indictment only as severe felonies, typically those crimes which carry a punishment of life in prison or higher. See *id.* Still other jurisdictions represent a myriad combination of “waiver in indictment jurisdictions” and “limited-indictment jurisdictions.” *Id.* at 742–43.

318. See *id.*

319. See generally Roger Fairfax, *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 706 (2008) (“Where the grand jury truly adds value is through its ability to exercise robust discretion not to indict where probable cause nevertheless exists—what might be termed ‘grand jury nullification.’”).

320. *Id.*

321. ERWIN CHERMERINSKY & LAURIE LEVENSON, CRIMINAL PROCEDURE ADJUDICATION 47 (Aspen, 2008) (“[Originating in England] the grand jury consisted of a group of citizens who would act as a buffer between the Crown and the accused. Acting in secrecy, the grand jury would decide when individuals should be charged with crimes.”); *United States v. Navarro-Vargas*, 408 F.3d 1184, 1187–90 (9th Cir. 2005). See generally Fairfax, *supra* note 319, at 705.

322. E.g., U.S. CONST. amend. V (“No person shall be held to answer for a capital...crime, unless on a presentment or indictment of a Grand Jury...”). See generally Costello v. United States, 350 U.S. 359, 362 (1959) (“[...] [G]rand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory.”).

prosecutorial in determining the worthiness or seriousness of a case to proceed onto trial.³²³ Focusing on the grand jury as prosecutor, this section presents a unique view that the grand jury's function can be used to induce more fairness and equity within the prosecutor's decision-making by encouraging him to proceed in cases where he might traditionally decline or neglect, such as hate crime prosecutions.³²⁴ In this way, the grand jury can be utilized as the "carrot" to promote aggressive prosecution of hate crimes instead of the "stick" to "nullify" technically valid but overzealously charged cases.

Although the grand jury is an existing formal mechanism which injects the "community viewpoint," in the form of grand jurors voting on cases, it may have significant pitfalls as a vehicle to limit prosecutorial discretion. Due to the prosecutor's broad control over the grand jury process itself, a grand jury mandate may not make any real change in the unilateral nature of the prosecutor's charging decisions.³²⁵ Notwithstanding the known limitations of the grand jury's influence upon the prosecutor, another way to utilize the grand jury is to legislatively require grand jury presentation only in "neglected areas of prosecution."³²⁶ Requiring the prosecutor to

323. CHEMERINSKY & LEVENSON, *supra* note 321, at 48–49 (noting that the grand jury is considered an independent screening body). *See generally* Fairfax, *supra* note 320, at 756–57 (arguing that the exercise of robust discretion by the grand jury, beyond mere probable cause determinations, further serves overall efficiency goals of the criminal justice system).

324. Prosecutors often decline to prosecute cases in which the witnesses are uncooperative, the potential petite jury will be unsympathetic to the victim's interests, the charges are politically unpopular, or the crime itself is considered to socially acceptable conduct. *See generally* Dinovitzer & Dawson, *supra* note 31. However, through public outcry and educational awareness, as well as legislative amendments, prosecutors have been forced to change their view point on several "neglected" crimes. *Id.* Mother's Against Drunk Driving is a good example of how their grassroots campaign regarding awareness as well as enforcement has changed how often and how aggressively DUI (driving under the influence) cases are prosecuted. *See generally* James C. Fell & Robert B. Voas, *Mothers Against Drunk Driving (MADD): The First 25 Years*, 7 Traffic Prevention 195 (2006). Moreover, the punishments for DUI have drastically increased in the recent past as well as the social acceptability of the conduct itself. It is no longer socially acceptable to drive drunk. *Id.*

325. CHEMERINSKY & LEVENSON, *supra* note 321, at 48 (discussing the reality that "the grand jury is directed in its operations by the prosecutor It is therefore extremely rare for a grand jury to refuse to issue an indictment requested by a prosecutor").

326. Hate crimes represents an area of neglected prosecution. *See generally* Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 110-113, 110th Cong. (2007); The Hate Crime Statistics Act, S. Rep. No. 101-21 1989). For example, the statistics from California indicate approximately twenty-five percent (25%) of all the hate crime cases that are reported are actually prosecuted. Local Law Enforcement, H.R. 110-113. California was one of the first states to require hate crime reporting laws and enact enhanced punishments for bias-motivated crimes. *See id.* California is known to have aggressive government

consult the grand jury not in every case, but only in those traditionally neglected cases, would effectively make the prosecutor focus more time and attention to these hate crime incidents and consider more closely his charging decisions.³²⁷ Any case in which the prosecutor was leaning toward *nol pros* could be presented for community input into the final decision.

Additionally, the "community,"³²⁸ via the grand jurors' input, automatically becomes part of the prosecutorial decision-making process based on their view of the case facts through their deliberation and indictment vote.³²⁹ The requirement of grand jury presentment mandates participation from the community.³³⁰ The grand jurors

enforcement of hate crimes but still only reaches twenty-five percent prosecution of hate crimes. See *id.*

327. One might view this solution option creating the opposite result, by mandating the extra step of seeking grand jury indictment; the prosecutor may even be less likely to pursue charges for an already disfavored and neglected area of the law.

328. Does the grand jury represent the community? In the "Jena Six" cases, specifically the Mychal Bell trial, approximately one hundred petit jurors appeared for service and all were white citizens. There is conflicting and disputed evidence that additionally two black prospective jurors that were served as petit jurors but were excused. Nonetheless, even based on those disputed figures African-Americans represented by two percent of the venire and zero percent of the actual jury, notwithstanding the fact that African Americans actually represent twelve percent of the population in town of Jena, La. City-Data, <http://www.city-data.com> (last visited Oct. 28, 2008) (search Jena, La. for population). Therefore, applying this example to a potential grand jury scenario, the grand jury, which typically could include up to twenty-four members could likely still have no African American representation, and therefore lack twelve percent of the community's voice. When the grand jury is potentially being asked to evaluate case facts regarding hate crimes, having diversity among the grand jurors is important. Notably, ethnic and/or racial diversity is only one of the many necessary components of diversity that would be desirable within the grand jury in order to capture the representative voice of the community's input upon the charging decision. Without a diverse sample of the community involved, the grand jury option is simply an exercise in futility and does not help to further democratic equality in the criminal justice system.

329. This option could backfire and create more injustice and more unequal results if the grand jury declined to indict more cases than the prosecutor unilaterally would. It may be debatable whether or not the "community's" view point regarding neglected area of prosecution would be helpful to justice. Often times the reason why certain crimes are neglected by prosecutors is because of the perceived resistance of the community to such cases and the unlikely success such cases would have before petit jurors, which also represent the community's view point. Although the American Bar Association (ABA) establishes the American Bar Association Standards which instruct American prosecutors not to be persuaded by the societal prejudices of the jury pool, stating: "[i]n cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question." American Bar Association Standards for Criminal Justice: The Prosecution Function, §3-3.9(e) (3d. 1993) *reprinted in*, JOSHUA DRESSLER AND GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PROSECUTING CRIME, 779 (Thomson West 2003). Yet, as a practical matter, it is nearly impossible for prosecutors to achieve the ABA's lofty ideal.

330. FED. R. CRIM. P. 6(a). See generally CHERMERINSKY & LEVENSON, *supra* note 321, at 48 ("Pursuant to Federal Rule of Criminal Procedure 6(a), 23 citizens sit on a grand jury. They

represent a cross-section of the community and their collective opinion regarding the facts of a case and, thus, approximate the larger community's view of the case.³³¹ Based on this perspective of the grand jury and its function, the grand jury solution would require prosecutors to seek community voices before making charging decision in hate crime cases.³³² This solution is likely the most efficient way to gain community input into the complex and highly subjective prosecutorial charging-decision.³³³

However, achieving the grand jury solution may have some dissatisfactory effects.³³⁴ First, although grand jurors ultimately render their own "independent" opinion regarding the case facts, the prosecutor basically controls the presentation of the evidence and the explanation of the applicable law.³³⁵ The prosecutor's opinion of the case may easily influence, if not blatantly manipulate, the case presented to the grand jury.³³⁶ The grand jury process is not fully

are selected from a cross-section of the community. Grand jurors typically serve for six months, although their service can extend for as long as 18 months.").

331. FED. R. CRIM. P. 6(a).

332. *Id.*

333. *Id.*

334. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (1996) (discussing jury nullification). See also Fairfax, *supra* note 319, at 714 (acknowledging the reality that a grand jury could nullify "...out of bias or prejudice refusing to indict a defendant because he belongs to a favored race or because the alleged victim belongs to a disfavored race"). Professor Roger Fairfax further quotes professor Owen Fiss' observations of petit juror racial bias, stating that:

[i]n the 1960s, the risk of jury nullification was particularly pronounced in southern communities, where the human rights victim typically was black and the accused white. The racial polarization of the community could easily be exploited to devalue the life of the black victims or to exonerate or excuse the defendant.

Id. at 715 (citing OWEN FISS, *THE AWKWARDNESS OF THE CRIMINAL LAW, IN THE LAW AS IT COULD BE* 133, 136 (2003)).

335. "The prosecutor is authorized to act as legal advisor to the grand jury." R. MICHAEL CASSIDY, *PROSECUTORIAL ETHICS* 44-45 (Thomson West 2005) (citing ABA CRIMINAL JUSTICE STANDARD 3-3.5(a)). "[The prosecutor] may properly instruct them on the elements of crimes under investigation, and answer any legal questions they have about the evidence." *Id.* at 44-45.

336. Prosecutors presenting cases to the grand jury are cautioned not to insert their own personal opinion about the case or its witnesses to the grand jurors. *Id.* at 45. The ABA Criminal Justice Standards and the NDAA Standards instruct prosecutors not to influence the grand jurors' opinion. A.B.A., Criminal Justice Standard 3-3.5(b); National District Attorneys Association, National Prosecution Standards, §60.3 (2d Ed. 1977) (1991) ("[P]rosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury...").

adversarial.³³⁷ The defense is neither present nor able to ask any questions of the prosecution's or defense's witnesses.³³⁸ Additionally, no neutral judge is present to make rulings or referee fairness.³³⁹ The prosecutor controls the timing, climate, and posture of the grand jury.³⁴⁰ Although grand jurors may ask questions of the witnesses, typically the prosecutor controls whether those questions are ultimately asked and answered of the witness.³⁴¹ ³⁴² Therefore, regardless of the strength of the case facts, if the prosecutor does not want the grand jury to return an indictment on a particular case, the prosecutor can easily present the case facts and the applicable law in a way that would induce a negative outcome such as no bill.³⁴³

Furthermore, any case in which the grand jury returns an indictment is eventually turned over to the prosecutor to handle for trial.³⁴⁴ If a prosecutor is less than enthusiastic or does not agree with the grand jury's factual determinations, he or she could effectively kill the case through sabotage in pre-trial motions or at trial.³⁴⁵ Therefore, despite the grand jury's voice and its community input, if the

337. *Costello v. United States*, 350 U.S. 359, 362 (1956) ("[...] [G]rand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory.").

338. Once given proper notice, a defendant being considered by the grand jury can present live witnesses to the grand jury who would be questioned by the prosecutor.

339. *Supra* note 336.

340. *Id.*

341. ABA Criminal Justice Standard 3-3.5(a) (permitting prosecutor to instruct on the law). A prosecutor can prevent, limit or amend a grand juror's question if she determines that the question is improper based on the Federal Rules of Evidence or other equivalent rules in that jurisdiction. *Supra* note 337. For example, the grand juror's question may require the witness to respond with inadmissible hearsay or require mentioning of unconstitutionally obtained evidence, in which case the prosecutor would prevent the question from being asked and/or prevent the witness from answering the question. *Id.*

342. All grand jury proceedings should be recorded except the actual deliberations or voting. FED. R. CRIM. P. 6(e). Like all official court proceedings it is important to keep an accurate record of the proceedings. The need for a correct and complete record is even more acute in the grand jury context because the alleged criminal defendant nor his representative counsel are present in the grand jury proceedings, therefore, it is only through an accurate and complete record that the defendant could challenge the legality of the proceedings. See Cassidy, *supra* note 287, at 45 ("It is inappropriate for the prosecutor to instruct the stenographer to "go off the record" when he is eliciting testimony from a witness or counseling the grand jury."). See also ABA Criminal Justice Standard 3-3.5(c) ("The prosecutor's communications and presentations to the grand jury should be on the record.").

343. Similarly, if the prosecutor wanted the grand jury to return an indictment on a particular case, even if the case facts were weak, the prosecutor could present the case in a persuasive manner, without any obstruction from the absent defense attorney, and induce the grand jury to return an indictment. CASSIDY, *supra* note 335.

344. CASSIDY, *supra* note 335.

345. *Id.*; see also WEINREB, *supra* note 306.

prosecutor disagreed, his authority in the ultimate litigation of the case would supplant the grand jury's opinion.³⁴⁶

2. *Subjecting Prosecutorial Discretionary Decisions to the Oversight of a Citizen's Hate Crimes Enforcement Task Force*

Instead of mandating grand jury presentation, the legislature should create an oversight committee called the Hate Crimes Enforcement Task Force. The legislature could further give the job of responding to complaints with restorative justice remedies to a special prosecutor.

The decision of the prosecutor not to prosecute a particular case can send an incorrect message to the individual perpetrator and the larger community that the conduct is not forbidden and even tolerated without any negative consequences.³⁴⁷ Further, non-prosecution sends a message to victims and their families and communities that the crimes committed against them are not serious or punishable.³⁴⁸ Thus, not prosecuting could result in heightened animosity between groups, particularly those that identify with the perpetrator against those that identify with the victim.³⁴⁹ It could also result in increased violence, repeated incidents of hate crime, targeted intimidation and violence, and vigilante justice where victimized citizens decide to take the law into their own hands to deter or punish the perpetrators.³⁵⁰ As a result, a lenient or incompetent prosecutor can be as harmful to the community as an overzealous prosecutor.³⁵¹ Prosecutorial indifference can ultimately lead to lawlessness within a community.³⁵²

A prosecutorial oversight committee is the safeguard measure against prosecutorial indifference and inequity in enforcement decisions. The proposed Hate Crimes Enforcement Task Force would

346. CASSIDY, *supra* note 335.

347. See Blecker, *supra* note 35; see also State *ex rel* R.T., *supra* note 201.

348. See Blecker, *supra* note 35.

349. *Id.*

350. Jena 6 protestors were non-violent in their objection to the non-prosecution of the white noose hangers versus the overzealous and aggressive prosecution of Mychal Bell. See Person, *supra*, note 142.

351. Compare Wisconsin v. Mitchell, 508 U.S. 476 (1993) (hate crime battery incident seriously prosecuted, but not excessively as an attempted murder case even though the victim in *Mitchell* was "rendered unconscious and in a coma for four days" compared to the relatively minor injuries of the victim Justin Barker in the Jena High School school-yard fight), and *supra*, note 149 (Reed Walters discussing that the noose hanging incident was not a crime but Mychal Bell and his colleagues attempted murder).

352. *Id.*

be independent from the prosecutor's office and able to receive complaints directly from citizens, not just through police requests for prosecutions. In this way, the Task Force will act as a check against police indifference as well.³⁵³ The goal of the Task Force is not to increase actual prosecution, but additionally to provide an option for a meaningful a non-criminal remedy encompassing a restorative justice response aimed at education on tolerance and prevention of future violence.

The Task Force option faces some of the same effectiveness challenges as the grand jury solution.³⁵⁴ Additionally, the Task Force option will likely suffer from issues of diversity.³⁵⁵ A diverse representation of the community is necessary to ensure that the viewpoints of both the alleged perpetrators and the alleged victims are considered in the pre-charge decision-making process.³⁵⁶ However, some of these diversity problems could be handled in the legislature's mandate, which could require an equitable representation of women and ethnic minorities based on the census data or other reliable data of the community's composition.³⁵⁷

The Task Force option benefits from a restorative justice component.³⁵⁸ For example, if a Hate Crimes Enforcement Task Force

353. See CHEMERINSKY & LEVENSON, *supra* note 322 (“Although prosecutors enjoy broad discretion in charging cases, there are statutory, administrative, ethical, and constitutional limits on prosecutorial discretion.”); See also WELLS-BARNETT, *supra* note 19 (modern mandates require reporting of hate crime incidents); see also Miller, *supra* note 13.

354. *Infra* Part V.A.1, *Mandating Grand Jury Consideration Before Nolle Prosequi For All Hate Crimes*.

355. Diversity is not only ethnic and gender diversity, but also diversity of viewpoint, culture, and socio-economic status. Some states currently have commissions or a task force but most are part of a larger prosecutor's office, like the local district attorney's office or state attorney general's office. The citizen's task force proposed here would be independent from the prosecutor's office and seek to establish a diverse membership. Further as a statewide task force, it would seek to avoid local political pressures. Compare Jackson, *supra* note 252.

356. See Jackson, *supra* note 252.

357. See *id.*

358. Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1307 (2008):

Restorative justice involves redemption and reconciliation. Redemption demands contrition and atonement. Reconciliation compels forgiveness and mercy. Both approaches integrate offenders, victims, and their adjoining communities through narratives of empathy. Restorative justice narratives promote emphatic understanding by telling stories of commonplace dignity and humiliation. At their best, the stories generate cross-racial dialogue in law, culture and society. *Id.* See also National Institute of Justice, Restorative Justice, available at <http://www.ojp.usdoj.gov/nij/topics/courts/restorative-justice/welcome.htm> (last visited Jan. 11 2009):

existed in Jena, Louisiana in 2006 during the time of the incidents at Jena High School, the Task Force would have had an opportunity to officially voice its opinion to the District Attorney regarding his decision not to charge the three white students for the hanging nooses. Additionally, the Task Force could have sponsored an educational outreach to Jena High School focused on tolerance and prevention of future incidents targeted at the intimidation of the black students at the high school for sitting under the now infamous “whites only tree.” These educational assemblies could have addressed the inappropriateness of the “whites only tree” and the historical baggage of desegregation, discrimination and other biased attitudes that are still operating in that community.

Criminal sanctions are not always the best response, especially when dealing with juveniles.³⁵⁹ Hence, the Task Force would bridge the gap between the community’s view point and the prosecutor’s charging decision, and between the community’s view point and the alleged perpetrator’s motivations, or lack thereof.³⁶⁰ Moreover, this option would neither condone nor ignore the seriousness of the incident due to the presence of deterrence in the educational component.³⁶¹

This Task Force model, applied to the Jena High School incident, may have prevented the subsequent aggravated battery against Justin Barker. The tolerance and crime prevention focus may have de-escalated the situation and prevented a vigilante justice type of response to the law enforcement officials’ inaction.³⁶² Also, with this hypothetically proposed Task Force, a representative from the Task

Restorative justice principles offer more inclusive processes and reorient the goals of justice. Restorative justice has been finding a receptive audience, as it creates common ground which accommodates the goals of many constituencies and provides a collective focus. The guiding principles of restorative justice are: (1) Crime is an offense against human relationships; (2) Victims and the community are central to justice processes; (3) The first priority of justice processes is to assist victims; (4) The second priority is to restore the community, to the degree possible; (5) The offender has personal responsibility to victims and to the community for crimes committed; (6) Stakeholders share responsibilities for restorative justice through partnerships for action; (7) The offender will develop improved competency and understanding as a result of the restorative justice experience. *Id.*

359. *See id.*

360. *See* ALFIERI, *supra* note 358, at 1307–08.

361. *See id.*

362. *See id.*

Force could have spoke at Jena High School's assembly instead of District Attorney Reed Walters whose inappropriate and arguably threatening comments only heightened rather than eased tensions.

B. Private Prosecution Model for Neglected Cases

Private prosecution is another vehicle through which "community voices," more specifically the victim's voice, can impact justice. The private prosecution option, as suggested here, would trigger to override the prosecutor's *veto*. In other words, the private prosecution solution would provide another mechanism through which balance between the legislature's intent to protect targeted victims of hate crime and enforcement of those crimes could be restored. Punishment and deterrence for hate crimes would no longer rest solely within the executive's exercise of discretionary justice. Reinvigorating the victims' ability to wage private prosecution actions is one way in which to limit the impact of unilateral prosecutorial discretion.

Historically, criminal cases were litigated by private prosecution.³⁶³ Modernly, public prosecutors litigate criminal cases almost exclusively.³⁶⁴ The preference towards public prosecution emerged as a means of achieving a uniform standard of criminal law enforcement irrespective of the means of the victim or the victim's family to finance the enforcement of the criminal violation.³⁶⁵ Moreover, it has been suggested that a neutral prosecutor would encourage a more fair process.³⁶⁶ It is believed that a public prosecutor represents a more neutral and fair attorney to represent the community's interest, not only the individual victim's interest, in a criminal prosecution. In essence, a crime occurs when a social harm has been perpetrated upon the community and it is the community's condemnation of the conduct that makes it criminal as opposed to

363. See generally John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994).

364. Under the American criminal justice system, governmentally paid public prosecuting attorneys are responsible for litigating criminal cases. However, private attorneys are allowed to assist the public prosecutor in several jurisdictions. See *id.* at 512. Additionally, in rare instances of conflicts of interest between the public prosecutor and the criminally accused, a private attorney can be appointed as a special prosecutor with authority over certain cases. Federal law in the post-Watergate era contains a provision for Congress to appoint a private attorney as an independent prosecutor.

365. See Bessler, *supra* note 363.

366. There is no constitutional requirement for a neutral prosecutor.

civil.³⁶⁷ The public prosecutor, as the representative of the people including the victim, initiates a criminal case on their behalf to redress the wrong. Based on these principals alone, it makes sense to allow the public prosecutor exclusivity over the enforcement of criminal sanctions. However, as a practical matter, the public prosecutor cannot legitimately pursue all worthy cases. The public prosecutor's resources are limited and finite, and often charging decisions are made with these concerns in mind. Hate crimes are complex, time consuming, political hot-potatoes, and sometimes represent "minor offenses" in the larger scope of urban metropolitan jurisdictions. Even in small towns, like Jena, hate crimes are discretionarily ignored for a myriad of reasons.

Public prosecutors, as the primary litigators of crimes, are preferable to a solely private system.³⁶⁸ Further, it is undisputed that victims of crime do not have a "right" to demand the prosecution of certain crimes.³⁶⁹ However, in situations where the public prosecutor is "unable or unwilling" to prosecute,³⁷⁰ a private prosecutor should be allowed to substitute and seek redress of the social harm caused to the victim and the community.³⁷¹ Private prosecution is currently allowed in some states with limitations, but legal scholars generally disfavor and criticize the process as borderline unconstitutional.³⁷² Private prosecution, however, could be a solution for neglected cases where the local prosecutor is unwilling or unable to enforce hate crime type cases.

The main issue concerning the Jena High School incident is that Walters' inaction led many Americans to believe that hanging nooses to threaten minorities was neither illegal nor criminal. Sadly, hate crimes are not adequately prosecuted. The low level of enforcement sends the wrong message. Private prosecutors should be allowed to pursue legitimate cases to increase enforcement efforts and help move America into a new phase of history where bias-motivated crime is not condoned, but instead is taken more seriously.

367. See PERKINS & BOYCE, *supra* note 37.

368. A solely private system places too much financial burden on the victim and the victim's family to fund the costs of litigation.

369. CASSIDY, *supra* note 32; see also DAVIS, *supra* note 272.

370. Rome Statute of the International Criminal Court, Art. 13(b) (1998).

371. W. Va. CODE §7-7-8 (West 2004) (under this West Virginia's code, victims may petition the court to appoint a private prosecutor where the public prosecutor refuses to go forward with criminal charges).

372. See BESSLER, *supra* note 363.

VI. CONCLUSION

Limitless prosecutorial discretion, the perception of incompetence, and overt racism fueled the controversy concerning the proper governmental response to the hanging nooses from the “whites only tree” at Jena High School. With hardly any remedial response to the hanging nooses, tensions grew as more incidents, including battery, arson, and allegedly, attempted murder, occurred at the school and in the town. With no prosecution of the white students and overzealous prosecution of the black students, the Jena story provides the “perfect” case study to explore the need and methods for limiting prosecutorial discretion, particularly in racially motivated or hate crime cases. Limiting prosecutorial discretion is progress towards the equality and freedom that Langston Hughes envisioned as a healthy democracy.³⁷³

373. HUGHES, *supra* note 1.

