

# The Pedagogical Prosecutor

*Nirej Sekhon\**

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## I. INTRODUCTION

“We do not prosecute by public pressure or by petition. We prosecute based on the facts on any given case as well as the laws of the state of Florida.”<sup>1</sup> This might have seemed like an unremarkable claim were it not made by Florida State Attorney Angela Corey about George Zimmerman’s shooting of Trayvon Martin.<sup>2</sup> While on

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\*Assistant Professor of Law, Georgia State University College of Law. Thanks to Phoenix Cai, Kim Chanbonpin, Jack Chin, Russ Covey, Donald Dripps, William Edmondson, Yaniv Heled, Tim Kuhner, Paul Lombardo, Caren Morrison, Mike Simons, Wadie Said, Shirin Sinnar, Lauren Sudeall-Lucas, Jonathan Todres, Anne Tucker, Jenia Iontcheva Turner, and Ron Wright for thoughtful comments on earlier drafts.

<sup>1</sup> *George Zimmerman Murder Charge Sets Up Hurdles for Prosecutors in Trayvon Martin Shooting*, CBSNEWS.COM (Apr. 12, 2012, 10:36 AM), [http://www.cbsnews.com/8301-201\\_162-57412881/george-zimmerman-murder-charge-sets-up-hurdles-for-prosecutors-in-trayvon-martin-shooting/](http://www.cbsnews.com/8301-201_162-57412881/george-zimmerman-murder-charge-sets-up-hurdles-for-prosecutors-in-trayvon-martin-shooting/).

<sup>2</sup> *See id.*

“neighborhood watch” Zimmerman shot Martin, an African-American teenager.<sup>3</sup> The prosecutor for Seminole County, where the shooting occurred, resisted prosecuting Zimmerman given the likelihood he would assert self-defense or, to use Florida’s statutory language, that he “st[ood] his . . . ground.”<sup>4</sup> Subsequently, Florida’s governor appointed Angela Corey to the case; she decided to prosecute Zimmerman for second-degree murder.<sup>5</sup> Zimmerman’s recent acquittal might appear to vindicate Seminole County’s initial decision not to prosecute. That, however, is only true if one views prosecutorial success exclusively in terms of obtaining convictions. That view is incorrect because prosecutors have the unique capacity to generate political meaning separate and apart from obtaining convictions.

The uproar over Martin’s death echoed conflict that erupted over “Stand Your Ground” when Florida first adopted that language in 2005.<sup>6</sup> In light of that history, Angela Corey’s ultimate decision to prosecute George Zimmerman could not have been anything but “political.” Florida’s Stand Your Ground law leaves much to prosecutorial discretion and charging decisions are not typically reviewable by a court.<sup>7</sup> That prosecutors only elected to charge Zimmerman after national uproar erupted over Martin’s death calls her quote into serious question. Corey casts politics and prosecutorial discretion as binary opposites. She implies that politics is a purely exogenous force that threatens the integrity of prosecutorial decision-making. She suggests that prosecutorial discretion is simply the professional judgment intrinsic to the interpretive exercise of applying law to fact. Discretion, in other words, is principled while politics is not.<sup>8</sup> Corey’s stark, binary opposition between politics and discretion has parallels in legal scholarship.

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<sup>3</sup> See, e.g., Lizette Alvarez & Michael Cooper, *Prosecutor Files Charge of 2nd-Degree Murder in Shooting of Martin*, N.Y. TIMES, Apr. 12, 2012, at A1.

<sup>4</sup> *Id.*; FLA. STAT. § 776.013(3) (2013).

<sup>5</sup> See Alvarez & Cooper, *supra* note 3.

<sup>6</sup> See discussion *infra* Part III.B.i.

<sup>7</sup> See *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

<sup>8</sup> Many would contend that, insofar as the Martin killing was concerned, “politics” was more principled than prosecutorial discretion. See Kim Severson, *Black Man’s Killing in Georgia Eludes Spotlight*, N.Y. TIMES, Apr. 26, 2012, at A1 (implying that prosecutor unfairly declined self-defense case in the absence of public pressure akin to that precipitated by Trayvon Martin’s death); Mallory Simon & Ann O’Neill, *Unstable ground: The Fine Line Between Self-Defense and Murder*, CNN.COM, (Apr. 30, 2012), <http://www.cnn.com/2012/04/29/us/stand-your-ground>.

This Article shows that the politics-discretion binary is pervasive in criminal-justice scholarship and typically takes one of two forms. In the first version (“Binary 1”), politics is a problem while in the second version (“Binary 2”), discretion is. In Binary 1, politics is to blame for criminal justice’s harsh excesses over the last three decades.<sup>9</sup> Politics is a toxic force impelled by the public’s taste for vengeance.<sup>10</sup> By this account, a fearful and easily manipulated public readily embraces the “tough on crime” rhetoric that politicians feed it. This dynamic, in turn, impels the creation of not just more criminal laws, but broader and harsher ones.<sup>11</sup> Legislators are perfectly willing to pass these laws knowing that prosecutors will have the final say on what sort of cases are actually brought. In other words, prosecutorial discretion is the check on politics’ punitive excesses.

In Binary 2, discretion is the problem. Those who embrace this version take an internal view of criminal justice and tend to be preoccupied with agency costs.<sup>12</sup> Accounts in this camp have analogized prosecutors’ offices to administrative agencies.<sup>13</sup> The analogy is readily made in the federal context given that federal prosecutors are unelected.<sup>14</sup> But even in the state context, the analogy is plausible: prosecutors have broad discretion to interpret and apply public law, the vast majority of which occurs outside public

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<sup>9</sup> See, e.g., JAMES Q. WHITMAN, *HARSH JUSTICE* 49–59 (2003) (arguing that American criminal justice policy is, ironically, harsher than Europe’s on account of its democratic, non-status based history); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1982 (2008) [hereinafter *Unequal Justice*] (identifying political and legal reasons for inequality in American criminal justice).

<sup>10</sup> See *Unequal Justice*, *supra* note 9, at 1982 (arguing that in a system where suburban voters have political strength criminal justice policy will “oscillate[] . . . between wholesale indifference and unmitigated rage”).

<sup>11</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 532–33 (2001) [hereinafter *Pathological Politics*].

<sup>12</sup> See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963–64 (2009); Erik Luna & Marianne Wade, *Prosecutors As Judges*, 67 WASH. & LEE L. REV. 1413, 1507 (2010); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 86 (2002) [hereinafter *Tradeoff*].

<sup>13</sup> See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874 (2009); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 331–42 (2004); Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2129, 2132–36 (1998); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 137 (2008) [hereinafter *Black Box*]; Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 752–53 (2003).

<sup>14</sup> See Barkow, *supra* note 13, at 876.

view.<sup>15</sup> This raises the possibility of significant agency costs—for example, prosecutors too readily decline cases or offer significant discounts to defendants who are willing to plead guilty.<sup>16</sup> Internal solutions to these kinds of problems emphasize bureaucratic changes that promote vigorous supervisory control over prosecutorial discretion. The purpose is to align prosecutors’ incentives with “stakeholders’” interests, of which the public is one.<sup>17</sup> “Public” here does not refer to the amorphous group of bloodlust-gripped citizens that Binary 1 assumes, but rather a more localized group of citizens that has definable interests regarding public safety and justice. Accordingly, the politics that this public might generate is a check on prosecutorial discretion.

Both versions of the politics-discretion binary are worthy of critique. Both cast politics as exogenous to prosecutorial decision-making: politics is either an external constraint or an external impetus. Both versions also embrace homogenized notions of the “public.” In Binary 1, the “public” possesses shared and readily identifiable biases and fears. In Binary 2, the “public” possesses a set of shared and readily identifiable interests. Depending on which binary one embraces, the regulatory question will either be how best to insulate prosecutors from politics or how best to expose them to it.

Neither binary, however, offers guidance for how to think about the prosecutorial role in the face of a heterogeneous public. Heterogeneity is the defining feature of a pluralist democracy like our own; different people have profoundly different views regarding political and social issues. The “public,” whether writ large or small, will not be unified in its beliefs, interests, or biases. The central normative dilemma in a liberal democracy is how to make public choices that are legitimate and just in the face of such heterogeneity.<sup>18</sup> Criminal justice illustrates the dilemma lucidly. It often implicates issues of unique political and emotional salience—for example, questions regarding what “victimhood” and “harm” mean, what the scope of an individual’s right to use deadly force should be, and when mistakes of judgment should be punished. These, of course, were precisely the sorts of questions implicated by

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<sup>15</sup> See *Black Box*, *supra* note 13, at 137 (noting that plea bargaining’s prevalence suggests decline of adversarial process in favor of administrative process).

<sup>16</sup> See *Tradeoff*, *supra* note 12 at 86.

<sup>17</sup> See, e.g., Bibas, *supra* note 12, at 963–64; *Black Box*, *supra* note 13, at 187–91.

<sup>18</sup> See, e.g., JOHN RAWLS, POLITICAL LIBERALISM, at xxv (2005) (“How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?”).

the Martin shooting and subsequent Zimmerman prosecution.

Prosecutors have unique power to generate social and political meaning through their discretionary choices—for example, to prosecute or decline cases. While that power derives from prosecutors' authority to punish, it is not reducible to it. Prosecutors' capacity to generate political and social meaning is particularly significant when they enforce a law around which there is (or has been) "expressive conflict"—that is, public disagreement about the content or value of the message that specific legislation sends.<sup>19</sup> Such conflict often takes the form of a debate as to what the effects of a particular law are or will be. For example, proponents of Florida's Stand Your Ground law argued that the law reaffirmed a citizen's right to defend herself and would deter would-be assailants from victimizing her.<sup>20</sup> Opponents argued that the law communicated a "shoot first, ask questions later" ethos that would encourage vigilante justice.<sup>21</sup>

The passage of a law around which there has been expressive conflict does not extinguish the basis for conflict. Rather, passing a law just shifts the conflict's locus to prosecutors' offices. Criminal laws often rely on vague and general language subject to competing interpretations. Such ambiguity will require prosecutors to make choices that implicate the very questions that animated expressive debate about the law itself. For example, hate-crime laws typically enhance punishments for criminal misconduct that occurred "because of" discrimination. Whether such language should just encompass majority-on-minority violence or should extend to minority-on-majority (or minority-on-minority) violence is expressively fraught. This dilemma echoes the debate that swirled around the passage of hate-crime laws in the 1990s: do they promote or compromise equality?<sup>22</sup>

Asking how prosecutors should use their unique expressive power presents an opportunity to rethink our ideals regarding the prosecutorial function in a pluralistic society. Most scholarship concerning prosecutorial discretion is preoccupied with the question of how best to channel or restrain prosecutorial discretion. This Article takes a different tack on the accountability question. It asks, what role should prosecutors play in holding the public and

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<sup>19</sup> See *infra* notes 60–62 and accompanying text.

<sup>20</sup> See *infra* notes 108–111 and accompanying text.

<sup>21</sup> See *id.*

<sup>22</sup> See *infra* Part III.B.ii.

legislatures accountable? The answer takes us beyond the binary formulations that prevail in the scholarly literature.

Drawing on political theory, this Article argues that prosecutors should use their unique expressive power pedagogically—that is, to advance constructive political dialogue in legislatures and amongst citizens. Doing so would serve two interests. First, it would encourage legislatures to revisit criminal laws in light of the effects those laws are having in society. Second, it would promote more intensive public engagement with criminal-justice policy. Both interests are particularly important where a criminal law has been the subject of expressive conflict, as was true for Stand Your Ground and hate-crime laws. A liberal democracy's dynamism turns on both citizens' and policy makers' willingness to not only engage with pressing social questions, but to revisit and reconsider earlier positions they may have held regarding those questions. Prosecutors are uniquely situated to facilitate this process. Viewed through a pedagogical framework, prosecutors' obligations would be less rigidly dependent upon obtaining convictions—a trial loss, as in *Zimmerman*, should not necessarily signify failure.

This Article proceeds in three parts. Part II reveals the extent to which the discretion-politics binary saturates recent scholarly literature on prosecutorial decision-making. While descriptively instructive, this scholarship does not properly conceptualize the significance of prosecutorial discretion in the face of democratic pluralism. Part III demonstrates how and why prosecutorial choices have expressive power. It uses Stand Your Ground and hate-crime laws as examples. Part IV draws on liberal precepts to argue that the ideal prosecutor should be a “pedagogical” one. Where ethically possible, prosecutors should use their expressive power to promote both legislative accountability and public dialogue. Both of these interests are particularly important where there has been expressive conflict around the relevant criminal law. However, prosecutors' obligation to promote accountability and dialogue should not end there. It should also extend to those criminal laws that are presently uncontroversial, only because the legislature and public are not paying attention.

## II. POLITICS AND DISCRETION

Recent scholarship regarding prosecutorial discretion tends to draw a binary opposition between politics and discretion. While law

scholars have long recognized prosecutorial discretion's breadth,<sup>23</sup> the last fifteen years have seen them turn to public choice theory and organizational behavior to make sense of that reality.<sup>24</sup> Those who have highlighted legislatures' profligate willingness to enact new criminal laws tend to embrace what this Article refers to as "Binary 1."<sup>25</sup> Binary 1 posits politics as the problem and prosecutorial discretion as an imperfect bulwark against it. Passing criminal laws allows legislators, with relatively little cost, to secure the expressive purchase of being "tough on crime."<sup>26</sup> This appeals to members of the voting public whose anxieties about crime are as deep as its attention spans are shallow.<sup>27</sup> By this account, sensationalist episodes of violence galvanize a public that is otherwise indifferent to criminal justice policy.<sup>28</sup> If one accepts this view, it is pretty clear why savvy politicians would have an easy time seducing the public with tough-on-crime rhetoric. Politicians do not have to worry about the consequences of the criminal laws they endorse because those laws authorize enforcement without requiring it. This holds true even in district attorney elections.<sup>29</sup> The difficult questions of how to organize enforcement priorities are left to low-visibility prosecutorial choices that lie well outside public purview or interest.<sup>30</sup>

Given the "pathological" politics of criminal law,<sup>31</sup> the opportunities for criminal prosecutions are virtually unlimited. In the face of this reality, prosecutors tend towards leniency—they charge far fewer crimes and demand far less punishment than the criminal

<sup>23</sup> See, e.g., KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 193–94 (1970) [hereinafter DISCRETIONARY JUSTICE]; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981).

<sup>24</sup> On the public choice front, see, e.g., Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1080 (1993); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 803–05 (2006) [hereinafter *Political Constitution*]; On the organizational behavior front, see, e.g., Bibas, *supra* note 12, at 996–1015; Richman, *supra* note 13, at 753.

<sup>25</sup> See, e.g., ANGELA J. DAVIS, ARBITRARY JUSTICE 169 (2007) [hereinafter ARBITRARY JUSTICE] (arguing politics insufficient to hold prosecutors accountable); Bibas, *supra* note 12 at 984 ("Voters . . . focus[ ] on memorable but unrepresentative stories.").

<sup>26</sup> See *Pathological Politics*, *supra* note 11, at 532–33.

<sup>27</sup> See Bibas, *supra* note 12, at 987–88 (noting that the public suffers from "chronic misperceptions" about how criminal justice systems function); Dripps, *supra* note 24, at 1089 (arguing public adopts victim's perspective).

<sup>28</sup> See, e.g., Bibas, *supra* note 12, at 983–87; *Unequal Justice*, *supra* note 9, at 1982.

<sup>29</sup> See, e.g., Bibas, *supra* note 12, at 985–86; Erik Luna & Marianne Wade, *Prosecutors As Judges*, 67 WASH. & LEE L. REV. 1413, 1508 (2010).

<sup>30</sup> See, e.g., Barkow, *supra* note 13, at 874; Bibas, *supra* note 12, at 964.

<sup>31</sup> See *Pathological Politics*, *supra* note 11, at 532–33.

law would permit.<sup>32</sup> However, because prosecutorial charging discretion is not generally subject to judicial review, some scholars worry about consistency and egalitarianism.<sup>33</sup> Until recently, aggressive external—typically judicial—regulation was the answer offered in response to these worries.<sup>34</sup>

Recent criminal-justice scholarship is deeply skeptical of whether external regulation of prosecutors, political or judicial, is effective or even possible.<sup>35</sup> These scholars tend to embrace what this Article calls “Binary 2.” In this version of the binary, discretion is the problem and the solution lies in properly aligning prosecutors’ incentives with the public’s interests. Among these scholars, the trend has been to look to administrative law and management theory for guidance. Beginning with Gerald Lynch’s 1998 article, scholars have increasingly analogized prosecutors’ offices to administrative agencies.<sup>36</sup> Lynch argued that federal criminal justice is more akin to an inquisitorial than adversarial system. Federal prosecutors, not judges, are the inquisitors who determine guilt and innocence.<sup>37</sup> Because the system is analogous to an administrative one, Lynch argued in favor of applying administrative law’s accountability principles to prosecutors.<sup>38</sup> A number of writers have expanded on Lynch’s core insight.<sup>39</sup>

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<sup>32</sup> See *id.*

<sup>33</sup> See, e.g., ARBITRARY JUSTICE, *supra* note 25, at 17; Vorenberg, *supra* note 23, at 1555–56.

<sup>34</sup> See, e.g., DISCRETIONARY JUSTICE, *supra* note 23, at 207; Vorenberg, *supra* note 23, at 1570–71.

<sup>35</sup> See, e.g., Barkow, *supra* note 13, at 873–74; see also Bibas, *supra* note 12, at 963–64 (describing external controls as only “moderately promising” vehicle for aligning prosecutors’ interests with the public’s); Tradeoff, *supra* note 12, at 53 (questioning efficacy of external controls). These scholars tend to view “external” regulation with a somewhat jaundiced eye and propose “internal” approaches in lieu or in addition to external ones. The mechanism by which prosecutors’ offices would adopt such internal reforms, however, remains elusive—i.e., absent some form of political, moral, or bureaucratic pressure from an external source, what will impel any given prosecutors’ office to self-regulate more stringently? Technocratic solutions cannot easily sidestep this fundamental question of political will. Cf. David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 39–40 (2011) (suggesting that public’s willingness to identify with those in jail and prison could help end “mass incarceration” in the United States).

<sup>36</sup> Lynch, *supra* note 13, at 2117.

<sup>37</sup> *Id.* at 2129.

<sup>38</sup> *Id.* at 2143 (arguing prosecutors should issue regulations and hold formal hearings).

<sup>39</sup> See, e.g., Barkow, *supra* note 13, at 874; Black Box, *supra* note 13, at 137; Richman, *supra* note 13, at 752–53.



In Lynch's wake, scholars have proposed bureaucratic and corporate techniques to minimize agency costs,<sup>40</sup> maximize fidelity to law,<sup>41</sup> and promote consistent, egalitarian decision-making.<sup>42</sup> These scholars assume that traditional electoral and political checks will only restrain prosecutors in high-profile cases.<sup>43</sup> The vast majority of cases, however, are not high-profile, and for these cases the criminal justice system is totally opaque.<sup>44</sup> In these cases, prosecutors will make choices that serve their own institutional purposes. While maximizing their overall conviction rate is typically one of these purposes, it does not mean that prosecutors will obtain convictions in ways that conform to popular understandings of fairness.<sup>45</sup> The prevalence of plea-bargaining in our criminal justice system generates significant agency costs that pull in the direction of undue harshness or leniency. For example, prosecutors may overcharge some defendants with the expectation of charge bargaining to induce guilty pleas.<sup>46</sup> With other defendants, prosecutors may offer significant sentence reductions in order to induce pleas.<sup>47</sup>

Recent scholarship is highly skeptical of external reforms like banning plea-bargaining.<sup>48</sup> Instead, for example, Stephanos Bibas has argued for using a corporate law model to align prosecutors' institutional incentives with the public's and other "stakeholders" interests.<sup>49</sup> Ronald Wright and Marc Miller, in a series of articles, have suggested that more intensive, internal case screening and data monitoring will improve the consistency and fairness of prosecutorial

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<sup>40</sup> See Bibas, *supra* note 12, at 963–64; *Pathological Politics*, *supra* note 11, at 549–50; see also *Tradeoff*, *supra* note 12, at 86 (discussing the agency cost problem that arises when charge reduction is permitted in plea bargaining).

<sup>41</sup> See *Black Box*, *supra* note 13, at 129.

<sup>42</sup> See *id.* at 132.

<sup>43</sup> Cf. Bibas, *supra* note 12, at 984 (suggesting that public tends to pay inordinate attention to certain high-profile cases).

<sup>44</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912–13 (2006) (describing the dominance of "insiders" within criminal justice bureaucracies).

<sup>45</sup> See *id.* at 935–36 (suggesting a D.A.'s high conviction rate says little about the terms on which the conviction was obtained); *Pathological Politics*, *supra* note 11, at 549–50.

<sup>46</sup> See *Pathological Politics*, *supra* note 11, at 519–20.

<sup>47</sup> See *id.* at 519–20.

<sup>48</sup> See *Tradeoff*, *supra* note 12, at 31 & nn.6–7 (criticizing external approach and enumerating its proponents).

<sup>49</sup> See Bibas, *supra* note 12, at 996–1015 (advocating for changes to prosecutors' office structure, personnel policies, and office culture).

choices.<sup>50</sup> They hypothesize that intensive screening would help ensure that only viable cases are prosecuted and encourage more trials and open pleas.<sup>51</sup> Other proposals have included splitting off prosecutors' offices' adjudicative functions from their investigative functions as is the case with administrative agencies.<sup>52</sup>

Implicit in both binaries are assumptions about politics, the public, and criminal law that are worthy of critique. First, "the public" is cast as a relatively stable entity with identifiable interests that exogenously impel or restrain prosecutorial decision-making. Binary 1 homogenizes "the public" by assuming the existence of an undifferentiated public taste for vengeance. Similarly, the notion of agency costs, so central to Binary 2, assumes that it is possible to identify a shared public interest in particular criminal justice outcomes.<sup>53</sup> If one understands the "public interest" at a high level of generality—for example, community safety—and the relevant community is quite small, "the public" might seem homogeneous. The more granular the definition of interests and the broader the geographic unit, however, the more fragmented "the public" will appear. Even within a neighborhood, for example, there are often very different views of what constitutes a crime problem.<sup>54</sup> In light of this, it should not be surprising that there is so much disagreement about when self-defense should be available to someone who has killed another. Such pluralism is a defining feature of democratic coexistence. Scholarship on prosecutorial discretion does not provide a useful normative framework for thinking about how prosecutors should make decisions in the face of such pluralism.

Of course, one might think that the criminal law itself suggests some optimal level of prosecution. In theory, the law reflects the legislature's settled view of a particular issue. Thereafter, prosecutors must simply apply the law. This was Prosecutor Corey's suggestion.<sup>55</sup> It is, however, a wildly implausible one given the number of criminal

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<sup>50</sup> See, e.g., *Black Box*, *supra* note 13, at 166–72; *Tradeoff*, *supra* note 12, at 31–36. They are very clear that their goal is not to achieve justice in individual cases, but a better-run prosecutors' office. *Id.* at 49–55. By that, they mean fair and consistent across cases. *Id.* at 49–50.

<sup>51</sup> See *Tradeoff*, *supra* note 12, at 49–55.

<sup>52</sup> See Barkow, *supra* note 13, at 874.

<sup>53</sup> See Bibas, *supra* note 12, at 963–64; *Pathological Politics*, *supra* note 11, at 549–50; see also *Tradeoff*, *supra* note 12, at 86 (discussing the agency cost problem that arises when charge reduction is permitted in plea bargaining).

<sup>54</sup> See SUDHIR ALLADI VENTAKESH, *OFF THE BOOKS* 72–73 (2006).

<sup>55</sup> See *supra* Part I.

laws and the vague language that often comprise them.<sup>56</sup> For example, a law permitting use of deadly force where *reasonably* necessary to thwart an imminent aggression does not, in and of itself, suggest the terms of optimal application.<sup>57</sup> This will be all the more true where laws are crafted using terms whose meanings are themselves subject of expressive uncertainty as is true with hate-crime laws. The next section develops these points in detail.

### III. PROSECUTION AND PLURALISM

Prosecutorial choices have the capacity to generate expressive meaning that amplifies, diminishes, or operates in complete disjunction from the criminal laws under which a case might be brought. In a pluralistic society like our own, this power is particularly significant where there has been expressive conflict over a criminal law. Prosecutors will have to exercise their near absolute discretion to charge or decline cases in the absence of public consensus as to when such a law should apply, if ever. Typically, such a law's black letter will not answer how prosecutors should exercise their discretion either.

Section A describes prosecutors' power to generate expressive meaning and how that power relates to criminal laws. Following that theoretical discussion, Section B uses Stand Your Ground and hate-crime laws as case studies. In both contexts, the underlying criminal law was subject to expressive conflict prior to passage. Both sets of laws leave vast discretion to prosecutors. The charging decisions that prosecutors must make under these laws often implicate the very issues that generated expressive conflict around the underlying criminal laws when they were enacted.

Many assumed that Stand Your Ground accounts for prosecutors' sluggishness in charging George Zimmerman. That assumption is not warranted. The conflict around Stand Your Ground congealed around the legislature's use of that particular rhetorical flourish. The law, however, leaves prosecutors considerable room to make discretionary choices that implicate the very questions that gave rise to conflict around the law when it was enacted.<sup>58</sup> For example, the charging decisions in the *Zimmerman* case impelled fierce debate about the right to protect oneself, racism,

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<sup>56</sup> See *Pathological Politics*, *supra* note 11, at 529–33.

<sup>57</sup> See *infra* Part III.B.i.

<sup>58</sup> See *infra* notes 121–131.

and gun violence.<sup>59</sup> While the trial did not produce the catharsis that some might have hoped for, in a liberal democracy there is intrinsic value in public airing.

A similar story can be told about hate-crime laws. The debate over whether enacting hate-crime laws is a good idea has long past. That, however, cannot be taken to mean that there is broad social consensus as to what constitutes a hate crime or when punishment for such is appropriate—for example, should minority-on-minority or minority-on-majority attacks count as hate crimes? Section C concludes by arguing that although head prosecutors are typically elected, prosecutors' expressive obligations should not exclusively be to the local, electoral unit.

A. *Expressive Enforcement*

The mere existence of a criminal law does not foretell how, or if, it will be enforced. This means that prosecutorial decision-making potentially has the expressive potential to amplify, diminish, or act in complete disjunction from the criminal law's underlying message.

Expressive accounts of criminal law identify public denunciation as its defining feature.<sup>60</sup> "Public denunciation" means condemnation leveled by the State. Such condemnation distinguishes "hard treatment" from a "criminal sanction." In a complex society thoroughly penetrated by state apparatuses, hard treatment will come in myriad forms. That it severely impinges upon an individual's economic or liberty interests, however, does not make hard treatment a "criminal sanction"<sup>61</sup>—there are circumstances in which the State levies hefty fines or compels one individual to pay another to satisfy a court-ordered judgment.<sup>62</sup> The State might even preventively detain an individual to forestall future harm,<sup>63</sup> but it does so without expressly condemning the detainee. Unaccompanied by official

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<sup>59</sup> See *infra* notes 108–114, and accompanying text.

<sup>60</sup> See, e.g., JOEL FEINBERG, *DOING & DESERVING* 98–101 (1970); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 419–21 (1999). Professor Kahan is credited with reigniting interest in expressive theory in the criminal context. See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1369–70 (2000).

<sup>61</sup> See FEINBERG, *supra* note 60, at 96; KAHAN, *supra* note 60, at 419–21.

<sup>62</sup> See KAHAN, *supra* note 60, at 419.

<sup>63</sup> See David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 695–96 (2009) (describing state and federal contexts in which preventive detention is permitted).

condemnation, hard treatment is simply hard treatment.<sup>64</sup>

Condemnation is a searing symbolic performance—it proclaims collective judgment that particular persons are less worthy than others. Calling those who engage in misconduct “criminals” is to degrade them. Expressive theories posit that the act of degrading produces “social meaning” that, in turn, generates material effects.<sup>65</sup> It may, however, be difficult to precisely identify those effects. For example, “social meaning” might mean creating new (or reaffirming existing) social norms, enhancing a specific group’s dignity, generating public feelings of security, or cultivating public perception of the state’s competence to deal with pressing social problems. Such effects need not be mutually exclusive. Congress’s recent enactment of a federal hate-crime law relating to LGBT victims presents a good example.<sup>66</sup>

Although the law does not contemplate an aggressive enforcement mechanism, advocates vigorously supported its passage.<sup>67</sup> The law sends the message that attacking LGBT persons is no less a violation of equality precepts than discriminatory attacks against other minorities. Advocates hope that this in turn will consolidate norms of tolerance for LGBT persons, if not deeper bonds of civic friendship between them and others.<sup>68</sup> Advocates, however, would be hard-pressed to identify the precise sociological mechanism(s) by which a hate-crime law will generate such effects. Such a law acts in conjunction with an array of social forces the net effect of which is, hopefully, greater social acceptance of LGBT persons. It is, however, difficult to imagine how this would happen in the absence of vigorous federal enforcement.<sup>69</sup> This invites the more general question of what expressive relationship, if any, exists between a law and its enforcement.

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<sup>64</sup> See FEINBERG, *supra* note 60, at 98.

<sup>65</sup> See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 471–74 (1997) (discussing stigma’s capacity to shape behavioral norms); *Pathological Politics*, *supra* note 11, at 520–21.

<sup>66</sup> See Matthew Shepard & James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

<sup>67</sup> See Michael F. Pabian, *The Hate Crimes Prevention Act: Political Symbol or Prosecutorial Tool?*, 48 CRIM. L. BULL. 347, 347 (2012).

<sup>68</sup> While a deontologist may be satisfied with a relation of tolerance, a communitarian would likely not be. See Nirej S. Sekhon, *Equality and Identity Hierarchy*, 3 N.Y.U. J.L. & LIBERTY, 349, 365–66 (2008). The communitarian would seek to promote deeper bonds between citizens. See *id.* at 377–78.

<sup>69</sup> See Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1267 (2000).

Intuitively, we expect some relationship between the social meaning produced by a criminal law and the specific cases brought under that law. A criminal law both denounces a category of conduct and confers discretionary authority upon prosecutors to condemn specific individuals for engaging in such conduct. Criminal laws are generally enacted with the expectation that they will be enforced and have some impact in the world. Scholars have recognized the intuition,<sup>70</sup> but much of the work on enforcement and social meaning to date has focused on how low-level criminal law enforcement—in poor communities, in particular—generate norms of law-abidingness.<sup>71</sup> In contrast, this article asks what relationship exists between the social meaning legislative enactments generate—for example, the actual Stand Your Ground law—and the prosecutorial choices made pursuant to such laws. The answer is particularly important where a law like Stand Your Ground is enacted for the very purpose of making a broad expressive statement.

There are three ways in which the two orders of social meaning will interact: amplification, diminution, or disjunction. Empirically, the relationships will be complex and, often, indeterminable. The empirical difficulties that stymie sociological conclusions about law and social meaning will be even more nettlesome when assessing the relationships between law and prosecutorial practices.<sup>72</sup> This is in part because prosecutorial practices include non-action—that is, declining cases—about which the world typically hears nothing. In this regard, the case against George Zimmerman is exceptional.

One might expect a straightforward amplification or diminution in the relation between law and prosecutorial practice where a criminal law expressly affirms the value of victims' lives. For example, Congress criminalized human trafficking because it is “a contemporary manifestation of slavery whose victims are predominantly women and children . . . .”<sup>73</sup> Despite the bold

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<sup>70</sup> See FEINBERG, *supra* note 60, at 104 (“[U]nreliable enforcement gives rise to doubts that the law really means what it says.”); Beale, *supra* note 69, at 1267; *Pathological Politics*, *supra* note 11, at 521.

<sup>71</sup> See *infra* notes 174–175 and accompanying text.

<sup>72</sup> Even in the rare cases where data regarding prosecutorial choices is made available, interpreters are left to make educated guesses about the reasons for particular choices. See *Black Box*, *supra* note 13, at 149–53 (speculating on the causes of changes in the rates at which New Orleans prosecutors charge/decline domestic violence cases).

<sup>73</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(a), 114 Stat. 1464, 1467 (2006) (codified as amended at 22 U.S.C. § 7101 (2013)).

language, there have been strikingly few prosecutions.<sup>74</sup> Positive social meaning regarding the value of victims' lives is likely generated in proportion to the actual enforcement of the trafficking law for a couple of reasons. First, prosecuting cases keeps the plight of victims in the public eye. Second, and related, prosecution also highlights the government's seriousness about making good on its legislative commitment to victims—that is, successful prosecutions will amplify the legislative message that trafficking victims are actually not “slaves.” Non-enforcement very likely sends the exact opposite message.<sup>75</sup> This intuitive amplification relation, however, may not always hold.

Overly aggressive enforcement may diminish the social meaning that a contested criminal law was supposed to produce. Take for example the recent criminal conviction and sentencing of Dharun Ravi in New Jersey. A jury convicted Ravi for eavesdropping on his gay college roommate Tyler Clementi's sexual encounter with another man.<sup>76</sup> As widely reported, Clementi killed himself soon after learning of what Ravi had done.<sup>77</sup> A jury convicted Ravi under New Jersey's “bias intimidation law.”<sup>78</sup> The conviction and sentencing generated national controversy with many suggesting that prosecutors overreached.<sup>79</sup> Even prominent LGBT advocates were split on whether a harsh sentence for Ravi would help or hinder their political agenda.<sup>80</sup> Echoing intuitions about amplification and diminution described in the paragraph above, many advocates felt that a harsh sentence would signify the value of LGBT lives and New Jersey's commitment to equality.<sup>81</sup> Other advocates, however, feared

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<sup>74</sup> See Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 457–58 & n.36 (2011) (questioning the practical value of criminalization).

<sup>75</sup> Cf. *id.*; see also *Pathological Politics*, *supra* note 11, at 521.

<sup>76</sup> See Kate Zernike, *30-Day Term for Spying on Roommate at Rutgers*, N.Y. TIMES, May 22, 2012, at A1.

<sup>77</sup> See *id.*

<sup>78</sup> See N.J. STAT. ANN. § 2C:16-1 (West 2013). New Jersey's statute makes it a crime to engage in any of a series of enumerated crimes with intention to intimidate based upon specified criteria, including sexual orientation. *Id.* The New Jersey statute is fairly typical of statutes that criminalize bias-related acts. See *infra* notes 148–150 and accompanying text.

<sup>79</sup> See generally Ian Parker, *The Story of a Suicide*, NEW YORKER (Feb. 6, 2012), [http://www.newyorker.com/reporting/2012/02/06/120206fa\\_fact\\_parker?currentPage=all](http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker?currentPage=all).

<sup>80</sup> See Kate Zernike, *In Rutgers Spying Case, Voices for Gay Rights Urge Leniency*, N.Y. TIMES, May 21, 2012, at A1.

<sup>81</sup> See *id.*

that a harsh sentence would offend broad-based public sentiments about LGBT people receiving undeserved special recognition—that is, a harsh sentence could send the message that LGBT victims’ lives were being treated as *more* valuable than those of non-LGBT victims on account of LGBT groups’ political clout.<sup>82</sup> This fear was not necessarily driven by social conservatives’ reactions. By some mainstream liberal accounts, Ravi’s misconduct was more attributable to juvenile stupidity than to homophobic malevolence.<sup>83</sup> The actual, relatively light sentence meted out reflects this notion.<sup>84</sup>

The Ravi case suggests how prosecutorial choices may differentially produce social meaning among majority and minority groups. While prosecutorial choices may affirm the social meaning produced by a law in one community, they may diminish it in another. The prosecution of criminal cases in the Jim Crow South presents a fairly extreme example.<sup>85</sup> Criminal laws forbidding killing and other grievous violence were rarely enforced in response to violence within black communities, let alone between white aggressors and black victims.<sup>86</sup> The systematic non-enforcement of criminal law helped sustain blacks’ inferior social status.<sup>87</sup> Laws of general application are supposed to apply in equal measure to all human beings; the State’s refusal to act in response to black victimhood consolidated the racist sentiment of blacks’ social status as subhuman. In this regard, non-enforcement amplified the defining ethos of the Jim Crow legal order.<sup>88</sup>

The line between diminution and disjunction will often be fuzzy. Critics of the Ravi prosecutions could have plausibly argued that it diminished or was disjointed from New Jersey’s hate-crime law. A

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<sup>82</sup> *See id.*

<sup>83</sup> Ian Parker’s account of the case in *The New Yorker*, for instance, is such an account. *See* Parker, *supra* note 79.

<sup>84</sup> *See* Kate Zernike, *Judge Defends Penalty in Rutgers Spying Case, Saying It Fits Crime*, N.Y. TIMES, May 31, 2012, at A22.

<sup>85</sup> As used in contemporary equal protection vernacular, selective prosecution means that a criminal law was enforced against a particular group for an impermissible reason—e.g., racism. *See* *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

<sup>86</sup> *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76–135 (1997) (detailing history of unequal enforcement).

<sup>87</sup> *See id.* at 29 (“Deliberately withholding protection against criminality . . . is one of the most destructive forms of oppression that has been visited upon African-Americans.”).

<sup>88</sup> *See, e.g., id.* at 41–48 (arguing southern states’ failure to enact or enforce anti-lynching laws ensured white supremacy).



straightforward example of pure disjunction might be found in high-profile pretextual prosecutions. These are cases in which the government aggressively prosecutes for a crime that is unrelated to (and less serious than) the one prosecutors and the public believe the defendant is guilty of. Al Capone's conviction for tax evasion is illustrative.<sup>89</sup> The highly publicized prosecution generated considerable expressive meaning. That meaning could only have an ironic relation (at best) to the tax law under which Capone was prosecuted and the numerous more significant criminal laws under which he was not.

### B. Prosecutorial Discretion and Expressive Conflict

Expressive conflict is a defining feature of any large, pluralistic democracy. There will, and should be, disagreement about how to address fundamental political and social questions.<sup>90</sup> Both Stand Your Ground and hate-crime laws demonstrate prosecutors' unique power to produce social and political meaning. That expressive power does not depend upon obtaining convictions in particular cases. It is particularly pitched where public opinion about a criminal law is fractured. Consensus may be lacking because a law contains a controversial norm, as is the case with Stand Your Ground. People have very different views on whether the State should permit individuals to "stand their ground" in situations where they feel threatened. Alternatively, with hate crimes, consensus is lacking because the law contains an "incompletely theorized agreement"—meaning there is broad agreement about a very general norm, but no agreement as to specifically when it should apply.<sup>91</sup> Most people, for example, agree that racial discrimination is bad, but disagree as to what constitutes racial discrimination.

#### 1. Standing One's Ground

Trayvon Martin's death and George Zimmerman's subsequent prosecution rekindled expressive conflict over Florida's Stand Your Ground law. Many commentators blamed Florida's ostensibly permissive self-defense law for both the Seminole County Prosecutor's torpid response to Martin's death and Zimmerman's

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<sup>89</sup> See *Pathological Politics*, *supra* note 11, at 551.

<sup>90</sup> See, e.g., RAWLS, *supra* note 18, at xxv.

<sup>91</sup> See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995).

subsequent acquittal.<sup>92</sup> Those criticisms are redolent of the more general public criticism leveled against Stand Your Ground in 2005 when Florida enacted it.<sup>93</sup> The suggestion, however, that Stand Your Ground prevented Seminole County from bringing charges is belied by the fact that the subsequently appointed prosecutor brought charges against George Zimmerman.<sup>94</sup> Zimmerman's recent acquittal might appear to vindicate the Seminole County prosecutor's initial refusal to prosecute. That is only true, however, if one imagines prosecutors' significance primarily in terms of obtaining convictions. Part III below develops the argument against that conception.

Prosecutors have the capacity to do more than just obtain convictions—they have power to stir social and political meaning around contested social issues. Criminal laws generally, and Stand Your Ground in particular, afford prosecutors considerable latitude with regard to bringing (or declining) cases. Prosecutors' expressive power is potentially independent of any conviction they might secure. George Zimmerman's recent acquittal bolsters this point—the trial has impelled a national dialogue about race, violence, and self-defense. It may even be that the acquittal has made for more animated political dialogue than a conviction would have.

Florida was the first state to adopt a so-called “stand your ground” statute in 2005.<sup>95</sup> While the expressive flourish “stand your ground” has been a lightning rod for controversy, the law did not effect as a dramatic a change to Florida's self-defense law as the controversy might suggest. The actual changes that the 2005 law effected did not constrain prosecutorial charging discretion in a case like the Martin shooting any more so than the predecessor law did. The expression “stand your ground” appears in place of what had previously been an express duty to retreat.<sup>96</sup> A number of states have eliminated the express duty to retreat,<sup>97</sup> although only some have

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<sup>92</sup> See, e.g., Lizette Alvarez & Cara Buckley, *Zimmerman Acquitted in Trayvon Martin Killing*, N.Y. TIMES at A1 (July 13, 2013); Alvarez & Cooper, *supra* note 3.

<sup>93</sup> See *infra* notes 108–113 and accompanying text.

<sup>94</sup> See Alvarez & Cooper, *supra* note 3.

<sup>95</sup> See Ben Montgomery & Colleen Jenkins, *Five Years Since Florida Enacted “Stand-Your-Ground” Law, Justifiable Homicides are Up*, TAMPA BAY TIMES (Oct. 15, 2010), <http://www.tampabay.com/news/publicsafety/crime/five-years-since-florida-enacted-stand-your-ground-law-justifiable/1128317>.

<sup>96</sup> Compare FLA. STAT. § 776.013(3) (2013), with *Berrios v. State*, 781 So. 2d 455, 457 (Fla. Dist. Ct. App. 2001) (describing duty to retreat required under common law and pre-2005 Florida statute).

<sup>97</sup> See, e.g., IND. CODE § 35-41-3-2(c)(2) (2013); KY. REV. STAT. ANN. § 503.050(4) (LexisNexis 2013); TENN. CODE ANN. § 39-11-611(b)(1) (2013).

elected to use the contentious phrase, “stand your ground.”<sup>98</sup> Eliminating an express duty to retreat need not restrain prosecutors’ charging leverage because self-defense still requires that the defendant have *reasonably* perceived an imminent threat of serious physical injury before using deadly force.<sup>99</sup> One might argue that the perception of an imminent threat cannot be reasonable if it was readily possible to avoid it by retreating.<sup>100</sup> At the very least, the reasonableness requirement means that Stand Your Ground is not purely subjective. An individual who has an idiosyncratically pitched sense of vulnerability will not be able to claim self-defense when she “shoots first and asks questions later.” While this is generally true of self-defense in most jurisdictions, Stand Your Ground does contain an important exception: when someone is in her home or car and uses deadly force against an invader, there is a presumption that she did so while in fear of imminent injury or death.<sup>101</sup> The defendant need not demonstrate that she actually and subjectively feared imminent harm. While this license to kill invaders is troublesome,<sup>102</sup> it was never at play in the Zimmerman case since his encounter with Martin occurred outside.

Expressive conflict over the law congealed around the expression “stand your ground” rather than any specific, substantive provision.<sup>103</sup> The perception that Stand Your Ground was more permissive of defensive violence impelled public uproar, both for and against the law.<sup>104</sup> Florida’s law was adapted from model legislation

<sup>98</sup> See, e.g., ALA. CODE § 13A-3-23(b) (2013); ARIZ. REV. STAT. ANN. § 13-411 (2013); GA. CODE ANN. § 16-3-24 (2013); KAN. STAT. ANN. § 21-5230 (2013); LA. REV. STAT. ANN. § 14:20(C) (2013).

<sup>99</sup> FLA. STAT. § 776.012(1) (2013).

<sup>100</sup> While Florida’s Stand Your Ground law does not *require* a duty to retreat, it seems to permit the finder of fact to consider the possibility of retreat as relevant to reasonableness. See *Williams v. State*, 982 So. 2d 1190, 1194 (Fla. Dist. Ct. App. 2008). But see LA. REV. STAT. ANN. §14:20(D) (2013) (“No finder of fact shall be permitted to consider the possibility of retreat as a factor in determining whether or not the person who used deadly force had a reasonable belief . . .”).

<sup>101</sup> FLA. STAT. § 776.013(1)(a) (2013).

<sup>102</sup> See *infra* text accompanying note 217.

<sup>103</sup> See, e.g., Steve Bousquet, *Bill Would Loosen Self-Defense*, ST. PETERSBURG TIMES, Feb. 24, 2005, at 1B; John-Thor Dahlburg, *Florida Law Lets Citizens Meet Force With Force*, L.A. TIMES, Oct. 1, 2005, at 10; Abby Goodnough, *Florida Expands Right to Use Deadly Force in Self-Defense*, N.Y. TIMES, Apr. 27, 2005, at A18; *Governor to Sign Deadly Force Bill*, GAINESVILLE SUN (Apr. 6, 2005), <http://www.gainesville.com/article/20050406/LOCAL/50405053> [hereinafter *Deadly Force*].

<sup>104</sup> See, e.g., Bousquet, *supra* note 103; Dahlburg, *supra* note 103; Goodnough, *supra* note 103.

crafted by the National Rifle Association (NRA).<sup>105</sup> The NRA's primary mission, of course, is to promote gun ownership and use.<sup>106</sup> Stand Your Ground was a potent battle cry for the organization and the Florida law was the first victory in what was to be a fairly successful national campaign.<sup>107</sup> Stand Your Ground's proponents extolled it as an affirmation of vigilant individualism in the face of an incompetent and paternalistic state, excoriating the government for its inability to protect individuals from violence and its insistence on prosecuting those who protected themselves.<sup>108</sup>

The law's opponents charged that Stand Your Ground would encourage (and reward) lawless individualism. Gun-toting vigilantes would avenge the slightest slight with gunfire,<sup>109</sup> eroding rule of law, and transforming Florida into a wild-west caricature.<sup>110</sup> A gun control group went so far as to put up signs on Florida highways that read "Visitor Warning. Florida residents can use deadly force. Please be careful."<sup>111</sup> This debate echoes the historic conflict around self-defense, and the duty to retreat in particular.<sup>112</sup> Trayvon Martin's

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<sup>105</sup> See Andrew Metz, *NRA Targets New York, Other States with 'Stand-Your-Ground' Bill*, NEWSDAY, Apr. 28, 2005; Kris Hundley, Susan Taylor Martin & Connie Humburg, 'Stand Your Ground': A Get-Out-of-Jail-Free Card, MIAMI HERALD (June 2, 2012), <http://www.miamiherald.com/2012/06/02/2830091>

/stand-your-ground-a-get-out-of.html; Susan Latham Carr, *Bill Permits Use of Force Against Intruders*, OCALA STAR-BANNER (Feb. 24, 2005), <http://www.ocala.com/article/20050224/NEWS/202240398?p=1&tc=pg>.

<sup>106</sup> See *About Us*, NRA.COM, <http://home.nra.org/history/document/about> (last visited Nov. 3, 2013).

<sup>107</sup> Twenty-three states have enacted some version of Stand Your Ground, although not all of them necessarily include that particular expression. See Cora Currier, *23 Other States Have "Stand Your Ground" Too*, ATLANTIC WIRE (Mar. 22, 2012), <http://www.theatlanticwire.com/national/2012/03/23-other-states-have-stand-your-ground-laws-too/50226/> (listing states and linking to specific statutes).

<sup>108</sup> See Bousquet, *supra* note 103 ("Law-abiding people should not be told that if they are attacked, they should turn around and run . . . This bill gives back rights that have been eroded and taken away by a judicial system that . . . appears to give preferential treatment to criminals." (quoting NRA lobbyist)); Deana Poole, *Gun Bill Could Mean: Shoot First, Ask Later*, PALM BEACH POST, Mar. 23 2005, at 1A ("You should not have to retreat in order to save your life." (quoting bill's sponsor)).

<sup>109</sup> See, e.g., David Royse, *House Debates Bill Allowing Deadly Force*, THELEDGER.COM (Apr. 1, 2005), <http://www.theledger.com/article/20050401/NEWS/504010369> (suggesting that law will permit deadly force in response to someone at a restaurant who "pushes you and reaches into their pocket").

<sup>110</sup> See, e.g., *Deadly Force*, *supra* note 103 (quoting state legislator opposed to the bill); Poole, *supra* note 108 108 ("Florida could wind up back in the Wild West . . .").

<sup>111</sup> John Pacenti, *New Law On Deadly Force Caught In Gun Politics*, PALM BEACH POST, Sep. 27, 2005, at 1B. See also *id.* (describing effort to leverage Florida's reliance on tourist economy against Stand Your Ground law).

<sup>112</sup> See Kahan, *supra* note 60, at 432–33.

death and Zimmerman's subsequent acquittal seemed to confirm opponents' fears.<sup>113</sup>

Following Martin's death, and in the acquittal's wake, critics charge that Stand Your Ground devalues minority life in at least two ways. First, by valorizing vigilantism and male aggression, it encourages the likes of George Zimmerman to (a) carry firearms and (b) impulsively shoot before reflecting on the nature of the threat an ostensible assailant poses.<sup>114</sup> Social psychology researchers have demonstrated that most Americans subconsciously associate black youth with violence and criminality.<sup>115</sup> To the extent that such feelings structure subconscious perceptions of others' aggressiveness, we should expect individuals to be quicker to find black youth more threatening than white youth.<sup>116</sup> If one accepts that Stand Your Ground encourages the use of force without reflection, one might expect young minorities to inordinately be on the receiving end of such violence.

Second, critics charge that Stand Your Ground amplified prosecutorial lethargy in charging George Zimmerman and completely stymied prosecution in other less notorious cases.<sup>117</sup> Stand Your Ground exacerbated prosecutors' and police departments' longstanding tendency to neglect minority crime victims.<sup>118</sup> Critics have long highlighted how the systematic devaluation of minority life manifests as official disinterest in violent crime where minorities are the victims.<sup>119</sup> But, it is unclear why Stand Your Ground would amplify that disinterest.<sup>120</sup> As suggested above, Stand Your Ground

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<sup>113</sup> See Adam Nagourney, *Prayer, Protests, and Anger Greet Florida Verdict*, N.Y. TIMES, July 15, 2013, at A1.

<sup>114</sup> See, e.g., Lizette Alvarez, *A Florida Law Gets Scrutiny After a Killing*, N.Y. TIMES, Mar. 21, 2012, at A1; Charles M. Blow, Op-Ed., *The Curious Case of Trayvon Martin*, N.Y. TIMES, Mar. 17, 2012, at A21.

<sup>115</sup> See, e.g., L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2044–52 (2011) (discussing research on implicit bias).

<sup>116</sup> See Blow, *supra* note 114.

<sup>117</sup> See, e.g., Anna Marie Smith, *Deadly Force & Public Reason*, THEORY & EVENT, Vol. 15.3, 2012, at 7–8; Hundley, Martin & Humburg, *supra* note 105; Fred Grimm, *Commentary: The Troubling History of Stand-Your-Ground Laws*, MCCLATCHYDC (Mar. 24, 2012), <http://www.mcclatchydc.com/2012/03/26/143105/commentary-the-troubling-history.html>.

<sup>118</sup> See KENNEDY, *supra* note 86, at 120; Hundley, Martin & Humburg, *supra* note 105 (“Defendants claiming ‘stand your ground’ are more likely to prevail if the victim is black.”).

<sup>119</sup> See KENNEDY, *supra* note 86, at 120.

<sup>120</sup> Of course, this claim is not true in those cases involving home invasions and carjackings. FLA. STAT. § 776.013(1)(a) (2013).

affords prosecutors considerable discretion.<sup>121</sup> Angela Corey exploited that discretion following the national protests demanding prosecution.<sup>122</sup> Stand Your Ground no more foreclosed this than would have a statute not containing that phrase. Of course, there are many who now say that the decision to prosecute was the wrong one and itself racially impelled—that is, the protests over the initial declination led to a race-conscious decision *to* prosecute.<sup>123</sup>

Charging or declining to charge George Zimmerman would have both generated social meaning with regard to race. The Florida legislature's enactment of Stand Your Ground sent a general message that self-defense should be more broadly available.<sup>124</sup> Had state prosecutors been particularly intent on amplifying that message, they might have stuck with the initial decision not to prosecute Zimmerman. Doing so, however, would have tended to confirm protestors' claims that Florida prosecutors do not value black victims. While Zimmerman's acquittal also amplified the legislature's message, it did so in a qualitatively different manner. The trial produced a more sustained and farther-reaching conversation about race and violence than would have likely occurred otherwise. While a good bit of it was partisan and shrill, much of it was not. Part IV develops the argument that, from an expressive perspective, the acquittal was more constructive than declining to prosecute the case would have been.<sup>125</sup>

That either declension or trial in the *Zimmerman* case would have been expressively rich is a function of the unique public attention that case has received. Typically, declinations will fly under the expressive radar. Prosecutors do not have any obligation to report declinations to the public. Thus, it is difficult to say whether there

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<sup>121</sup> See, e.g., Severson, *supra* note 8; Simon & O'Neill, *supra* note 8.

<sup>122</sup> See Serge F. Kovaleski, *In Martin Case, Police Missteps Add to Challenges to Find Truth*, N.Y. TIMES, MAY 17, 2012, at A1 (describing protests following Samford Police Department's failure to arrest Zimmerman and Prosecutor Wolfinger's suggestion that the case against Zimmerman should be put to a grand jury); Timothy Williams, *Grand Jury Won't Be Convened in Florida Teenager's Killing*, N.Y. TIMES (May 17, 2012), [http://www.nytimes.com/2012/04/10/us/trayvon-martin-prosecutor-wont-convene-grand-jury.html?\\_r=0](http://www.nytimes.com/2012/04/10/us/trayvon-martin-prosecutor-wont-convene-grand-jury.html?_r=0).

<sup>123</sup> See, e.g., Jacob Sullum, Op-Ed, *Why Zimmerman Should Be Acquitted*, N.Y. POST (July 11, 2013), <http://nypost.com/2013/07/11/why-zimmerman-should-be-acquitted/>.

<sup>124</sup> This, at least, seems like the most plausible reading of the legislature's symbolic gesture of including the "stand your ground" language in the revised self-defense statute. See FLA. STAT. § 776.013(3).

<sup>125</sup> See *infra* Part IV.B.i.

have been more declinations following Stand Your Ground's enactment.<sup>126</sup> It is even more difficult to say whether, broadly speaking, Stand Your Ground has impelled the kind of wild-west violence that critics feared or whether it has led to disproportionate minority victimization.<sup>127</sup> There has been suggestion that such force has been on the rise.<sup>128</sup> The reported uptick in self-defense claims in Florida, however, is consistent with any number of causal accounts of which increased civilian willingness to use deadly force is but one. It could also be that prosecutors are less willing to decline such cases—that is, more of them appear in the system. Alternatively, entirely exogenous factors could create such an uptick—for example, increases in home invasions that, in turn, precipitate defensive force. At least one Florida newspaper has attempted to systematically assemble information on how prosecutors have exercised discretion in self-defense cases.<sup>129</sup> But, the effort has yielded partial results at best.<sup>130</sup> Better empirical data will not forever resolve expressive conflict over Stand Your Ground, self-defense, or minority victimization.<sup>131</sup> But it would meaningfully inform and animate public dialogue.

## 2. Colorblind Hate Crime

Prosecutors have considerable expressive power in the hate-crime context because hate-crime laws are an example of what Cass Sunstein calls “incompletely theorized agreements.”<sup>132</sup> Members of the public often agree about very general norms—for example, racial discrimination is reprehensible. But, they disagree about how to apply those norms—for example, is affirmative action racially

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<sup>126</sup> *But see Alvarez, supra* note 114 (quoting Florida prosecutors who suggested that there have been a higher volume of self-defense claims in the wake of Stand Your Ground's passage).

<sup>127</sup> Although there have been media reports of both. Media reports have indicated that self-defense claims have increased since the law was passed and that these defenses are frequently successful. *See Hundley, Martin & Humburg, supra* note 105.

<sup>128</sup> Hundley, Martin & Humburg, *supra* note 105.

<sup>129</sup> Kris Hundley, Susan Taylor Martin & Connie Humburg, *Florida 'Stand Your Ground' Law Yields Some Shocking Outcomes Depending on How Law Is Applied*, TAMPA BAY TIMES (Jun. 3, 2012), <http://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133>.

<sup>130</sup> *See id.*

<sup>131</sup> *See* Susan Taylor Martin, Kris Hundley & Connie Humburg, *Race's Complex Role*, TAMPA BAY TIMES, June 4, 2012, at 1A.

<sup>132</sup> Sunstein, *supra* note 91, at 1733, 1739.

discriminatory?<sup>133</sup> The affirmative action example also highlights the difference between an “anti-subordination” perspective and an “anti-classification” one.<sup>134</sup> The former is concerned with practices that contribute to minority subjugation. In contrast, the latter is concerned with practices that classify based on objectionable criteria regardless of whether subjugation results.<sup>135</sup> The expressive conflict over hate-crime legislation was largely realized between these two poles. The passage of hate-crime laws, however, did not actually resolve the fundamental debate between the two. Because of hate-crime laws’ open-ended wording, the debate’s resolution fell to prosecutors.

Expressive conflict swirled about hate-crime legislation’s passage fifteen years ago.<sup>136</sup> Proponents generally took an anti-subordinationist tack, arguing that hate-crime laws would affirm the civic standing of groups that had historically been subject to discrimination. Hate-crime laws were supposed to disavow the most violent manifestations of such discrimination.<sup>137</sup> Doing so would recognize the unique stigmatic burdens such conduct imposes upon individual victims and their communities.<sup>138</sup> The laws would also affirm society’s commitment to equality.<sup>139</sup> Advocates have often sought passage of hate-crime legislation as part of a broader agenda to consolidate a group’s dignitary status.<sup>140</sup> For example, the recent debate regarding “sexual identity” in the federal hate-crime statute was part of a broader campaign to secure state recognition of gay identity—a campaign that included the repeal of “don’t ask, don’t

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<sup>133</sup> Sunstein, *supra* note 91, at 1739.

<sup>134</sup> See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1537 (2004) (arguing that “anticlassification” rationale of Court’s recent Equal Protection Clause cases has limited the more radical “antisubordination” rationale that girds *Brown v. Board of Education*).

<sup>135</sup> See *id.*

<sup>136</sup> See, e.g., Kahan, *supra* note 60, at 463–67.

<sup>137</sup> See Kahan, *supra* note 60, at 464. Hate-crime legislation is often precipitated by high-profile instances of bias-motivated crime. For example, in 2009 Congress enacted the “Matthew Shepard & James Byrd, Jr. Hate Crimes Prevention Act” which, among other things, expanded existing federal hate-crime law to include “sexual orientation.” Pub. L. No. 111-84, 123 Stat. 2190, 2840 (2009). Both Shepard and Byrd were victims in separate high-profile homicides that occurred in the late 1990s. The Hate Crimes Prevention Act was initially proposed in 1999. See Beale, *supra* note 69, at 1228 n.1 (detailing the bill’s early legislative history).

<sup>138</sup> See Kahan, *supra* note 60, at 464.

<sup>139</sup> See *id.* at 464–66.

<sup>140</sup> See *id.* at 465–66.



tell” and legalizing gay marriage.<sup>141</sup>

Critics of hate-crime legislation took an anti-classification tack. They impugned hate-crime legislation for violating basic equality principles by treating some crimes (and victims) more seriously than others based on the victim’s identity.<sup>142</sup> Critics also pointed out that criminal law traditionally differentiated *mens rea* from motive, relegating the latter to an evidentiary question.<sup>143</sup> These criticisms did not succeed in quelling widespread passage of hate-crime laws across the United States.<sup>144</sup> Voting in favor of a hate-crime law was tantamount to proclaiming one’s commitment to civil rights and revulsion to bigotry.<sup>145</sup> Legislatures could do so without any redistributive commitment of the kind associated with programs like affirmative action. Legislatures did not even have to explicitly commit to an anti-subordination perspective. Rather, the laws they passed were sufficiently vague such that they could be read consistently with both anti-subordination and anti-classification positions.

All hate-crime statutes punish attacks carried out *because* an individual is (or is perceived by the assailant) to be part of a protected group. By either creating a new crime or a sentencing enhancement,<sup>146</sup> hate crimes increase punishment for engaging in independently criminalized conduct with animus towards a protected group.<sup>147</sup> For example, the model legislation that the Anti-Defamation League drafted in the early 1990s,<sup>148</sup> and that many states have adopted, imposes criminal punishment for engaging in criminal conduct with impermissible bias.<sup>149</sup> Similarly, the federal hate-crime law requires that the predicate criminal misconduct must have occurred “because of the actual or perceived race, color, religion, or

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<sup>141</sup> In his reelection campaign, President Obama explicitly recognized these connections. BARACKOBAMA.COM, *President Obama and the Fight for LGBT Rights*, YOUTUBE (May 23, 2013), [http://www.youtube.com/watch?v=Tb60nFeJsNc&feature=player\\_embedded](http://www.youtube.com/watch?v=Tb60nFeJsNc&feature=player_embedded).

<sup>142</sup> See Kahan, *supra* note 60, at 465–66.

<sup>143</sup> See JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* 79–81 (1998).

<sup>144</sup> This has been true for nearly a decade. See *id.* at 3 (describing hate-crime laws in 1998 as a “routine category” of criminal law).

<sup>145</sup> See *id.* at 67–68.

<sup>146</sup> See *id.* at 29.

<sup>147</sup> See ANTI-DEFAMATION LEAGUE, *HATE CRIMES STATUTES: A 1991 STATUS REPORT* 2–5 (1991).

<sup>148</sup> See *id.*

<sup>149</sup> See JACOBS & POTTER, *supra* note 143 at 33–36.

national origin of any person . . . .”<sup>150</sup>

Using race as an example,<sup>151</sup> an anti-classification policy would compel a “colorblind” interpretation of the motive requirement. Colorblindness’ proponents view equality formalistically, as requiring across-the-board purging of race from public discourse.<sup>152</sup> That an individual would attack another based on race, whatever that race may be, deserves rebuke for having committed a hate crime. By this view, any racially motivated attack, majority-on-minority, minority-on-minority, or even minority-on-majority, ought to be prosecuted as a hate crime.

Anti-subordination proponents will view hate crimes very differently than anti-classification proponents, emphasizing their historic origin in remedying violent acts upon minorities.<sup>153</sup> By an anti-subordination account, equality requires undoing the subjugation of minority groups.<sup>154</sup> From this perspective, the State should only prosecute misconduct as a “hate crime” where the conduct, symbolically or otherwise, reaffirms a relation of domination between a dominant and subordinate group. The anti-subordination proponent would likely be uncomfortable with, if not outright opposed, to the prosecution of minority-on-majority attacks and, possibly, minority-on-minority attacks as hate crimes.<sup>155</sup>

The colorblind approach to hate crimes appears to have broad purchase among prosecutors. One of the earliest hate-crime cases to reach the Supreme Court involved a colorblind reading of

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<sup>150</sup> 18 U.S.C. § 249(a)(1) (2013). See JACOBS & POTTER, *supra* note 143 at 31 (noting that “because of formulation” is a defining feature of hate-crime laws).

<sup>151</sup> The majority of hate-crime incidences tend to involve racial animus. See LYNN LANGTON AND MICHAEL PLANTY, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, HATE CRIME 2003–2009 4, 10 & Table 14 (2011).

<sup>152</sup> See Neil Gotanda, *A Critique of “Our Constitution Is Color-blind,”* 44 STAN. L. REV. 1, 43–46 (1991).

<sup>153</sup> See Christopher Chorba, Note, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 320–21 (2001).

<sup>154</sup> See, e.g., Gotanda, *supra* note 152, at 63; Siegel, *supra* note 134, at 1545–46.

<sup>155</sup> Cf. Gregory S. Parks & Shayne E. Jones, “Nigger”: A Critical Race Realist Analysis of the N-Word Within Hate Crimes Law, 98 J. CRIM. L. & CRIMINOLOGY 1305, 1342–46 (2008) (arguing that blacks should not be prosecuted for hate crimes even when using the epithet “nigger,” but that whites should). An anti-subordinationist might support hate-crime prosecutions for intra-group attacks that somehow reaffirmed principles of racist domination. Cf. Doug Clark, *Court Applies Hate-Crime Law Broadly*, GREENSBORO NEWS & RECORD, Mar. 3, 2010, at A11 (discussing state appellate court’s affirmation of hate-crime conviction where white man shot another white man because of former’s disapproval of the latter’s marriage to black woman).

Wisconsin's hate-crime statute. In *Wisconsin v. Mitchell*, Mitchell challenged Wisconsin's hate-crime sentencing enhancement under the First Amendment.<sup>156</sup> While his legal argument is not particularly important here, what is important is that Mitchell was black while his victim was white.<sup>157</sup> Mitchell along with others, all of who were black, had recently watched the film *Mississippi Burning*. Impelled by the film's depiction of racist violence against blacks, Mitchell and his cohort attacked a white youth.<sup>158</sup> The attack was clearly a felonious battery. It was, however, only "racist" from a colorblind perspective. There is anecdotal evidence suggesting that such minority-on-majority attacks are prosecuted as hate crimes with some regularity.<sup>159</sup> There is also anecdotal evidence suggesting that minority-on-minority attacks are prosecuted as hate crimes with some regularity.<sup>160</sup> A recent homicide involving a South Asian victim in New York City illustrates this phenomenon. The assailant, a Latina, pushed the victim into an oncoming subway train.<sup>161</sup> In announcing its decision to pursue a hate-crime prosecution, the Queens D.A.'s office reported that she had made a remark to the police about the victim's having been a Muslim (he was actually a Hindu).<sup>162</sup> The D.A.'s decision is entirely consistent with a colorblind approach to hate crimes. An anti-subordination proponent, however, might question

<sup>156</sup> See 508 U.S. 476, 480–82 (1993).

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

<sup>159</sup> See JACOB & POTTER, *supra* note 149, at 17 (discussing black-on-white crimes); Chorba, *supra* note 153, at 361–71 (describing cases in which black defendants were charged with racially-motivated hate crimes).

<sup>160</sup> See, e.g., *Police: Arrest in Long Island Hate-Crime Beating*, N.Y. POST, (Aug. 22, 2009), [http://www.nypost.com/#!/print/news/regional/item\\_ZvAeojuDbg4rqyOmkf6SK](http://www.nypost.com/#!/print/news/regional/item_ZvAeojuDbg4rqyOmkf6SK) (attack on Ecuadorean immigrant by Hispanic man); *Seven Black Teens Arrested for Hate Crimes After Video of Them 'Attacking' Latino Boy Posted on YouTube*, N.Y. POST (Mar. 31, 2012), [http://www.nypost.com/p/news/national/youtube\\_black\\_teens\\_arrested\\_attacking\\_Ca9Qxpf7DqZwKPsBribfLk#ixzz1ux9LFGfY](http://www.nypost.com/p/news/national/youtube_black_teens_arrested_attacking_Ca9Qxpf7DqZwKPsBribfLk#ixzz1ux9LFGfY) (black on Hispanic violence); Arthur Weinreb, *Lesbians Charged with Hate Crime Against Gay Man*, DIGITAL J. (Feb. 27, 2012), <http://www.digitaljournal.com/article/320278> (lesbians charged with hate-crime for attacking gay man); cf. Kantele Franko, *Amish Gather Before Entering Prison for Hate Crimes*, CHRISTIAN SCIENCE MONITOR (Apr. 11, 2013), <http://www.csmonitor.com/USA/Latest-News-Wires/2013/0411/Amish-gather-before-entering-prison-for-hate-crimes>; Erik Eckholm & Daniel Lovering, *Renegade Group Is Accused in Bizarre Attacks on Fellow Amish in Ohio*, N.Y. TIMES, Oct. 18, 2011, at A14 (stating that federal prosecutors were considering whether to file hate-crime charges).

<sup>161</sup> See Marc Santora, *Woman Is Charged with Murder as a Hate Crime in a Fatal Subway Push*, N.Y. TIMES, Dec. 30, 2012, at A15.

<sup>162</sup> See *id.*

the capacity in which such a homicide reproduces relations of domination.<sup>163</sup>

While difficult to make quantitative generalizations because of data limitations, one can infer from Bureau of Justice Statistics data that a colorblind approach to hate crimes may be widespread. During the period from 2003 to 2009, the majority of hate-crime victims were white.<sup>164</sup> Conviction-maximizing prosecutors may have an incentive to embrace the colorblind interpretation of hate-crime laws.<sup>165</sup> The more charges in an indictment/information, the greater the prosecutor's leverage in charge and sentence bargaining—that is, the prosecutor's bargaining position in plea negotiations.<sup>166</sup> Prosecutors' interest in conviction maximization will lead them to interpret it broadly so that it applies in as many cases as possible. By doing so, prosecutors will have endorsed a colorblind view of the world without having expressly declared it as policy.

The classification versus subordination debate is not resolvable by simple reference to statutory language. Nor is it resolvable by reference to any cohesive public viewpoint. The terms of the debate, at bottom, track the expressive conflict that swirled around hate-crimes laws when they were enacted. Rather than resolving expressive debate, hate-crimes laws' passage obfuscated it, by converting it into a question of prosecutorial discretion and driving it under the radar. As with Stand Your Ground laws, it is difficult to say precisely why individual prosecutors wield their enforcement discretion as they do. While there is some aggregate data about hate-crime prosecutions and we can make generalizations about prosecutors' institutional incentives, both speak to the invisibility of prosecutorial decision-making. Prosecutorial choices will only rarely rekindle public debate—for example, when the rare defendant goes

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<sup>163</sup> The suspect's history of mental illness would likely consolidate this view. See Marc Santora & Anemona Hartocollis, *Troubled Past For Suspect In Fatal Subway Push*, N.Y. TIMES, Dec. 31, 2012, at A1.

<sup>164</sup> Sixty-one percent of victims were white. See LANGTON & PLANTY, *supra* note 151, at 7 & Table 9. The Bureau of Justice, however, does not track the race of suspects. One might assume that the majority of these incidences involve non-race-related bias (e.g., some these cases may consist of attacks motivated by some other non-racial discriminatory animus). Given that race is the most frequent basis for a hate-crime charge though, a significant number of these attacks against whites were likely race-based. LANGTON & PLANTY, *supra* note 151, at 4, 10 & Table 14

<sup>165</sup> A number of scholars have noted prosecutors' incentive to maximize convictions. See Bibas, *supra* note 12, at 985–86; Luna & Wade, *supra* note 12, at 1508; *Pathological Politics*, *supra* note 11, at 549–50.

<sup>166</sup> See *Pathological Politics*, *supra* note 11, at 549–51.

to trial in a publicly remarked case,<sup>167</sup> or when a public body actually rejects a hate-crime charge.<sup>168</sup> Prosecutorial choices should have such rekindling effect with much greater regularity.

*C. Think Globally, Prosecute Locally*

Because most district attorneys are elected in municipal or county elections,<sup>169</sup> it is tempting to conclude that prosecutors should simply interpret criminal statutes in a manner that accords with local preferences. This, however, is too parochial a conception of prosecutors' expressive obligations for two reasons. First, the local political unit is not necessarily the most representative political constituency when thinking about criminal laws enacted at the state level. Second and related, the local political unit may be more prone to parochialism than larger political units. This concern will be particularly acute where expressive conflict implicates minority interests.

While local head prosecutors typically owe their jobs to local voters, they are charged with enforcing criminal laws that are, by and large, enacted at the state level.<sup>170</sup> The vast majority of criminal laws in fact—for example, Stand Your Ground—are, like counties and municipalities themselves, created by state law. The obligation to enforce state law evenhandedly should have broader moral sweep than pleasing one's constituency.<sup>171</sup> If one accepts this premise, the principal-agent problem should be conceived in terms of the whole state. The obligation to enforce state criminal law evenhandedly is tantamount to a duty to the political community in whose name those laws were passed. Seminole County Prosecutor Norman Wolfinger implicitly acknowledged this duty by withdrawing from the case

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<sup>167</sup> See *supra* notes 76–82 and accompanying text.

<sup>168</sup> See, e.g., Frank Donnelly, *Jury: Beating of Mexican Wasn't 'Hate,'* Staten Island Advance, Apr. 24, 2010, at A1, available at [http://blog.silive.com/northshore/print.html?entry=/2010/04/robbery\\_gang-assault\\_-\\_but\\_no.html](http://blog.silive.com/northshore/print.html?entry=/2010/04/robbery_gang-assault_-_but_no.html) (grand jury rejected hate-crime charge in case where one Hispanic attacked another).

<sup>169</sup> ARBITRARY JUSTICE, *supra* note 25, at 11, 166 (More than ninety-five percent of district attorneys are elected in the United States).

<sup>170</sup> But see Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1470–72 (concluding that municipalities are increasingly enacting their own criminal laws).

<sup>171</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2013), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor/comment\\_on\\_rule\\_3\\_8.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8.html) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

against George Zimmerman.<sup>172</sup> Wolfinger suggested that his office was unable to impartially investigate the Martin shooting in the face of the broad public uproar over the case.<sup>173</sup>

The second related problem with imagining prosecutors' political obligations in wholly local terms is that local communities can be parochial. Some criminal-justice scholars have argued that local and sub-local communities exercise political power consistently with liberal ideals because of the intimate associations between victims, offenders, and other residents.<sup>174</sup> The underlying notion here is that these communities have experiential knowledge of the full range of costs and benefits that crime and law enforcement generate. Many have criticized this romantic view of localism.<sup>175</sup> "Political process failure" is possible in any heterogeneous community, even small ones.<sup>176</sup> "Process failure" refers to an electoral majority's willingness to consistently impose material or symbolic costs upon a disfavored minority.<sup>177</sup> For example, if the majority of voters in a particular jurisdiction are homophobic, one would not expect the political process to encourage the prosecutor's office to be particularly responsive to crimes targeting gay persons.<sup>178</sup> But, localism may very well present even graver dangers if a community is small and relatively homogeneous.

Richard Schragger has noted that disfavoring perceived

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<sup>172</sup> See Alvarez & Cooper, *supra* note 3.

<sup>173</sup> See Letter From Norman Wolfinger to Governor Rick Scott (Mar. 22, 2012), available at <http://www.flgov.com/wp-content/uploads/2012/03/3.22.2012WolfingerLetter.pdf>.

<sup>174</sup> See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis Of Criminal Procedure*, 86 GEO. L. J. 1153, 1160–66, 1182 (1998); see also *Unequal Justice*, *supra* note 9, at 2031–32 (arguing for more local control over criminal justice system). But see Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 508–14 (2003) (criticizing "social norms" approach to policing "inner city"); Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 384–87 (2001) (same).

<sup>175</sup> See, e.g., Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1005, 1010 (2003); Schragger, *supra* note 174, at 416–459.

<sup>176</sup> See David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L. J. 1059, 1086 (1999) ("[O]nce one looks beyond romanticized invocations of 'the community,' it becomes apparent that no community is united on these issues.").

<sup>177</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 78–87 (1980). Criminal-law scholars have become increasingly interested in the notion of process failure. See, e.g., *Political Constitution*, *supra* note 24, at 818.

<sup>178</sup> Cf. Kahan, *supra* note 60, at 467 (discussing Texas case in which judge imposed lenient sentence upon a defendant who had killed two gay men).

outsiders is how some local communities consolidate their own self-definition.<sup>179</sup> Frequently, race plays a role in distinguishing insider from outsider.<sup>180</sup> Many leveled a version of this criticism at Seminole County— by suggesting that police and prosecutors would have been quicker to act had Trayvon Martin been white.<sup>181</sup> Voters in homogeneous communities may very well have settled views on matters that are hotly debated in the larger political unit of which that community is a part. For example, one could imagine how a small, homogenous white community might be quicker to accept that minority-on-majority violence is best treated as a “hate crime” than a more diverse community might. The opacity of most prosecutorial decision-making will generally mean that such enforcement choices go unremarked. When police and prosecutors behave in a manner that is consistent with local political values, absent exceptional circumstances, local voters will not complain. And there is unlikely to be very much notice of those choices on the outside.<sup>182</sup> Prosecutorial opacity will quell political dialogue and obfuscate the political cleavages that exist between communities.

The Martin shooting illustrates the dangers of political localism. Had the Martin shooting not received broad state and national attention, there is good reason to think that prosecutors would have been even slower to charge Zimmerman had they done so at all. As discussed above, there was considerable expressive conflict over Stand Your Ground in 2005 when enacted.<sup>183</sup> Seminole County, however, was not the epicenter of that opposition. It is more than eighty percent white,<sup>184</sup> middle-income,<sup>185</sup> and republican.<sup>186</sup> It is difficult to say what course the investigation/prosecution of Zimmerman would have taken had it been left entirely to the Seminole County

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<sup>179</sup> See Schragger, *supra* note 174, at 376, 404–05.

<sup>180</sup> See Schragger, *supra* note 174, at 376, 404–05.

<sup>181</sup> See Dan Barry, et al., *In the Eye of a Firestorm*, N.Y. TIMES, Apr. 2, 2012, at A1.

<sup>182</sup> The press has highlighted a number of other cases that seem similar to Martin’s, but had received virtually no attention until the Martin shooting. See, e.g., Severson, *supra* note 8; Simon & O’Neill, *supra* note 8.

<sup>183</sup> See *supra* notes 103–113 and accompanying text.

<sup>184</sup> See United States Census Bureau, State and County Quick Facts, Seminole County, <http://quickfacts.census.gov/qfd/states/12/12117.html> (last visited Dec. 24, 2013).

<sup>185</sup> See *id.*

<sup>186</sup> See Dave Trotter, *Understanding the I-4 Corridor: Part II: Trending Seminole County*, The Political Hurricane, <http://thepoliticalhurricane.com/2012/09/08/understanding-the-i-4-corridor-part-ii-trending-seminole-county/> (last visited Dec. 24, 2013).

prosecutor.

While the Martin shooting and Zimmerman acquittals have impelled broad discussion of Stand Your Ground and self-defense laws, extra-local pressure has precipitated it. Critical public sentiment did not rise organically in Seminole County and then spread outward. In the shooting's immediate wake, the local response was quite limited. The Martin family and civil rights groups bear considerable responsibility for galvanizing public interest outside of Seminole County and Florida. Several weeks elapsed before the Martin shooting became state and national news.<sup>187</sup> The broad-based public outcry against the shooting, in turn, forced conversation about the relationship between race, Stand Your Ground laws, and enforcement discretion. Regardless of one's feelings about the Martin shooting in particular, the conversation is an important one. Had it been left to voters in Seminole County, that dialogue may not have occurred. Informed and ongoing public dialogue regarding such cleavages, even if heated, is healthy for our political culture. The question then becomes what responsibility should prosecutors bear with regard to promoting and structuring such dialogue. The next Part addresses that question.

#### IV. THE PEDAGOGICAL PROSECUTOR

This Part addresses the ends to which prosecutors should use the unique expressive power that Part III shows they possess. While most scholars are concerned with how best to regulate prosecutors, this Part advances a vision of prosecutors holding both legislatures and the public accountable for their criminal justice policy preferences, biases, and blind spots.

Drawing on liberal precepts, Section A argues that the ideal prosecutor should behave "pedagogically" vis-à-vis the legislature and public. Behaving pedagogically means actively trying to advance constructive public dialogue around criminal justice norms, particularly (but not exclusively) those that have generated expressive conflict. Behaving pedagogically would serve two functions. First, it would promote constructive public dialogue, which liberal accounts suggest is essential to a vibrant democracy. Second, it would impel legislatures to regularly revisit and reconsider criminal laws that they have passed in light of those laws' real-world consequences.

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<sup>187</sup> See Simon & O'Neill, *supra* note 8 (noting, in an April news article, that the Martin shooting had occurred in February).



Section B sketches some practical implications that flow from the pedagogical ideal. The pedagogical prosecutor would not be fixated on maximizing convictions. There are cases where an acquittal should be chalked up as a prosecutorial success. The pedagogical prosecutor would also be much more forthright about cases she declines to prosecute. State government could take steps to advance the pedagogical ideal on both of these fronts.

*A. A Pedagogical Obligation*

Most scholarship on prosecutorial discretion culminates by proposing a series of regulatory reforms designed to improve prosecutorial accountability.<sup>188</sup> But, legislatures and the public must also be held accountable for their preferences, biases, and blind spots. Accountability is ideally a two-way street. The discussion above has argued that prosecutors are uniquely positioned to play this role. Accordingly, the ideal prosecutor would behave “pedagogically.”

“Pedagogically,” means actively trying to inform and educate citizens and the legislature for the purpose of impelling political dialogue. This obligation would be in addition to (not in lieu of) the obligation to do justice in individual cases.<sup>189</sup> This pedagogic obligation flows from the unique position that prosecutors inhabit within the criminal justice system: in addition to their unique expressive power, prosecutors have a near-monopoly on information regarding the criminal justice system’s inputs, outputs, and the relation between the two. Prosecutors screen the pool of incidents that the police refer to them for charging. Prosecutors have near complete discretion on whether to proceed in any particular case.<sup>190</sup> And, of course, prosecutors have considerable leverage with regard to how a case will be disposed of—by trial, plea, or some other mechanism.<sup>191</sup> There is no other actor in the criminal justice system that is as well situated to describe how the pool of prospective offenders relates to those who are convicted.

The notion of a pedagogic obligation is anchored in a liberal conceptualization of the state and criminal justice. In most liberal accounts, the state’s legitimacy hinges on citizen consent.<sup>192</sup> A

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<sup>188</sup> See *supra* Part II.

<sup>189</sup> See *infra* Part IV.B.iii.

<sup>190</sup> See *United States v. Armstrong*, 517 U.S. 456, 464 (1995).

<sup>191</sup> See, e.g., *Lynch*, *supra* note 13, at 2129, 2132–33.

<sup>192</sup> See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 6 (1980); JOHN RAWLS, *A THEORY OF JUSTICE* 15–18 (1971); Noah Feldman, *Cosmopolitan Law?*, 116

properly functioning liberal state will respond to the people's will within specified constraints—that is, a political process and system of civil rights that forecloses fundamental unfairness to individuals.<sup>193</sup> This conception accepts policy-making as the site of contest and takes structured debate as a necessary feature of democratic coexistence.<sup>194</sup> In idealized liberal accounts, citizens are well informed, engaged with each other, and prepared to change their minds in response to good arguments.<sup>195</sup> The more complex a state becomes the more opaque its bureaucratic functions will come to seem; citizens will be less able to ascertain what the state is actually doing and what the consequences of any given policy choice are. Filling such information gaps is necessary for political dialogue and governance by consent to remain meaningful. This is particularly true with regard to criminal justice policy.

Imposing criminal sanctions has unique significance in a liberal state.<sup>196</sup> It is the paradigmatic example of the state's monopoly on "legitimate violence." It is by authority of criminal law that the state forcibly removes an individual from society, brands him a "criminal," and subjects him to confinement or other deprivation. Accordingly, one would expect the ideal liberal citizen to be particularly attentive to the content and consequences of criminal law.<sup>197</sup> This would be all the more true for criminal laws over which there has been expressive conflict. Because these are, by definition, laws over which citizens disagree—that is, where consent is fractured—liberal precepts of responsive government require regular reconsideration of such laws' validity in light of changing social circumstances.

Prosecutors are the best positioned to play the pedagogical function that a liberal criminal justice system requires. The pedagogical prosecutor would make choices that are not just designed to maximize her office's conviction rate, but rather, to educate legislators and the public. "Pedagogical" specifies a relation of public trust without limiting the relevant public to a narrow

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YALE L.J. 1022, 1038 (2007) (book review).

<sup>193</sup> See RAWLS, *supra* note 18, at xliii–xliv.

<sup>194</sup> See, e.g., ACKERMAN, *supra* note 192, at 6, 70, 73, 88; RAWLS, *supra* note 18, at xliii–xliv.

<sup>195</sup> See RAWLS, *supra* note 18, at xlix (describing notion of "civic friendship").

<sup>196</sup> See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 314 (2004).

<sup>197</sup> The average and ideal citizen are, of course, different things. See RAWLS, *supra* note 18, at 16 (describing idealized citizen in the "original position").

electoral unit.<sup>198</sup> The pedagogical prosecutor would both share information that is relevant to expressive debate and exercise her charging and sentencing discretion in ways that promote constructive public dialogue. The primary point here would not be to promote prosecutorial accountability (though that might be a useful byproduct). Rather, it would be to impel belief-testing within the political community. While such a process may lead to tentative political agreements, it is unlikely to do so in permanent ways—that is both the joy and frustration of pluralistic democracy. Accordingly, the pedagogical prosecutor’s goal should not be to steer the public towards a particular political result. Rather, the goal should be to promote broad engagement with issues of critical importance to our collective political life.

A completely theorized agreement is likely impossible with regard to self-defense and hate-crime laws.<sup>199</sup> Not only are these the kinds of issues around which we should expect disagreement, people imagine these issues as continuous with other ideological commitments that define their political identities.<sup>200</sup> For example, a libertarian might see a permissive self-defense rule tightly braided with anti-gun control and anti-tax positions. Critics of the Zimmerman acquittal inveighed against racism, gun control, and violence, often in the same breath.<sup>201</sup> Identity’s salience in debates over these issues means that they are probably not susceptible to enduring political or technocratic resolution. This is not to say that individuals and institutions will doggedly embrace the same positions over time.

For example, how would discussion around hate crimes change if it became clear that prosecutions were often for minority-majority attacks or petty crimes? Opposition to the expansion of hate-crime statutes might ease. Civil rights groups might more aggressively advocate for the passage of laws that expressly embraced anti-subordination principles. Perhaps hate crimes would appear like an altogether less attractive technique for advancing a civil rights agenda. Or how would the terms of discussion change regarding Stand Your Ground if it emerged that the vast majority of self-defense claims involved the use of force during a home invasion? What if it

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<sup>198</sup> See *supra* Part III.C.

<sup>199</sup> See *supra* note 91 and accompanying text.

<sup>200</sup> See Kahan, *supra* note 60, at 464–66.

<sup>201</sup> See, e.g., Michael Muskal, *Zimmerman Not Guilty*, L.A. TIMES, July 14, 2013, at 1; Nagourney, *supra* note 113.

was also clear that these were the kinds of cases that prosecutors were least likely to prosecute under the old statute?

A pedagogical model of prosecutorial discretion challenges the norms of bureaucratic invisibility that currently insulate prosecutors from scrutiny, relieve legislatures from responsibility for enacting sensible laws, and save citizens from having to think too much about the content or consequences of their knee-jerk beliefs about criminal justice. As discussed in Part II, most prosecutorial choices are made well below the horizon of public notice.<sup>202</sup> While such invisibility may be an inevitable feature of criminal justice machineries that are as sprawling and fragmented as our own,<sup>203</sup> it starves our political culture of information and dialogic impetus. It allows all of us to embrace easy solutions to complex problems about which we disagree—for example, the notion that simply “repealing” Stand Your Ground will prevent future Trayvon Martins from dying.<sup>204</sup>

A pedagogical model contemplates a shift in prosecutorial sensibility from an inward-looking, conviction orientation to an outward-looking, pedagogical orientation. As matters now stand, high “conviction rates” tend to be presented and received by the public as evidence of prosecutors’ ability. This, of course, is as much a statement about how prosecutors campaign for reelection as it is about voters’ expectations and attention spans.<sup>205</sup> A pedagogical ethos would value public airing for its own sake, regardless of what outcomes it produced in particular cases.

It would not be radical for prosecutors to privilege “public airing”—it has deep precedent in our legal system. Public airing’s pedagogical benefits have been long-recognized—for example, among the rationales justifying trial by jury is the benefit that inures to jurors by virtue of participating in an intensively deliberative civic process.<sup>206</sup> The benefit extends beyond the jury room. After

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<sup>202</sup> See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting federal prosecutors’ “broad discretion”) (internal quotation marks omitted).

<sup>203</sup> See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 461 (1993) (“[T]he criminal justice ‘system’ is not a system at all.”).

<sup>204</sup> This would be particularly unhelpful if “repeal” simply meant eliminating the “stand your ground” language in the Florida’s self-defense statute. See *supra* Part III.B.i.

<sup>205</sup> See *Bibas*, *supra* note 12, at 983–91.

<sup>206</sup> See, e.g., *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (“The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.”); *but see* Caren Myers Morrison, *Jury 2.0*, 62 *HASTINGS L.J.* 1579, 1622–24 (2011) (suggesting that the jury’s role has become precariously symbolic and that its vitality

completing their service, jurors discuss their experiences with those around them and are generally more inclined to participate in other civic activities.<sup>207</sup>

A public airing—for example, a trial or some other sort of hearing with witness testimony—has pedagogical value for two primary reasons. First, because of its intrinsically dramatic nature, a public airing is likely to attract attention—certainly much more so than disposition by agreement or some other mechanism that does not entail a public re-telling of the incident. The prospect of attracting attention will be even higher where the applicable criminal law is (or has been) the subject of expressive conflict.

Second, public airing highlights how contested legal principles play out in concrete circumstances. It provides fact-rich data points to inform expressive claims. This allows legislators and citizens to reevaluate their expressive commitments prior to returning to the debate—a kind of personal exercise in reflective equilibrium.<sup>208</sup> Were the legislatures' premises for enacting a law correct? Does the law produce the outcomes that gave rise to expressive conflict in the first place? It may be idealistic to expect large numbers of people to regularly change their minds about issues they care about after having engaged in some form of liberal dialogue. But, the vitality of a democratic society does not require that some fixed number of minds be changed in the course of any particular dialogic bout. The ultimate purpose is not to achieve a final political consensus, but to continue debate, reconsider existing policies and, hopefully, increase political engagement in the process.<sup>209</sup>

### B. Implications

Vigorous commitment to the kind of public airing that the pedagogical obligation requires could have a range of practical consequences. Most salient among them would be an increased number of criminal trials and systematic disclosures about cases that

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is at risk).

<sup>207</sup> See Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 661 (2002) (noting Alexis de Tocqueville's observation that jury is an important device for populist, civic education); Mary Lombardi, Note, *Reassessing Jury Service Citizenship Requirements*, 59 CASE W. RES. L. REV. 725, 759–60 (2009) (summarizing social science studies).

<sup>208</sup> Cf. RAWLS, *supra* note 18, at 48 (describing “reflective equilibrium” as process whereby theoretical commitments are tempered and adjusted in light of existing social and political arrangements).

<sup>209</sup> See RAWLS, *supra* note 18, at 226–27, 241, 243.

are pled or declined. State governments could help overcome local political hurdles. In addition, prosecutors might be encouraged to live up to the ideals sketched in Section A by including them in the rules of ethics.

### 1. Trying Tough Cases

Prosecutors taking their pedagogical responsibility seriously would have significant consequences for trial practice generally, and “tough cases” in particular. “Tough,” refers to plausible cases where securing a conviction may be challenging or particularly resource intensive. For such cases, prosecutors may be inclined to offer steep charge or sentencing discounts as part of plea offers. These might be cases with particularly ambiguous or complicated facts. They might be cases that do not fit within the ambit of what was legislatively (or popularly) contemplated by a law’s proponents when enacted. This may be especially true for cases involving laws that have been the subject of expressive conflict.<sup>210</sup> Measuring prosecutorial success largely in terms of convictions will lead prosecutors to make choices that do little to stimulate broad debate. “Losing” tough cases that further constructive public dialogue should be recognized as success. If criminal trials were valued for their own sake (i.e., without regard for outcome), prosecutors might be less inclined to obtain convictions by agreement in “tough cases.” States could make this possible by helping prosecutors overcome local political obstacles to such public airing.

*Zimmerman* is an example of a tough case. The acquittal did not detract from the case’s pedagogical value and, perhaps, even amplified it. Trayvon Martin’s shooting was evocative of just the sort of vigilantism that Stand Your Ground’s opponents warned of. Moreover, it demonstrated the racial consequences such vigilantism can have.<sup>211</sup> Martin’s death created a plausible criminal case, but there were significant evidentiary challenges. The prosecutor had to demonstrate beyond a reasonable doubt that Zimmerman intentionally killed Martin, but there was little direct evidence on the subject—Zimmerman had eliminated the best witness.<sup>212</sup>

The acquittal, of course, precipitated protests, far-ranging commentary on race’s continuing significance in our society, and the

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<sup>210</sup> See *supra* notes 99–113 and accompanying text.

<sup>211</sup> See *supra* notes 3–8, 109–112 and accompanying text.

<sup>212</sup> See Lizette Alvarez, *Zimmerman Trial, Opening This Week, Will Raise Complex Questions*, N.Y. TIMES, June 9, 2013, at A16.

relationship between self-defense and gun violence.<sup>213</sup> While some of the discussion has been predictably partisan, much of it has not.<sup>214</sup> Calls to reconsider Stand Your Ground laws have come from some surprising quarters.<sup>215</sup> Even if “Stand Your Ground” is primarily a rhetorical flourish,<sup>216</sup> there are aspects of these laws, beyond the flourish, that are worth reconsidering. For instance, Florida’s law contains provisions that discourage public airing. Where a would-be defender uses deadly force in her home or car, no inquiry is permitted into whether she subjectively experienced fear of imminent injury.<sup>217</sup> This forecloses trial in both ambiguous *and* unambiguous cases—that is, the presumption is not rebuttable regardless of how obviously the would-be defender did not fear imminent harm.

Whether *Zimmerman* precipitates specific changes in Stand Your Ground laws, however, should not be the measure of its pedagogical effect. It is the calls to reconsider (and rejoinders thereto) in and of themselves that are the proper measure. A liberal state’s vitality hinges on regularly revisiting contested social questions and airing different views.<sup>218</sup> Sometimes this will quickly precipitate changes in laws or social norms; other times slowly; and other times not at all. It is this iterative process, as opposed to any tentative consensus around a particular issue, that the pedagogical prosecutor should seek to sustain.

Blindly encouraging defendants to plead guilty in tough cases presents a sharp threat to democratic vitality. While it is common to lament criminal trials’ endangered species status,<sup>219</sup> few have

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<sup>213</sup> See Muskal, *supra* note 201; Nagourney, *supra* note 113; Adam Aaro, *Money Raised To Buy Zimmerman a New Gun*, FOX NEWS (Aug. 3, 2013), <http://www.myfox28columbus.com/template/cgi-bin/archived.pl?type=basic&file=/shared/news/features/top-stories/stories/archive/2013/07/sCQ08ILL.xml>; Regina Garcia Cano, *George Zimmerman Gets \$12,000 Towards Buying Gun from Ohio Firearms Group*, HUFFINGTON POST (July 26, 2013, 1:11 PM), [http://www.huffingtonpost.com/2013/07/26/george-zimmerman-gun\\_n\\_3660067.html](http://www.huffingtonpost.com/2013/07/26/george-zimmerman-gun_n_3660067.html).

<sup>214</sup> President Obama explicated black perceptions of the criminal justice system, but also urged all to accept the Zimmerman acquittal. See Nagourney, *supra* note 113.

<sup>215</sup> Senator John McCain forcefully exhorted state legislatures to review Stand Your Ground statutes. See Geoff Earle, *Mac Rips ‘Stand Ground,’* N.Y. POST, July 22, 2013, at 5.

<sup>216</sup> See *supra* notes 96–100 and accompanying text.

<sup>217</sup> See *supra* note 101 and accompanying text (discussing presumption of reasonableness).

<sup>218</sup> See *supra* Part IV.A.

<sup>219</sup> See, e.g., Morrison, *supra* note 206, at 1622–23 & nn.301–03 (summarizing

recognized that their rarity takes an expressive toll. While prosecutorial declinations are quite literally “under the radar,”<sup>220</sup> pleas are functionally the same from an expressive perspective. Although there will be a public record of pleas, that record is unlikely to play much role in public debate. Pleas are taken after minimal factual investigation and are not recorded in ways that are especially accessible.<sup>221</sup> The proliferation of criminal laws gives prosecutors a powerful chip with which to negotiate convictions.<sup>222</sup> Prosecutors have near-absolute discretion to file or drop charges against a defendant. Offering to drop charges in exchange for a plea on those that remain is a powerful strategy for extracting pleas.<sup>223</sup>

Hate crimes further illustrate the democratic harms that may result from failing to try tough cases. Hate-crime prosecutions for minority-on-minority or minority-on-majority crimes are likely to grate against many proponents’ view of those laws’ purposes.<sup>224</sup> A widespread colorblind interpretation of hate-crime laws might lead minority advocacy groups to reconsider whether hate-crime laws advance those communities’ interests. And yet, prosecutors are likely to adopt a colorblind interpretation of hate-crime laws “under the radar.” Hate crimes will always overlap extensively with other crimes.<sup>225</sup> This may have the effect of amplifying prosecutorial leverage in plea bargaining. Assume a case involving a black-on-black battery in which the defendant called the victim a “nigger.”<sup>226</sup> In a jurisdiction where prosecutors believe a colorblind reading of the causation requirement is plausible, a prosecutor might charge a hate crime in hopes of using it as leverage to extract a plea on the underlying battery charge.<sup>227</sup> Assuming that such a practice results in

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literature).

<sup>220</sup> This Article is not suggesting that prosecutors try implausible cases. They should, however, be more transparent about the kinds of cases they are not trying. See *infra* Part IV.B.ii.

<sup>221</sup> See *infra* Part IV.B.ii.

<sup>222</sup> See *Political Constitution*, *supra* note 24, at 802–04.

<sup>223</sup> See *Tradeoff*, *supra* note 12, at 111–13 (advocating for limit on charge bargaining).

<sup>224</sup> See *supra* notes 153–155 and accompanying text. By the same token, it is likely to allay many critics’ fears.

<sup>225</sup> See *supra* notes 146–149 and accompanying text.

<sup>226</sup> See Parks & Jones, *supra* note 155, at 1342–43.

<sup>227</sup> In a jurisdiction where the hate-crime statute was a sentencing enhancement, we might expect a similar dynamic to play out in the form of sentencing bargaining. See *Tradeoff*, *supra* note 12, at 111. While there are important differences between charge and sentence-bargaining, for present purposes the basic dynamic is the same: the prosecutors’ interest in obtaining a conviction impels a de facto policy of



more pleas (or longer sentences) in cases where hate crimes can be plausibly charged, we should expect conviction-maximizing prosecutors to drift towards a policy of colorblindness. That policy choice, however, would never be formally announced as such.

A pedagogical vision of the prosecutorial function aspires to more than just a shift in prosecutorial behavior. It contemplates a broad, long-term shift in public culture and expectations. Prosecutors likely view success or failure in terms of their conviction rate because the voting public tends to. In the wake of George Zimmerman's acquittal, there has been extensive commentary on the prosecutors' various strategic errors in trial.<sup>228</sup> Whether true or not, that mode of evaluating the trial entirely overlooks its expressive significance. Given that head prosecutors tend to be local politicians, it may be unrealistic to expect them to unilaterally embrace the pedagogical model. For example, Seminole County voters might very well have held it against their elected prosecutor if he had prosecuted Zimmerman. Of course, it was not Seminole County's prosecutor that was, ultimately, responsible for the prosecution.<sup>229</sup> This hints at ways in which state governments could help advance pedagogical prosecuting.

State governments should make resources available to prosecute expressively significant cases. Doing so would help relieve local prosecutors of the political burdens that might complicate such efforts. It could also help mitigate the impetus to plea bargain tough cases. Such support could simply take the form of additional state funding to litigate tough cases, although this would not speak to the conviction-maximizing incentives that local politics create. A more ambitious approach might involve state governments creating specialized state-level prosecutorial units that are specifically charged with litigating "tough cases." This would not be so different from the specialized prosecutorial units that some states create to deal with specialized or complex cases.<sup>230</sup>

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colorblindness. *See supra* notes 151–163 (discussing colorblindness versus anti-subordination).

<sup>228</sup> *See, e.g.,* Lizette Alvarez, *Self-Defense, Hard To Topple*, N.Y. TIMES, July 15, 2013, at A1.

<sup>229</sup> *See supra* notes 1–3 and accompanying text.

<sup>230</sup> For example, in New York State the Attorney General's office is responsible for prosecuting specific categories of crime. *See e.g., Criminal Enforcement and Financial Crimes Bureau*, NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, <http://www.ag.ny.gov/bureau/criminal-prosecutions-bureau> (last visited Nov. 12, 2013).

This brief sketch, of course, leaves a host of operational questions about case selection and the division of authority between local and state prosecutors. There are a variety of schemes imaginable on both fronts. State prosecutors could select cases, local prosecutors could refer cases, or there could be some collaborative intermediate approach. Cases could be selected according to criteria determined in advance by the legislature, prosecutors, or some other entity. Alternatively, local or state prosecutors could be left to make ad hoc discretionary judgments. This is intended as a jumping-off point only—programmatic details should be the subject of future research.

## 2. Filling the Information Gap

While trial is a powerful device for impelling public dialogue, it is not the only device. In most jurisdictions, it is unlikely that prosecutors can try every plausible case. And, of course, there will be cases that are facially implausible and are appropriately declined. With a law like *Stand Your Ground*, the legislature's express purpose seems to have been, in part, to encourage more declinations. Pleas are low-visibility choices while declinations are entirely invisible. For these choices to play any role in stimulating public dialogue, they must be more visible. Prosecutors should systematically make information available regarding these choices. At the most general level, such information should include interpretations of criminal laws—particularly those around which there has been expressive conflict—and general enforcement priorities. Such information should also include specific details regarding cases that were declined or resolved by plea.

Prosecutors have wide policy-making discretion. Prosecutors should clearly announce their policy choices as such. Doing so would provide important information to legislators, advocacy groups, and the public about a law's consequences. Hate-crime laws present a good example of how this might work. As discussed, lexical ambiguity regarding the motive requirement in hate-crime laws echoes the expressive contest that attended passage of the laws.<sup>231</sup> The hypothetical discussion in Part IV.B.i illustrated how a conviction-maximizing prosecutor will, in effect, tend towards a colorblind interpretation of the causation requirement. Prosecutors should announce such choices clearly. Such a move has precedent.

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<sup>231</sup> See Part III.B.ii.

In some jurisdictions, for example, prosecutors have announced official policies not to seek the death penalty.<sup>232</sup>

The salutary effects of announcing office policy need not be limited to interpretations of laws that have been subject to expressive conflict. There may be criminal laws on the books that have long gone unquestioned, but *should* be at the center of expressive debate. For example, in 2004, the San Francisco District Attorney's Office announced that prosecuting low-level sex workers was not an enforcement priority.<sup>233</sup> The statement impelled proponents and detractors to debate the merits of criminalizing commercial sex.<sup>234</sup> A prosecutor's office could take a similar tack with any number of laws that seem outmoded or unjust.

Of course, a pithy policy statement regarding enforcement priorities will not always be possible or helpful. It may, for example, be impossible to imagine the myriad circumstances in which a defendant would plausibly raise a self-defense claim. To ask prosecutors to declare a general policy regarding Stand Your Ground might not be especially helpful. It would, however, be helpful if prosecutors were forthcoming about concrete choices they made regarding such cases after the fact—that is, the decision to decline prosecution. This is true even in instances where a prosecutor's office commits itself to a particular policy position. Data regarding actual prosecutions and declinations will help observers ascertain what difference, if any, a particular law is having in the world.

Declination and plea data present particularly pressing informational gaps. While an enterprising researcher might be able to construct a rough profile of declined cases based on police reports, this is a tall task and likely to be incomplete.<sup>235</sup> In many cases, it will be impossible to know with certainty why prosecutors elected to decline a particular case. Prosecutors do not typically make such data available and, even in the rare cases that they do, they are not entirely transparent about their motivations.<sup>236</sup> Information regarding pleas

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<sup>232</sup> See, e.g., Leigh B. Beinen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Saliency for Issues of Cost*, 100 J. CRIM. L. & CRIMINOLOGY 1301, 1377 n.307 (2010).

<sup>233</sup> See Philip Matier & Andrew Ross, *Cops, D.A. Tangle over Strip Club Raids*, SAN FRANCISCO CHRONICLE, July 12, 2004, at B1, available at <http://www.sfgate.com/bayarea/matier-ross/article/Cops-D-A-tangle-over-strip-club-raids-3324156.php#page-2>.

<sup>234</sup> *Id.*

<sup>235</sup> See *supra* notes 129–131 and accompanying text.

<sup>236</sup> See *Black Box*, *supra* note 13, at 151–154.

will be more readily obtainable because it is public record; however, as with declinations, it would take a behemoth effort to gather and assemble the information to be useful for stimulating public debate. Using Stand Your Ground as an example, it would take substantial effort to compile a profile of how initial charging decisions relate to final convictions in cases where a defendant has alleged self-defense.

For example, let's assume that, following Stand Your Ground's enactment, Florida prosecutors began routinely reducing manslaughter charges to misdemeanor assault charges in cases where there was a self-defense claim. It would be difficult to gather the information necessary to demonstrate that reality. An investigator would have to scour court records in various jurisdictions, review files for individual cases, and compare pleas to the original indictments. Were such an endeavor possible, it would still reveal little about prosecutors' motivations. Ascertaining information about the race of the victim or the circumstances under which defensive force was used might very well require obtaining the police report and interviewing witnesses. This is to say that, even where information is publicly available, it is buried in documents managed by different bureaucracies. To be a useful resource for public debate, such information would have to be assembled in a user-friendly way.<sup>237</sup> While we should expect prosecutors to be more forthright with information relevant to public debate, state attorney general offices (or some other centralized bureaucracy) should collect and assemble it. Stand Your Ground is a good vehicle for roughly sketching how this might work.

Prosecutors should provide relevant information regarding their decisions to decline prosecution in cases involving self-defense. They should provide information that is germane to the expressive debate that characterizes self-defense in general and Stand Your Ground in particular. Opponents argue that Stand Your Ground encourages lawless violence that unduly impacts minorities. Proponents contend that Stand Your Ground allows individuals to protect themselves from violent attacks. From these simple statements of position, it is clear that several pieces of information regarding declination decisions would usefully inform public discussion: the nature of the defensive force (e.g., gunshot); its consequence (e.g., death); the injured individual's race and gender; the race and gender of the individual

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<sup>237</sup> *But see Black Box, supra* note 13, at 186–87 (describing Bureau of Justice Statistics and how the information it compiles is intended for “a small number of sophisticated or committed users. . .”).

who used defensive force; and summary case facts. Summary case facts should include a brief narrative of the case that addresses those dimensions of the incident that are most relevant to expressive debate around self-defense. For example, that an individual used force against another who was in the midst of a home invasion would be obviously relevant to expressive debate. Similarly relevant might be the fact that force was used in response to domestic violence. All the case circumstances that might be relevant to expressive debate cannot be identified in advance. We would, in large measure, have to rely upon pedagogical prosecutors' good judgment.

### 3. Defining "Justice"

The absence of political will to regulate prosecutors and the absence of competent regulators will stymie any external effort to constrain (or direct) prosecutorial discretion. As discussed in Part II, the absence of a plausible mechanism for achieving sweeping control of prosecutorial prerogative has led a few scholars to focus on internal, managerial, and technocratic reform.<sup>238</sup> What these approaches might claim in the way of practicality, they surrender in the way of normative ambition. This tension pervades all scholarship about prosecutorial agency, this piece included. There is likely no grand solution to the problem. Changing how prosecutors and the public engage one another will require myriad technocratic, cultural, and financial shifts. Systematically plotting those changes is beyond this (or any single) article's scope. It makes sense to think about reforms that will nudge prosecutors to voluntarily behave in the ways suggested by this Article. One place to start might be ethical rules for prosecutors.

Rules of ethics suggest that prosecutors' primary obligation is to do "justice."<sup>239</sup> The notion of justice should explicitly embrace a pedagogical function. Ethical rules, however, tend to focus on the panoply of constitutional rules that define prosecutor's responsibilities in individual cases.<sup>240</sup> Justice, however, entails something more than obeying the Constitution. That is especially true given the discretionary breadth that prosecutors enjoy. The

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<sup>238</sup> See *supra* Part II.A.

<sup>239</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2013), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor/comment\\_on\\_rule\\_3\\_8.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8.html).

<sup>240</sup> See *id.*

Constitution leaves it to prosecutors to make all sorts of decisions without judicial review. “Justice” should have some bearing on how prosecutors exercise that discretion. Ethical rules might therefore give more precise content to the word “justice.” In particular, justice should require that prosecutors bear some pedagogical responsibility in cases involving expressive conflict. The obligation to advance public dialogue in such cases might be achieved in any number of ways, three of which are discussed in the section above. As an initial matter, it may be wise to formulate the ethical obligation broadly, leaving considerable leeway for prosecutorial judgment on what constitutes expressive conflict. The ultimate goal is to begin an acculturation process through which prosecutors will internalize a pedagogical self-perception over time.

#### V. CONCLUSION

Prosecutors have unique expressive power in a pluralist democracy like our own. Cases implicating Stand Your Ground and hate-crimes laws powerfully illustrate this argument. The expressive conflict over Stand Your Ground implicates urgent questions about the relationship between individualism, violence, and criminal law. The expressive conflict over hate crimes implicates urgent questions about equality and minorities’ dignitary status. In neither context did enacting laws exhaust the basis of expressive conflict. Rather, the laws’ passage shifted the locus of expressive power from legislatures to prosecutors’ offices.

A healthy, pluralist democracy benefits from sustained dialogue in legislatures and amongst citizens. Pedagogical prosecutors would systematically use their expressive power to promote such dialogue. In advancing a pedagogical ideal for prosecutors, this Article has advocated for a shift in both prosecutorial and political culture. Prosecutors should learn to think of success in much broader terms than simply obtaining convictions. By the same token, the public must learn to credit prosecutors who are actively pedagogical, even if it comes at the price of a lower conviction rate. In such a world, prosecutors would not have been slow to prosecute George Zimmerman. Nor would the public have been quick to view the acquittal as a sign of failure.