

Introduction to the Symposium: The Jena Six, the Prosecutorial Conscience, and the Dead Hand of History

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I. INTRODUCTION

This Symposium seeks to use the Jena Six case as a vehicle for exploring troubling modern problems of racial justice in the American criminal justice system. The purpose of this Introduction is to offer the reader a factual overview of the case, explain its socio-legal significance, outline the Symposium's goal, and summarize how each of the articles in this Symposium seeks to further that goal.

A. *Who are the Jena Six?*

i. *Background*

The plight of the Jena Six has recently made headlines throughout the nation, even leading to a congressional hearing on the subject.¹ The term the "Jena Six" refers to six African American students at Jena High School ("Jena High") in Jena, Louisiana who were expelled from school and charged with attempted second-degree murder and conspiracy to commit second-degree murder for what the students' supporters have called a "school yard brawl."² Five of the Jena Six were juveniles at the time of the assault; nevertheless, the prosecutor chose to transfer the case against the one student thus far tried and convicted, Mychal Bell, to adult court without a hearing.³ Bell was convicted of the charges of aggravated second-degree

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¹ See, e.g., Noose Hate Crime Act, H.R. 6777, 110th Cong. (2008); S. Res. 396, 110th Cong. (2007); *Black Teen Guilty of Battery in Racially Charged La. Case*, WASH. POST, June 29, 2007, at A14; Abbey Brown, *All White Jury Selected for First 'Jena Six' Trial*, TOWN TALK (Alexandria, La.), June 27, 2007, at 1A; Mary Foster, *Race is Talk of Small Louisiana Town*, ASSOCIATED PRESS, July 5, 2007; Gretel C. Kovach & Arian Campo-Flores, *A Town in Turmoil*, NEWSWEEK, Aug. 20, 2007, at 36; Howard Witt, *Racial Demons Rear Heads*, CHI. TRIB., June 29, 2007, § 1, at 3; Farai Chideya, *Searching for Justice in Jena 6 Case* (NPR radio broadcast July 5, 2007).

² See sources cited *supra* note 1; accord Reed Walters, Op-Ed, *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A27 (rebutting descriptions of the events by commentators as "'a schoolyard fight,' as it has been commonly described in the news media and by critics").

³ See Abbey Brown, *Jury Unanimously Convicts First 'Jena 6' Teen to Face Trial*, NEWS-STAR (Monroe, La.), June 29, 2007, at 1B; Jesse Muhammed, *Young Black Males the Target of Small-town Racism*, FINALCALL.COM NEWS, July 25, 2007, <http://www.finalcall.com/artman/>

battery and conspiracy to commit aggravated second-degree battery after the complaint was amended to add those charges and to delete the attempted-murder-related ones—still exposing Bell to a maximum potential prison sentence of twenty-two-and-a-half years.⁴ Although Louisiana's appellate courts ultimately sent Bell's case back to juvenile court in a major victory for Bell, he was nevertheless sentenced to an eighteen-month term as a juvenile.⁵ The five remaining members of the Jena Six still await trial.⁶

2. *The "White Tree"*

To opponents of the prosecution, the plight of the Jena Six is but one of the most overt recent examples of the routine but usually more covert racial disparities in the administration of American criminal justice.⁷ Jena High is a majority-white school, and the schoolyard violence in question may have stemmed from a dispute over the "white tree," a large oak tree under which only white students sat.⁸ A black student had asked for and received a

publish/article_3753.shtml. The Jena Six teens were originally arrested and charged with aggravated second-degree battery, but on December 11, 2006, the prosecutor amended the charges to attempted second-degree murder and conspiracy to commit second-degree murder. See Supplemental Motion for a New Trial at 1, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. Sept. 4, 2007). On the eve of Bell's trial, prosecutor Reed Walters again amended his complaint, this time charging Bell with aggravated second-degree battery and conspiracy to commit aggravated second-degree battery. See *id.*; see also Brown, *supra*. Second-degree murder is a charge for which a juvenile over the age of fifteen *must* be tried in adult court upon return of an indictment or a finding of probable cause that the offense was committed. LA. CHILD. CODE ANN. art. 305A (2008). The juvenile procedures transfer statute says nothing about mandatory transfer of attempted second-degree murder. However, the statute does grant the prosecutor *discretion* whether to seek transfer to adult court of attempted second-degree murder or a second or subsequent aggravated battery but *not* of a first charge of aggravated second-degree battery. LA. CHILD. CODE ANN. art. 305B (2008). Neither provision permits transfer solely on conspiracy charges. See also Motion in Arrest of Judgment, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. August 27, 2007).

⁴ See Supplemental Motion for a New Trial at 1, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. Sept. 4, 2007).

⁵ *Mychal Bell of 'Jena 6' Ordered to Juvenile Facility*, CNN.COM, Oct. 12, 2007, <http://edition.cnn.com/2007/US/law/10/11/bell.jail/index.html>.

⁶ Interestingly, a Louisiana appeals court removed Judge J.P. Mauffrey, Jr., a Lasalle Parish judge set to hear the remaining Jena Six cases, from doing so on the grounds that Mauffrey created the appearance of impropriety by making several statements suggesting that he had already decided that the accused were guilty. See *Judge Taken Off Remaining 'Jena 6' Cases*, CNN.COM, Aug. 1, 2008, <http://www.cnn.com/2008/CRIME/08/01/jena6.appeal/index.html>.

⁷ See Tom Mangold, 'Stealth Racism' Stalks Deep South, BBC NEWS, May 24, 2007, http://news.bbc.co.uk/2/hi/programmes/this_world/6685441.stm; Bill Quigley, *Injustice in Jena as Nooses Hang from the "White Tree,"* COUNTER CURRENTS, July 3, 2007, <http://www.counter-currents.org/quigley030707.htm>; Sherrel Wheeler Stewart, *Supporters of the Jena 6 Gather 43,000 Signatures for Petition, Rally Calling for Equal Justice*, BLACK AMERICA WEB, Posting of Traycee06 to <http://traycee-jackson.blogspot.com/2007/07/update-on-jena-six.html> (July 31, 2007). Other websites and blogs discussing the Jena 6 include, e.g., *Color of Change*, <http://colorofchange.org/jena/main.html>, and *Davey D's Hip Hop Blog*, <http://blogs.myspace.com/mrdaveyd>.

⁸ See Darryl Fears, *La. Town Fells 'White Tree,' But Tension Runs Deep: Black Teens' Case Intensifies Racial Issues*, WASH. POST, Aug. 4, 2007, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080302098.html>.

school official's permission to sit under the tree.⁹ Shortly thereafter, students and school authorities found three hangman's nooses dangling from the tree.¹⁰ Several black students responded by sitting under the tree, leading to scuffles, followed by a school assembly at which a local prosecutor, Reed Walters, spoke.¹¹ At this assembly, Walters allegedly said, specifically to the black students, "I can be your friend or your worst enemy. I can end your lives with the stroke of a pen."¹²

In the ensuing months, after Jena High's main academic building burned down in what investigators deemed an act of arson,¹³ school officials put Jena High on lockdown. The school principal had recommended that the three white students who hung the nooses be expelled, but, according to some reports, the school board reduced the punishment to a three-day suspension.¹⁴ Other reports declared that the reduced punishment was a nine-day suspension at an alternative facility, two weeks of in-school suspension, a series of Saturday detentions, attendance at discipline court, and mandatory submission to psychological testing.¹⁵ The investigating school committee also concluded that no racial motivation lay behind the noose hangings.¹⁶

Meanwhile, when Robert Bailey, who would later become one of the Jena Six, sought to attend a party, a white male attacked him. The Jena prosecutor charged Bailey's assailant with simple battery.¹⁷ The very next day, when Bailey and some of his friends entered a grocery store, a white

⁹ *Id.* The *Jena Times* reporter's spin on this report was that the black student had jokingly asked the assistant principal at the end of a student assembly whether black students were allowed to sit under the tree in the center of the campus and that the assistant principal replied that the students could "sit anywhere you want." See Jeannine Bell, *The Hangman's Noose and the Lynch Mob: Hate Speech, Hate Crime and Jena 6*, 44 HARV. C.R.-C.L. L. REV. 329, 329 (2009) (citing Craig Franklin, *Media Myths About the Jena 6: A Local Journalist Tells the Story You Haven't Heard*, CHRISTIAN SCI. MONITOR, Oct. 24, 2007, at 2). There was disagreement over whether the tree was in fact a "white tree," one sat under only by whites before the nooses were hung. See *id.* at n.1.

¹⁰ Reports differ as to whether there were two or three nooses. Compare Mangold, *supra* note 7 (describing three nooses), with Bill Sumrall, *Jena High Noose Incident Triggers Parental Protests*, TOWN TALK (Alexandria, La.), Sept. 6, 2006, at 6A (noting only two nooses).

¹¹ See Fears, *supra* note 8; Amy Goodman, "A Modern-Day Lynching"—Parents of Jena Six Speak of Injustice, Racism in Sons' Prosecution, DEMOCRACY NOW, July 10, 2007, <http://www.democracynow.org/article.pl?sid=07/07/10/1413228>.

¹² See Goodman, *supra* note 11; Wade Goodwyn, *All Things Considered: Beating Charges Split La. Town Along Racial Lines* (NPR radio broadcast July 30, 2007) (transcript available at <http://www.npr.org/templates/story/story.php?storyid=12353776>); Mike Taibbi, *NBC Nightly News: In Depth: Racial Divide in Jena, Louisiana* (NBC television broadcast July 31, 2007).

¹³ Taibbi, *supra* note 12.

¹⁴ Fears, *supra* note 8.

¹⁵ These alternative reports included a *Christian Science Monitor* story written by a Jena reporter, who was the husband of a Jena High teacher. See Craig Franklin, *Media Myths about the Jena 6: A Local Journalist Tells the Story You Haven't Heard*, CHRISTIAN SCI. MONITOR, Oct. 24, 2007, at 9, available at <http://www.csmonitor.com/2007/1024/p09s01-coop.html>.

¹⁶ See *id.*

¹⁷ See *id.* (describing the incident).

man named Matt Windham grabbed a shotgun from his truck, purportedly to use on Bailey.¹⁸ Bailey and his friends wrestled the gun away from Windham and took it to the police, reporting the incident. However, to their surprise, authorities charged Windham's black victims, not the white Windham, with robbery for the theft of the firearm.¹⁹

3. *The "Schoolyard Brawl"*

Only two days after the shotgun incident, the school fight that led to charges against the Jena Six broke out at Jena High. This fight resulted in a white student, Justin Barker, being treated at the local hospital and released the same day.²⁰ Barker purportedly attended a social function that evening, though there are some conflicting reports over the severity of his injuries and the length of time that he spent in the hospital.²¹ Authorities eventually charged Barker with possessing a firearm in an arms-free zone for bringing a loaded rifle to Jena High, but the courts released him on \$5,000 bond.²² However, police arrested the Jena Six for the assault on Barker.

Authorities first charged the Jena Six with aggravated second-degree battery. The complaint was later amended to include the charges of attempted second-degree murder and conspiracy to commit second-degree murder.²³ The courts ordered bond imposed on each of the Jena Six, ranging from a low of \$70,000 to a high of \$138,000, a sharp contrast to Barker's relatively meager bond.²⁴ The day before Bell's trial, however, the prosecu-

¹⁸ See Fears, *supra* note 8. But see Jason Whitlock, *Jena 6 Case Caught Up in Whirlwind of Distortion, Opportunism*, KAN. CITY STAR, Sept. 30, 2007, at B11 (noting that the police contend that Windham was threatened, chased to his truck, and had his gun wrestled away from him at that point).

¹⁹ See Fears, *supra* note 8.

²⁰ Mangold, *supra* note 7.

²¹ Compare *id.* (noting that Barker "fell to the ground" and "suffer[ed] bruising and concussion," but was "treated at the local hospital and released, and that same evening felt able to put in an appearance at a school function."), with Walters, *supra* note 2 (claiming that "[o]nly the intervention of an uninvolved student protected Mr. Barker from severe injury or death.>").

²² Abbey Brown, *Student May Be Expelled for a Year*, TOWN TALK (Alexandria, La.), May 12, 2007, at 1B, available at <http://www.thetowntalk.com/apps/pbcs.dll/article?AID=/99999999/NEWS/70916032>.

²³ See Supplemental Motion for a New Trial at 1, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. Sept. 4, 2007).

²⁴ See *Court Rules 'Jena 6' Defendant to Stay Behind Bars*, CNN.COM, Sept. 21, 2007, <http://www.cnn.com/2007/US/law/09/21/jena.hearing/index.html> (stating the bond amounts and alleging that Bell's high bond resulted from his record, which includes four prior juvenile offenses); see also Abbey Brown, *'Jena Six' Defendant's Criminal History Comes to Light; Bond Denied*, SHREVEPORT TIMES, Aug. 25, 2007, available at <http://www.shreveporttimes.com/apps/pbcs.dll/article?AID=/20070825/NEWS03/708250353>; Prosecutor: *"Jena Six" Defendant Had Four Juvenile Convictions*, TIMES-PICAYUNE (New Orleans, La.), Aug. 25, 2007. State and federal prosecutors investigating the case concluded, however, that the assault on Barker was unconnected to the noose-hanging incident, though the media, protestors, and many students and parents reached very different conclusions. See generally, Barbara Mikkelsen & David Mikkelsen, Snopes.com, *Jena 6* (Dec. 30, 2007), <http://www.snopes.com/politics/crime/jena6.asp> (last visited April 20, 2009) (advocacy email circulated by supporters of the

tor dropped the attempted-murder charge, proceeding instead on charges of aggravated second-degree battery and conspiracy to commit aggravated second-degree battery.²⁵

Bell's conviction on the aggravated second-degree battery charge as an adult left him facing a potential sentence of twenty-two years in prison.²⁶ According to his supporters, Bell's trial counsel was ineffective, failing to call witnesses in Bell's defense, to question or object to many jurors who admitted having formed prejudgments about the case, and to make serious protests to assure diversity on what turned out to be an all-white jury.²⁷

The lenient treatment of the white students contrasted sharply with the harsh treatment of the black students on a wide range of matters: the severity of the charges, the size of the bond, the length of the sentences sought, adult versus juvenile court, and arrest versus mere intra-school discipline. These apparent racial disparities ensured that prosecutor Reed Walters would find himself under fire.

B. *What Was the Prosecutor's Vision of His Ethical Obligations?*

Two of Walters's decisions would prove to be particularly controversial. Critics first argue that Walters overcharged the Jena Six, particularly Mychal Bell, in a purported effort to do an end-run around Louisiana law on juvenile transfers to adult court. Recall that Walters proceeded on an attempted second-degree murder charge until the eve of Bell's trial. Under Louisiana law, second-degree murder is a charge for which a juvenile over the age of fifteen *must* be tried in adult court upon return of an indictment or a finding of probable cause that the offense was committed.²⁸ In contrast, the juvenile procedures transfer statute says nothing about mandatory transfer of *attempted* second-degree murder. The statute *does* grant the prosecutor discretion to seek transfer to adult court for attempted second-degree murder or a second or subsequent aggravated battery, but it does *not* give the prosecutor such discretion for a first charge of aggravated second-degree battery—the charge of which Bell was ultimately convicted by a jury.²⁹ Neither provision permits transfer solely on conspiracy charges.³⁰ Therefore, the late reduction

Jena Six); *Jena Six*, http://en.wikipedia.org/wiki/Jena_Six (serving as a compendium of public views on the case, if not necessarily a recounting of the true events).

²⁵ See Supplemental Motion for a New Trial at 1, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. Sept. 4, 2007).

²⁶ See *id.*

²⁷ See *id.*

²⁸ See LA. CHILD. CODE ANN. art. 305A (2008).

²⁹ See LA. CHILD. CODE ANN. art. 305B (2008); see also Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 119 n.165 (2007) (crafting his own argument as to why Walters was wrong to argue that he had no legal grounds for proceeding against the noose-hangers).

³⁰ See LA. CHILD. CODE ANN. art. 305A (2008); LA. CHILD. CODE ANN. art. 305B (2008); see also Motion in Arrest of Judgment at 1, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. Aug. 27, 2007).

of the charges may have created the appearance of charge-manipulation by the prosecutor to empower him to seek trial in adult court.³¹ Indeed, an appellate court eventually overturned Bell's conviction on the ground that he should not have been tried in adult court.³² Upon the case's remand to juvenile court, Bell pled guilty to a simple battery.³³ These observations explain why it is more accurate to say that the prosecutor chose to proceed in adult court rather than that he was required to do so.³⁴

Walters has also faced criticism for his refusal to file hate crimes charges against the noose-hangers.³⁵ Louisiana law permits a sentence enhancement for racially-motivated crimes, which requires proof of a predicate crime not dependent upon racial motivation before the race enhancement can be sought.³⁶ However, critics argue that the prosecution might have charged "simple criminal damage to property," defined under Louisiana law as "the intentional damaging of any property of another, without the consent of the owner, and . . . by any means other than fire or explosion," a crime subject to not more than a \$1,000 fine where the damage is under \$500 and by not more than six months imprisonment.³⁷ Other critics seem to have suggested that assault could have been the predicate offense, for it is defined under the Louisiana Code as the "intentional placing of another in reasonable apprehension of receiving a battery."³⁸ Under the first statute, the damage to property would be hanging the nooses. Under the second statute, the argument would be that noose-hanging is reasonably perceived as a threat of harm by African Americans, particularly the African American students at Jena High, and the jury should be free to infer the white students' intention to raise such a fear from the well-known symbolism of the noose.³⁹ Other critics of Walters's behavior and motivations contend that it would be stretching Louisiana law to have proceeded against the noose-hangers under these stat-

³¹ Cf. Memorandum in Support of Motion in Arrest of Judgment at 5-6, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. Aug. 27, 2007) (making analogous argument).

³² See *Louisiana v. Bell*, No. KW 07-01106, slip op. at 1 (La. Ct. App. Sept. 14, 2007).

³³ See Howard Witt, *Plea Deal Arranged for Teen in Jena 6*, CHI. TRIB., Dec. 4, 2007, at C1. After his release, Bell tried to commit suicide. He told reporters that he felt special pressure after these events to prove that he was a decent person and to show that he deserved a good future. He hoped to go to college on a football scholarship, and several schools had apparently approached him about that possibility. When he was charged recently with shoplifting, he said that he could not bear how that charge might endanger his potential scholarship. Accordingly, he sought to take his own life. See Kevin McGill, *Lawyer: Jena Six Teen Shot Himself Out of Despair*, ABCNEWS.COM, Dec. 30, 2008, <http://abcnews.go.com/US/wireStory?id=6550308>.

³⁴ See *supra* note 3 (discussing various charges).

³⁵ One of the most vocal recent critics is Anthony V. Alfieri. See generally Anthony V. Alfieri, *Prosecuting the Jena 6*, 93 CORNELL L. REV. 1285 (2008) (critiquing what the author sees as Walters's "colorblind" approach to his charging decisions).

³⁶ See LA. REV. STAT. ANN. §14:107.2 (2007).

³⁷ See LA. REV. STAT. ANN. §14:56 (2007).

³⁸ LA. REV. STAT. ANN. §14:36 (2007); see David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1464 (2008).

³⁹ See Bell, *supra* note 9, at 349-50 (articulating and defending a variant of this argument).

utory provisions.⁴⁰ Strangely, neither side in this debate has focused nearly enough on the other purportedly discriminatory prosecutorial decisions made after the assault on Robert Bailey, the rifle threats directed against some members of the Jena Six, and Barker carrying a loaded rifle to school at a time of high racial tension.⁴¹ Those disparities include sometimes filing reduced charges or no charges at all, seeking modest punishments, and seeking lower bail for white students.⁴²

On the other hand, unlike some other well-known cases of alleged prosecutorial race discrimination, there was no dispute that the crime with which the Jena Six were charged took place—although whether the members of the Jena Six were the perpetrators might be another matter. U.S. Attorney Donald Washington testified before Congress: “I agree that there’s a victim in this case who was brutally beaten, that the individuals who have been charged are not saints or martyrs. They’re young kids who were involved in conduct that needs to be addressed.”⁴³ However, that those kids may bear significant fault does not, in Professor Charles Ogletree’s view, justify the harsh measures taken. Ogletree explained: “It seems to me, along with [columnist] Richard Cohen, that battery seems to be the appropriate charge. These were dramatically overcharged against the Jena Six.”⁴⁴

Walters published an op-ed piece in the *New York Times* defending his actions in the case.⁴⁵ Amazingly, Walters did not attempt to justify his original decision to proceed with second-degree attempted-murder charges, nor did he significantly defend his failure to return the case to juvenile court once he dropped the only charges supporting adult court jurisdiction.⁴⁶ He argued that the law prohibited him from bringing hate crimes charges against the white students who hung the nooses on the tree, while the law correspondingly required him to proceed against the black students, particularly Mychal Bell, as adults, seeking extremely harsh punishments.⁴⁷ Thus, Walters said:

I can understand the emotions generated by the juxtaposition of the noose incident with the attack on Mr. Barker and the outcomes

⁴⁰ See Luban, *supra* note 38, at 1464-65.

⁴¹ Compare Alfieri, *supra* note 35, with Luban, *supra* note 38 (neither author dwelling much on these other disparities).

⁴² See Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.—C.L. L. REV. 393, 394-95 (2009) (citations omitted).

⁴³ See *Jena 6 and the Role of Federal Intervention in Hate Crimes and Race-Related Violence in Public Schools Before the H. Comm. on the Judiciary*, 110th Cong. (2007), http://votesmart.org/speech_detail.php?sc_id=324763 (statement of Donald Washington, U.S. Attorney).

⁴⁴ *Jena 6 and the Role of Federal Intervention in Hate Crimes and Race-Related Violence in Public Schools Before the H. Comm. on the Judiciary*, 110th Cong. (2007), http://www.votesmart.org/speech_detail.php?sc_id=324767 (statement of Charles Ogletree, Professor, Harvard Law School).

⁴⁵ See Walters, *supra* note 2.

⁴⁶ See *id.*

⁴⁷ See *id.*

for the perpetrators of each. In the final analysis, though, I am bound to enforce the laws of Louisiana, as they exist today, not as they might in someone's vision of a perfect world. That is what I have done. And that is what I must continue to do.⁴⁸

Walters also described himself as a "small-town lawyer and prosecutor" whose job for sixteen years has been "to review each criminal case brought to me by the police department or sheriff, match the facts to any applicable laws, and seek justice for those who have been harmed."⁴⁹ Thus, Walters portrayed himself as straight-jacketed by clear and absolute law, as if he had no discretion and, accordingly, no responsibility. While noting that the courts ultimately sent Bell's case back to juvenile court, Walters saw no need to re-think his charging decisions or his responsibilities—or even to admit the *possibility* of error.

Law professors David Luban and Anthony Alfieri have questioned the credibility of Walters's explanation. Luban writes:

[I]n a deeply segregated town where the legacies of Jim Crow inflect the social meaning of charging decisions, facially neutral standards may *in fact* be deeply color-coded. As Alfieri nicely puts it, "Charging decisions, trial strategies, and sentencing recommendations all constitute acts of naming." In the Jena Six case, the grave charges against Bell, and Walters's explanation that he is a repeat offender, reinforce (and derive their plausibility from) the stereotype of young black men as dangerously and uncontrollably violent. Walters's far-fetched insistence that the attack on Barker had nothing to do with the turmoil at Jena High—the nooses, the racial conflict they provoked, the arson—make Bell's assault on Barker seem like an inexplicable and inexcusable criminal assault out of nowhere, which is exactly how Walters depicts it. It is hard not to suspect that had the races of assailant and victim been reversed, Walters might have cited the escalating violence at Jena High as a mitigator that would have led to different decisions: to charge the assailant as a juvenile, to seek rehabilitative sentencing rather than hard jail time, to charge lesser offenses, or conceivably, to forego charging Bell at all.⁵⁰

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Luban, *supra* note 38, at 1463 (quoting and summarizing in part Alfieri, *supra* note 35, at 1296-1302). It should be noted that the United States Attorney's Office's investigation led it to a seemingly different conclusion in some respects from that of Luban and Alfieri. Though conceding that the noose-hangings and the schoolyard brawl were both "likely symptoms of racial tension," the U.S. Attorney concluded that there was "no connection [between the two events] that a prosecutor could take into court and say, 'You know, judge or jury, we're prosecuting these white kids for these nooses, and look at all the damage they caused downstream, all the way down to the fight at Jena High School on December 4 . . .'" *U.S. Attorney: Nooses, Beating at Jena High Not Related*, CNN.COM, Sept. 19, 2007, <http://www.cnn.com/>

Walters's explanation—an explanation Luban finds lacking in credibility—uncoupled his charging decisions from the racial context of the incidents at Jena High, and it also disavowed any responsibility to place those decisions into a broader social context or to consider the broader social effects of his actions. Indeed, he specifically distanced himself from the question of whether “America needs a new civil rights movement,”⁵¹ focusing the bulk of his op-ed piece on why he considered Bell's alleged crime a heinous one and why he could not charge the noose-hangers with a hate crime given the facts of the two cases.⁵² He devoted not one word to whether he should have considered the impact of his decisions in the Jena Six case on the local and national African American communities, on interracial conflict, on the perceptions and reality of governmental legitimacy, on likely future crimes by others in these various communities, on the educational culture at Jena High, on the racial culture in the town of Jena itself, or even on the rehabilitation of all the teenagers in the varied Jena High incidents.

The Jena prosecutor's vision of his professional role is thus to be bound by the “letter” of the law—a position that assumes, as several of the authors in this Symposium maintain, that there is always such a crystal clear “letter” to be found.⁵³ Walters sees his job as obligating him to resolve each case before him in isolation, ignoring whether it is part of a pattern of related cases, whether it sends destructive social messages, and whether it furthers “equal” justice in society as a whole. In short, this is a narrow, technical conception of the prosecutor's role that, it may be argued, embodies a form of willful ignorance inconsistent with empirical realities, relevant psychological theories, the evolving recognition of a different social role for the prosecutor, and the most normatively desirable vision of that role.⁵⁴

Thus far, relatively little academic work has been written about the Jena Six case. Nor, so far as we know, has any academic Symposium focused entirely on the case's social implications. This Symposium seeks to fill these gaps with a series of articles and essays that view the Jena Six case as emblematic of broader questions of racial justice, questions understandable only in light of history, and questions that should prick the prosecutorial conscience to embrace a broader role than that embraced by Walters.

2007/US/law/09/19/jena.six.link/index.html. The U.S. Attorney found insufficient evidence to prosecute the noose-hangers for a federal hate crimes or civil rights violation because, in the office's representative's own words: “We could not prove that, because the statements of the students themselves do not make any mention of nooses, of trees, of the ‘N’ word or any other words of racial hate.” *Id.* Once again, the symbolism of the nooses themselves was deemed an insufficient indicator of racist motivation. In addition, like Walters, the local U.S. Attorney apparently believed that his role was over once he decided not to file federal charges.

⁵¹ Walters, *supra* note 2.

⁵² *See id.*

⁵³ *See infra* notes 72-74 and accompanying text.

⁵⁴ *See infra* Part II.B.

II. JENA AND JUSTICE

The articles in this Symposium address the intersection of the cultural, legal, and political implications of the Jena Six case. All the articles, of course, have the continuing significance of race in our justice system as a central theme.

The articles fall into three broad groups: first, those addressing the meaning of the noose, both historically and modernly; second, those addressing prosecutors' ethics; and third, those addressing the seen or unseen overarching effects of race on the adult and juvenile criminal justice systems. The Symposium authors employ primarily historical or social scientific methods, rather than parsing specific cases and statutes. Although the right- and wrong-doing of various actors in the Jena Six case itself are addressed, the authors generally use that case as a starting point for discussing questions of the racial distribution of power, perception, and principle. The power is that of the justice system to reinforce pre-existing racial inequalities, the perceptions and misperceptions are those held of the justice system by various racial groups, and the principles are those needed to guide prosecutors—the only systemic actors with a duty to “do justice”—through the racial thicket. Indeed, we suggest that several factors account for the Jena Six case's powerful hold on the public imagination: the prominent role of the noose-as-symbol; the open racial violence at a time when such matters are assumed to be at most relics of a distant, long-buried past; and the prosecutor's insistent denial of responsibility for causing or fixing racial harms, real or imagined. Jena picks at the scabs covering America's racial wounds, exposing flawed assumptions and challenging the complacent to action. But it is all too easy to let time loosen Jena's hold and once again cloud public memory. All the authors speaking in this Symposium share the hope that they can lift that fog, harnessing clearer vision as a first step to better-informed and more zealous action.

A. *The Noose's Meaning*

The noose is most commonly associated in media images with lynchings of African Americans. As numerous scholars have documented, that portrayal, insofar as it goes, is historically accurate. But, argues Richard Delgado in *The Law of the Noose: A History of Latino Lynching*, the picture is incomplete.⁵⁵ More specifically, Delgado explains, Latinos, particularly Mexican Americans in the Southwest, were lynched at a similar rate as African Americans during lynch-fever's heyday. Delgado starkly summarizes the social causes of Latino lynchings, finding them similar to those of African American lynchings but with one unique twist: “Mexicans were

⁵⁵ Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297 (2009).

lynched for acting ‘too Mexican’—speaking Spanish too loudly or reminding Anglos too defiantly of their Mexicanness. Even Mexican women, often belonging to lower economic classes, were lynched, often for sexual offenses including such as ‘resisting an Anglo’s advances too forcefully.’⁵⁶ Lynching of Mexican Americans, like that of African Americans, thus served to secure white status and power. But Mexican American lynching also served the additional functions of seeking to erase any distinctive Mexican American identity, silencing “deviant” culture and dissent, and making some measure of assimilation the price for “toleration” of Mexican American presence in the United States. Delgado’s summary of the brutality of these lynchings—and the determination of the organized resisters to halt their spread—powerfully demonstrates these functions of the noose being served and contested.

Delgado takes the silencing theme one step further, however, asking why the history of Latino lynchings has been so long obscured. Drawing on post-colonial theory, Delgado notes that the history was passed on orally, in Spanish, through tales, songs, and rituals, and recounted in Spanish-language community newspapers. Yet almost all mainstream scholars and media ignored the phenomenon, reinforcing an image of white colonialists as “bearers of justice, science, light, and humanism,”⁵⁷ and the Mexican American colonial subjects as “primitive, hapless, or even bestial.”⁵⁸ This dichotomy between the just and the bestial serves to justify the colonizers’ material and cultural dominance, a form of rule seen as benefiting governor and governed alike.

Therein lies a startling argument concerning modern assimilationist efforts, specifically the English-only movement, argues Delgado. A Latino or Latina child who speaks and reads Spanish fluently is able to absorb the Latino American oral and written cultural record that survives only in Spanish rituals and writings. But the same child growing up in a world in which the dominant culture derides and sanctions that same fluency will not develop it sufficiently to learn her ancestors’ history. Without such learning, the modern child is less able to see similarities between older overt and newer covert forms of racial oppression, is less likely to develop a distinctive multicultural identity, and is more likely to embrace and defer to the dominant white culture’s values. In this way, argues Delgado, the English-only movement helps to perpetuate historical wrongs by hiding their presence, thereby helping to destroy a distinctive Latino American voice in our politics.

Frank Wu, though not specifically emphasizing lynching, addresses concepts that shed light on the Jena Six noose-hangings.⁵⁹ Wu argues that

⁵⁶ *Id.* at 299-300.

⁵⁷ *Id.* at 305.

⁵⁸ *Id.*

⁵⁹ See Frank Wu, *Burning Shoes and the Spirit World: The Charade of Neutrality*, 44 HARV. C.R.-C.L. L. REV. 313 (2009).

the Jena Six case must be understood in light of two competing schools of racial thought: assimilation and multiculturalism. Assimilationists argue that race and ethnicity should be rendered irrelevant to whatever extent possible. The goal of racial and ethnic policy should be to assimilate all individuals into the dominant culture. Multiculturalists, by contrast, argue that communities of difference ought to be tolerated, indeed encouraged, and that they should be respected for their difference. Assimilation into the dominant culture is thus an evil to be avoided. Wu illustrates how these two schools of thought can play out in less well-known instances by examining the case of Peng Song, a University of Michigan undergraduate of Chinese ancestry who, in keeping with Chinese funerary customs, burnt an offering on school grounds in honor of his recently deceased grandfather. Song was criminally prosecuted for this action, though no one was harmed and though other students burned fires on campus, such as burning incense or smoking marijuana, without criminal punishment. But the latter sorts of burning (despite the illegality of marijuana use itself) were consistent with the dominant culture, while Song's actions were not. Wu thus sees Song's prosecution as an instance of attempted forced assimilation. The assimilationist ethic, in Wu's view, rendered the Song prosecution a racially discriminatory one under any sound conception of justice.

Wu sees the Jena Six case as another instance of attempted forced assimilation, at least to the locally dominant culture. The noose hangings, though meriting some sort of mild sanction, reflected Jena's dominant white racial culture. The black students sought recognition for the special harm that nooses did to African American individuals and culture—a form of multiculturalist rationale. By prosecuting the black students but not the white ones, Jena sent the message that it expected black students to defer to the locally dominant culture, marking any asserted black difference in perspective as unworthy of serious respect—a multicultural ethic dangerously subversive to white authority. Awareness of this ethic, suggests Wu, helps us understand the motivations of the actors in the case and the conflicting values at stake. Moreover, his piece reflects at least implicitly the similar themes at work in Delgado's article, though through a Chinese rather than a Latino example.

Jeannine Bell returns our attention primarily to lynchings of African Americans in her piece, *The Hangman's Noose and the Lynch Mob: Hate Speech, and the Jena Six*.⁶⁰ Bell points out that Jena High School's committee investigating the incident ruled that "there was no racial motivation behind the placing of the nooses."⁶¹ This committee conclusion, Bell observes, raises the question whether perpetrator or victim perspectives should control in judging a noose hanging's meaning in individual cases. Bell argues that it

⁶⁰ See Bell, *supra* note 9.

⁶¹ *Id.* at 330.

is the victim's reasonable perceptions of meaning that should be determinative of an individual noose-hanger's culpability.

After briefly reviewing the history of African American lynchings, Bell turns her focus to modern lynchings. In 2000, the Equal Employment Opportunity Commission handled dozens of workplace noose-discrimination cases throughout the country. Private sector employment lawyers have also noted a significant increase in such cases. Bell's survey of recent cases found noose discrimination occurring among service workers, in warehouses, and in the construction and trucking industries. Publicity surrounding the Jena Six seems to have prompted numerous copycat noose incidents with as many as fifty occurring in the two months after the Jena Six civil rights protest march. Copycat incidents were geographically dispersed, reaching into schools, government offices, and private and public workplaces.

Bell identifies several types of perpetrator-proffered justifications for noose hanging, and casts doubt on the most common rationales given for such incidents. Such misperceptions are surprising given the media's historically accurate construction of the noose's meaning. The truth is therefore readily available for public consumption. However, Bell finds significant evidence that blacks and whites often ascribe, or at least purport to ascribe, different meanings to noose hangings. Blacks consistently interpret noose-hangings as conveying racial threat. Noose hangings have psychological effects on the black community similar to those caused by hate crimes. Direct victims experience anger, then fear, and often experience high blood pressure, nightmares, and post-traumatic stress. Black onlookers likewise perceive a continuing threat, suffering intimidation and altering their behavior in the hope of reducing the risk of attack. Yet whites often insist they were "just kidding," claiming surprise and confusion at horrified black reactions. Even white newspaper columnists, reporters, and cartoonists parody or belittle what they see as black hypersensitivity, political correctness, or naked attempts to manipulate white guilt.

Bell then carefully explores existing remedies for noose-hangings—employment discrimination suits, state-level anti-noose legislation, and federal criminal and civil remedies—and finds them all wanting. Their failures stem from problems of proof, including an insistence on evidence of racist or threatening intent, which valorizes the perpetrator's perspective, rendering justice rare. Bell's solution is to advocate for a narrower version of Mari Matsuda's proposal⁶² that legal remedies for racist speech should be limited to instances in which the fairly-understood message of racial inferiority is directed against a historically oppressed group—and conveying hateful and degrading meanings. The reasonable perceptions of the audience rather than the actual intentions of the offender would control. Bell would narrow this

⁶² Mari Matsuda, *The Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989).

approach, however, only to instances of “wordless speech” conveyed by “readily identifiable extreme symbols of racial hatred like the hangman’s noose.”⁶³ Still, Bell holds little hope that her proposal can realistically survive the gauntlet of racial politics.

B. Prosecutors’ Ethics

Three of the Symposium authors argue for distinct forms of prosecutorial ethics reform: an ethics of history, of esteem, and of compassion.

In *The Jena Six and the History of Racially Compromised Justice in Louisiana*,⁶⁴ Gabriel Chin defends an ethics of history. Chin concedes that proving conscious racially-selective prosecution in a specific case is extraordinarily difficult and likely impossible as to the Jena Six prosecutor. Yet if we examine the history of discriminatory prosecution in Louisiana, it is hard not to conclude that Reed Walters at least subconsciously engaged in racially discriminatory prosecution or failed to recognize and resist such prosecutions resulting from powerful, longstanding local social forces. Although he does not say so expressly, Chin implies that a good prosecutor is obligated to be attentive to history and context, especially where matters of race arise, in making ethical choices. Reed Walters thus at least committed the sin of culpable blindness.

Accordingly, Chin discusses the post-Civil War motivations for white “redemption” of Louisiana from purported black control, particularly to choke black political power growing in part from their numbers then constituting a majority of the state’s population. Chin traces this continuing history of racial suppression and discrimination in the state through Jim Crow to the present. That history includes acts of violence, both large and small—most famously the Colfax Massacre of 1873, in which conservative whites overthrew a local government just thirty-six miles from Jena. The Supreme Court’s decision in the resulting litigation, *United States v. Cruikshank*,⁶⁵ effectively rendered Congress powerless to halt political terror at the ballot box. Whites-only primaries, literacy tests, the “separate but equal” approach constitutionally validated by *Plessy v. Ferguson*,⁶⁶ and a host of other racially discriminatory legal measures assured white social and political dominance of Louisiana for well over a century.

The criminal justice system played a central role in that dominance, primarily via white exploitation of the “duly convicted” exception to the Thirteenth Amendment’s prohibition on involuntary servitude.⁶⁷ Chin there-

⁶³ *Id.* at 355.

⁶⁴ See Gabriel Chin, *The Jena Six and the History of Racially Compromised Justice in Louisiana*, 44 HARV. C.R.-C.L. L. REV. 361 (2009).

⁶⁵ 92 U.S. 542 (1875).

⁶⁶ 163 U.S. 537 (1896).

⁶⁷ U.S. CONST. amend. XIII, § 1.

fore devotes significant attention to the state's convict leasing and prison plantation systems. Louisiana initially leased convicted prisoners out to coal mines, cotton and sugar plantations, brickyards, saw mills, and a host of other profit-making entities. Later, the state replaced convict leasing with a state agricultural plantation, Angola. Moreover, until around 1970, violations of vagrancy laws, crop liens, work contracts to pay off bonds, and other similarly vague or minor offenses were used to compel African Americans to work for whites or face prison. Although many of these laws were facially neutral, in application they were used, along with numerous similar techniques, to control the black population.

Chin likewise examines in some detail the discriminatory use of the criminal law to suppress the black vote in the age of Jim Crow, and demonstrates the contemporary vitality of race discrimination in numerous major spheres of life in Louisiana generally, and La Salle Parish and Jena specifically. In sum, Chin argues that the "continuing enthusiasm for prison, and the continuing de facto segregation in Louisiana schools, housing, and the ballot box" makes the prospect of backlash among white voters against discriminatory prosecution of African Americans unlikely.⁶⁸ Consequently, the injustice of the Jena Six prosecution is of the same kind as the centuries-old patterns of injustice in Louisiana.

Andrew E. Taslitz challenges the dominant paradigm of prosecutorial ethics—what he calls "Do-justice adversarialism"—as enabling seemingly racially-neutral prosecutorial decisions to contribute in fact to a system of white racial domination.⁶⁹ An adversarial ethic assumes that the battle of equals between lawyers zealously representing their client's interest *in individual cases* produces both truth and justice. "Do-justice adversarialism" recognizes that prosecutors, because they represent the state or "the People," must moderate their zeal when necessary to "do-justice"—a term in practice generally narrowly-defined to mean working to halt the most egregious, consciously-inflated failures of procedural justice while still focused on the needs of the isolated individual cases. Taslitz argues for replacing the dominant model with two new ones—"modified do-justified adversarialism" and the "medical model"—at least to address racial bias concerns.

Modified do-justice adversarialism recognizes that subconscious influences, especially concerning race, can also undermine the fairness of criminal justice procedures. Accordingly, prosecutors must take such influences into account in making a wide range of decisions. Prosecutors must pay attention to the raced "cultural meaning" of prosecutorial actions. While modified do-justice-adversarialism focuses on the prosecutor's relationship with the accused, an alternative model, the medical model, governs "the prosecutor's direct relationship with . . . third parties, institutions, and com-

⁶⁸ See Chin, *supra* note 64, at 391.

⁶⁹ See Taslitz, *supra* note 42, at 395.

munities, and with the ‘People’ as a whole.”⁷⁰ The medical model embraces three principles: (1) prevention is better than treatment; (2) if treatment is necessary, do no harm; and (3) treat the Body of the People holistically, recognizing that the health of the mind (including the subconscious mind) and of the Body interact. The prosecutor’s duty is to serve all the People, not any subset.

Taslitz justifies the two models and applies them to the Jena Six case, finding Reed Walters’s actions, even generously construed and accepting Walters’s own explanations of his choices as true, wanting. But the bulk of Taslitz’s piece is devoted to justifying the two models by describing the prosecutor’s role in the “economy of racial esteem.” Because esteem and disesteem can accrue to salient social groups as well as individuals, there is, according to Taslitz, an economy of racial esteem and disesteem. Racial groups incurring disesteem suffer material and psychic harms both for the entire group and for its individual members. Taslitz further argues that one major purpose of the criminal justice system is to impose merited disesteem on *individuals* proportionate to their conduct. Although Taslitz applauds the social value of the system imposing merited and proportionate disesteem on individuals, he demonstrates that the system too often has the unjustifiable effect of stigmatizing that individual’s entire racial group and all its members.

Taslitz then demonstrates how three illustrative prosecutor behaviors — the charging decision, plea-bargaining, and statements made to the media—likely magnify these unwanted racial effects. Taslitz draws on cognitive science, the “fair-pricing” strand of behavioral economics, political science, case law, and anecdote as converging sources of data to support his argument. Taslitz insists that the prosecutor thus unwittingly becomes a regulator of the market for racial disesteem, reinforcing pre-existing market biases working against racial minorities. Because prosecutors help to inflict this damage, he argues that prosecutors are ethically obligated to right the wrongs they have done to the justice system and to innocent third parties. The modified do-justice adversarial and medical models provide the theoretical structure through which Taslitz hopes to redeem prosecutors.

While Taslitz worries about prosecutors as market regulators blind to racial “externalities,” Ellen Podgor, in her piece, *Race-ing Prosecutors’ Ethic Codes*,⁷¹ worries more about prosecutors as advocates missing not sight but heart. Compassion, argues Podgor, should self-consciously influence prosecutors’ charging, plea-bargaining, and sentencing decisions. Drawing on the work of philosopher Martha Nussbaum, Podgor explains that the degree of compassion to be given another turns on an accurate understanding of the severity of the injury they have suffered, the degree to

⁷⁰ *Id.* at 448.

⁷¹ See Ellen Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.–C.L. L. REV. 461 (2009).

which they brought it on themselves, and the perceived importance of the afflicted person to the purported compassion-giver. Whatever an accused may have done, however, she cannot fairly be charged with “bringing on himself” the severe injuries inflicted by even subconscious or institutional racism. Moreover, if race effectively reduces the psychic importance of the offender’s fate to the prosecutor, that is a severe, unjustified diminishment of the offender’s human value, a harsh form of disrespect for human equality.

That a prosecutor is consciously unaware of such processes, explains Podgor, is no excuse. We know enough for her to become sufficiently aware, especially in cases like the Jena Six where the risk of racial bias should be obvious. Compassion requires a prosecutor to do her best to stand in the offender’s shoes, to see the world through her eyes and her circumstances, not because the offender’s world view should govern but because it better informs the prosecutor about what justice requires. However, empathy is only one prerequisite for compassion. Once understanding the offender’s fate, the prosecutor must judge the degree to which the offender alone—rather than forces largely beyond her control—brought about that fate. Any degree to which her suffering is unwarranted requires a desire to alleviate it and action to do so, for these are essential components of compassion. In other words, a wrongdoer merits only the punishment that she deserves and no more. Surely, suggests Podgor, ensuring proportionate punishment, particularly as untainted by racial bias, must be within the scope of even the traditional notion of a prosecutor “doing justice.” Compassion, even for a grave wrongdoer, is thus a prerequisite for a prosecutor to do her job ethically. Podgor notes, however, that compassion does not necessarily dictate gentler treatment of offenders. For example, where the prosecutor is convinced that the crime is grave, the evidence is strong, and the procedures are fair and untainted by racial bias, harsh punishment may be just what the offender deserves. Nonetheless, Podgor implies that the prosecutor’s willingness to determine what degree of compassion, if any, is merited, and to act on that assessment, cannot be abandoned.

Podgor summarizes the constitutional and statutory ethics rules governing prosecutors’ conduct and finds them (apart from the vague mandate to “do justice”) devoid of concern with compassion, including the subset of racial compassion. However, Podgor concedes that compassion is not something that can be legislated. Prosecutors in our system have enormous discretion, yet they too often exercise that discretion using a strict “letter of the law” approach that fails to consider “all surrounding events” and does not “look beyond the facts of one specific case.”⁷² Podgor thus pleads for prosecutors to take a more “multi-dimensional” approach to guiding their own discretion, to use not only head but also heart. Podgor summarizes her position as follows:

⁷² *Id.* at 474.

When speaking of compassion, it is more common to be examining its role in sentencing or in what role it should play in a justification of the accused's conduct. Compassion, however, is an emotion that should also have influence in charging individuals with crimes. Compassion should influence the prosecutor's decision of whether criminal charges will be brought and who will face those charges. Compassion should also influence the specific charges that the accused might face. Finally, the prosecutor's decision to dismiss charges or offer a cooperating role and reduction in sentence to someone accused of criminal conduct may in fact be resulting from an influence of compassion for the accused individual. Some might argue that compassion for victims or society as a whole needs to also be factored into this discussion.⁷³

Returning to the Jena Six case, Podgor concludes by arguing that Reed Walters could have benefited mightily from the exercise of compassion. Had he done so, Podgor argues that it is unlikely that he would have refused to charge "one group because no law existed, while overcharging others with crimes that if proven may have been motivated in part by [the wrongful conduct of just] those escaping the criminal process."⁷⁴

C. Broader Systemic Concerns

Joseph Kennedy's piece, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*,⁷⁵ bemoans the failure of the modern civil rights movement to embrace criminal justice reform with the same zeal with which it embraces reform of education, the workplace, and the housing market. Kennedy blames this failure, and white indifference to the skewed racial effects of our criminal justice system, on a *de facto* acceptance of its "normalcy." This acceptance stems, in turn, from the too-often unchallenged belief that poor inner-city African American communities create a norm-less world, or at least a world governed only by anti-norms: local social norms that encourage lawlessness and that reject the law-abiding norms ruling broader society. Order can be restored in a norm-less community only via the heavy hand of harsh criminal punishment, fear and isolation to deter criminality being the only option. Harnessing local community norms to restore order is simply impossible in a world that has no norms worthy of the name.

But Kennedy argues that inner-city African American communities are decidedly *not* norm-less. Rather, community norms are "under stress." In other words, causes other than moral breakdown increase levels of crime and

⁷³ *Id.* at 472.

⁷⁴ *Id.* at 475.

⁷⁵ See Joseph Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477 (2009).

social disorder, and weaken the effectiveness of social norms in regulating behavior and reinforcing community bonds. But people still “believe fiercely in the importance of family and hard work.”⁷⁶ Because these norms survive, they “will reassert themselves once the strain is removed or ameliorated.”⁷⁷ A norm-less community needs a stern parent ready to use punishment to teach individuals that they are responsible for their actions and to reassert control by force because appeals to conscience no longer work. A norm-less community is dangerous and unpredictable, requiring constant surveillance to protect its members from themselves and the broader society from the ills of the diseased community. Mass incarceration results. A community whose norms are under strain, by contrast, requires relief, allowing the community to heal itself. Kennedy thus devotes a good portion of his piece to documenting the causes of strain in inner-city African American communities. Kennedy also describes how the unique combination of racial poverty and residential segregation, the related decline of the working poor, and the misguided policy of mass incarceration have subjected poverty-stricken African Americans to harshly disparate criminal punishment, a consequence that reinforces community poverty, isolation, fear, and crime.

Perhaps the most powerful portion of Kennedy’s piece is his thorough demonstration of the enduring nature of positive social norms in poor African American communities. Kennedy examines empirical evidence showing that poor blacks passionately embrace the national dream that education and hard work are the two paths to material and spiritual success. Poor youth consider these paths more important than money and connections to getting ahead. Moreover, once sex and socioeconomic status are controlled for, African Americans are no more likely than whites to drop out of school, but *are* more likely to choose an academic over a vocational curriculum and a four-year over a two-year college. Nor is the black family falling apart. Black families may alter to accommodate the stresses of poverty, but the black commitment to family bonds is a strong one.

Kennedy thus convincingly concludes that our decades-long policy of African American mass incarceration increases the strain on norms in poor, inner-city black communities, rendering it a self-defeating policy. Our treasure would better be spent on relieving the community strains of poverty, isolation, and unemployment rather than on demonizing community culture. Sustained attention to the Jena Six’s plight, Kennedy optimistically hopes, will help to change hearts and minds to understand this truth, in turn sparking a new civil-rights movement.

Sara Sun-Beale shifts attention from the racial ills of the overall criminal justice system to its juvenile justice component.⁷⁸ Beale’s argument is

⁷⁶ *Id.* at 495.

⁷⁷ *Id.* at 492.

⁷⁸ See Sara Sun-Beale, *You’ve Come a Long Way, Baby: The Re-Reform of Juvenile Justice as Seen from Jena, Louisiana*, 44 HARV. C.R.–C.L. L. REV. 511 (2009).

that the Warren Court's failure to expressly address racial issues in most of its criminal procedure jurisprudence, particularly concerning the rights of juveniles, left the Jena Six with little constitutional help in their plight. Simultaneously, increasingly punitive juvenile justice legislation that largely abandoned the commitment to rehabilitation of an earlier era left prosecutors with substantial discretion to decide if and when juveniles should be tried as adults—a discretion too fragile to resist political pressures for harsh punishment. The earlier commitment to rehabilitation unavoidably leaves room, Beale argues, for the free play of racial bias in exercising prosecutorial discretion. However, once rehabilitation became only a *purported* goal, with punishment and isolation becoming, in practice, the true goals, prosecutorial discretion—and the room it created for racial bias—remained, but with a harsh bite. Beale then extends her broader analysis specifically to the law and culture of Louisiana, which gives extraordinary discretion to the prosecutor to transfer juvenile cases to adult court within an intensely punitive environment insensitive to historic and continuing racial bias.

Concerning the Warren Court, Beale notes two flaws in its criminal procedure doctrine: (1) that the criminal procedural protections extended to juveniles were extremely limited, and (2) that the bulk of the criminal procedure jurisprudence relied on facially neutral rights that proved toothless in the face of racial disparities like those facing the Jena Six. Beale concedes that the Warren Court's criminal procedure revolution was probably significantly motivated by a desire to root out racial bias and that the racially neutral rules it chose to accomplish this task were probably meant to blunt Southern criticism of those rules. Nevertheless, the result is limited constitutional protection against racial bias.

Beale attributes the rise of increasingly punitive juvenile justice legislation to “law and order” political campaigns that succeeded in electing “tough on crime” politicians to office, and to a news media that found increasing crime coverage to be an effective means for raising revenues while embracing an image of African Americans as violent deviants. Beale documents the dramatic racial disparities in juvenile prosecutions and punishments that resulted. She likewise explores social science evidence suggesting that unconscious racial bias, primed by the media and politicians, was an important contributor to these disparities. Beale's conclusion is not optimistic:

The highly discretionary nature of the juvenile justice system is a double-edged sword. This subjective design has traditionally been in place in order to be able to focus on the best interests and rehabilitative potential of each child. Yet the discretionary attributes also allow the operation of unconscious biases to tip the balance towards harsher alternatives at various points in the system. Neither state law nor the federal Constitution provides a mechanism to address it. Traditional equal protection doctrine falls short

in several respects. It requires proof of purposeful discrimination, and statistical disparity is not sufficient to prove a prima facie case or obtain discovery. But in the juvenile system, as elsewhere, unconscious racial biases and stereotypes are a serious problem.⁷⁹

III. CONCLUSION

Taken as a whole, the articles in this Symposium stress the power of human action. The meanings ascribed to the noose, Walters's prosecutorial decisions, and the various incidents of racial conflict surrounding the Jena Six case provide important windows into how race operates in the American criminal justice system. History continues to have an impact on modern understandings of human action, even if modern actors are unaware of history's continuing power. The racialized meaning of modern actions also affects public attitudes toward crime, the content of resulting legislation, the ways in which judicial and prosecutorial discretion are exercised, and the nature of what are likely to be effective solutions to the problems of racial bias and disparity. Once again, these meanings may do their work at a subconscious level, yet their influence cannot be denied. All Americans, but especially those with power to change the criminal justice system, have a duty to expose the subconscious and institutional influences at work in their own choices (and in those of other criminal justice system actors) and to correct racism's pernicious effects. Many of the authors in this Symposium argue that the prosecutor, as a minister of justice, has a heightened obligation to achieve this goal of racial justice. Control over cultural meanings, including in the legal system, is an immense form of social power. It is the hope of the authors whose work appears in the following pages that their efforts will promote responsible uses of that power to achieve racial justice.

⁷⁹ *Id.* at 544.

