INTRODUCTION

This is a critical analysis of the controversial killing of Trayvon Martin, a young, Black teen from South Florida. The details of the killing remain contentious, laden with competing theories of murder.
and self-defense. For some, this is a case about race. For some, this is a case about neighborhood watch and protecting oneself or, instead, illegal vigilante justice. For others, it may be a case about prosecutorial discretion and law enforcement accountability. Still, others find this to be a case about Florida's Stand Your Ground Law. Fundamentally, the Martin killing is a hybrid case about both race and law, and the


4. See Gregg v. Georgia, 428 U.S. 153, 183 (1976). In Gregg v. Georgia, the Court stated:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.

Id. (quoting Furman v. Georgia, 408 U.S. 238, 308 (1972)); BLACK'S LAW DICTIONARY 1599 (8th ed. 2004) ("Vigilante" is "a person who seeks to avenge a crime by taking the law into his or her own hands"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1395 (11th ed. 2005) ("Vigilante" is "a member of a volunteer committee organized to suppress and punish crime summarily . . . as when the processes of law are viewed as inadequate"); WEBSTER'S II NEW COLLEGE DICTIONARY 1231 (1999) ("Vigilante" is "volunteer group of citizens that without authority assumes police powers, as pursuing and punishing criminal suspects").
government's response to each. It is about how one killing can trigger provocative issues so that public outcry and media coverage combine to ignite intense passion across the country and throughout the world. Due to the latent, but smoldering embers surrounding race, crime, and (in)justice, the community was essentially primed to react. In fact, a strong reaction swelled. Based on this confluence of circumstances, the Martin killing sparked a flame in the American discourse that goes beyond any simple explanation as to why a bullet was shot into this young man's chest. The Martin killing, to some degree, reinvigorated a movement toward racial equality in the criminal justice system, while simultaneously strengthening racial animosity and negative stereotypes, both White and Black.

Like all stories, the Trayvon Martin killing must be understood in context. This Article strives to provide relevant context, a backdrop, and a lens with which to view the legal and cultural atmosphere that preceded the Martin killing, as well as the actions, reactions, and counter-reactions that followed. As the still pending criminal case is litigated, with George Zimmerman presumed innocent until the contrary is proven beyond a reasonable doubt, there is still much to be gained from a critical analysis of the circumstances surrounding this case. The ultimate outcome of the litigation, criminal or civil, is not the focus of this piece. This Article suggests that the Martin killing represents more than one victim and criminal allegation. Instead the Article suggests that if we are bold enough to embark upon it, this tragedy presents an opportunity for understanding, some healing, and even improvement to the statutory law.

5. Prosecutions, at their core, are stories. Depending on how the story is told, and maybe even depending on who tells the story, the outcome of the case can be dramatically different. See Lenora Ledwon, Law and Literature: Text and Theory (1996); Kenneth D. Chestek, Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions, 9 Legal Comm’n & Rhetoric: JALWD 99 (2012) (exploring the art of narrative and how effective storytelling can have a significant impact on the outcome of a legal argument using the example of several recent Affordable Care Act cases and the diverging judicial views when interpreting the same law; presenting the argument that each plaintiff's ability to effectively tell their story impacted the ultimate analysis of the law in dramatic ways); Ty Alper et al., Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial, 12 Clinical L. Rev. 1, 7-15 (2005) (explaining the importance in formulating an effective narrative through a critical analysis of the Rodney King trial, and emphasizing the role of social context in the eventual outcome of any case). In the case of the Trayvon Martin killing, with multiple witnesses, numerous factual discrepancies, and a plethora of competing interpretations on what actually occurred that fateful night, the art with which the prosecution and the defense can present the story of the events that led to Trayvon's death could have a significant impact on the view that the jury ultimately accepts as "true," and the case's final verdict.
I. THE WOUND: THE PAINFUL PAST AND CONTINUED RE-INJURY

The long tradition of impunity that historically followed the unprovoked killing of Black men in America is an old and deep, wound that many people in the African American community still grieve. In the past, even cases with clear murderous facts were minimized by the insertion of a false counter-narrative urging that the Black male victim provoked his own death by “being upitty,”6 or “whistling at a white woman,”7 or trying to vote,8 or requesting fair wages,9 or in the modern version, “walking from the store wearing a hooded sweatshirt in the wrong neighborhood.”10 Yet, the tale of a Black man going “missing”11

6. Being “uppity” was an allegation against a Black person for talking back to a White man and not showing the appropriate deference and subordinate status. See MARYANNE VOLLER, GHOSTS OF MISSISSIPPI: THE MURDER OF MEDGAR EVERS, THE TRIALS OF BYRON DE LA BECKWITH, AND THE HAUNTING OF THE NEW SOUTH 356 (1995); see also Hiroshi Fukurai, Social De-Construction of Race and Affirmative Action in Jury Selection, 11 LA RAZA L.J. 17, 18 (1999) (discussing the murder of Medgar Evers, a Mississippi Black civil rights leader, and how his killer had called him an “uppity nigger”).

7. STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL vii (1998) (“The national press reported that Emmett Till had been murdered for whistling at a white Mississippi woman, whose putative avengers—her husband and his half-brother—were quickly acquitted by an all-white jury. . . . [t]he case caused considerable national excitement and even attracted national attention”).

8. David R. Colburn, Rosewood and America in the Early Twentieth Century, 76 FLA. HIST. Q. 175, 190-91 (1997) (“In addition to the forty-seven blacks who died by lynching, the Klan attacked the black community of Ocoee, Florida, in western Orange County in November 1920 when two black men attempted to vote”).

9. James C. Clark, Civil Rights Leader Harry T. Moore and the Ku Klux Klan in Florida, 73 FLA. HIST. Q. 166, 166 (1994) (“On Christmas night 1951 Harry Tyson Moore became the first civil rights leader assassinated in the United States when a bomb placed beneath the bedroom of his small frame home in Mims, Florida, exploded. It killed Moore and his wife Harriett”). Harry T. Moore was known for his fight for fair wages. Id.

10. On his Friday morning show, Fox News Host Geraldo Rivera caused a “firestorm” with his comment: ‘I’ll bet you money, if he didn’t have that hoodie on, that nutty neighborhood watch guy wouldn’t have responded in that violent and aggressive way.’ Jack Mirkinson, Geraldo Rivera Doubles Down on Trayvon Martin Hoodie Comments: ‘Half of it is the Way the Young Men Look,’ HUFFINGTON POST (Mar. 24, 2012), http://www.huffingtonpost.com/2012/03/24/geraldo-rivera-trayvon-martin-hoodie-comments_n_1377014.html. Trayvon’s former football coach, Jerome Horton, stated: ‘He [Trayvon] always walked with his hoodie and his headphones . . . If he wasn’t on the phone, he was listening to music — anyone that knows him knows that.’ Kim Segal, Protesters Declare “I am Trayvon Martin,” But Who was He?, CNN (Mar. 30, 2012), http://www.cnn.com/2012/03/30/us/trayvon-martin-profile/index.html. In a sworn statement taken on April 2, 2012 at 7:05 p.m. by an assistant state attorney, Trayvon Martin’s girlfriend stated: “[H]e told me this guy was gettin’ real close to him . . . next I hear Trayvon say ‘why you followin’ me for’? . . . I hear an old man sayin’ ‘what are you doin’ around here?’” Serge F. Kovaleski, Martin Speck of ‘Crazy and Creepy’ Man Following Him, Friend Says, N.Y. TIMES, May 19, 2012, at A9. During his 911 call to the police on the night Trayvon Martin was killed, George Zimmerman stated:
only to be found dead-drowned in the bayou, shot in the cotton fields, hung by a tree, hung by a tree, beat to death by the police, or victimized by a

We've had some break-ins in my neighborhood, and there's a real suspicious guy... this guy looks like he's up to no good or he's on drugs or somethin'... it's raining and he's just walkin' around lookin' about... he looks black... yeah [he is wearing] a dark hoodie... he's here now and he's just staring looking at all the houses, now he's just staring at me... he has his hand in his waistband... and he is a black male... [he is in] his late teens, somethin's wrong with him, he's comin' to check me out... he's got somethin' in his hands, I don't know what his deal is.


11. CNN Wire Staff, Sanford Police Chief Fired in Wake of Trayvon Martin Case, CNN (June 20, 2012), http://articles.cnn.com/2012-06-20/justice/justice_florida-martin-case-police-chief_1_stand-your-ground-law-police-dispatcher-shooting?_s=PM:JUSTICE (discussing how Trayvon Martin was reported missing by his father, when Trayvon did not make it back from his short walk to the store for skittles and ice tea—snacks for the basketball game he was watching with his father); Heat Don Hoodies After Teen's Death, ESPN.COM (Mar. 24, 2012), http://espn.go.com/nba/truehoop/miamiheat/story/_/id/7728618/miami-heat-don-hoodies-respon se-death-teen-trayvon-martin [hereinafter ESPN.com] ("[Dwayne] Wade posted a photo of himself... wearing a hooded sweatshirt, otherwise known as a hoodie... [LeBron] James posted another photo -- this one of the Heat team, all wearing hoodies, their heads bowed, their hands stuffed into their pockets").

12. JAMES R. McGOVERN, ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL 1 (1982) ("In the early hours of October 27, 1934... a mob lynched a black laborer, Claude Neal. He was accused of raping and murdering an attractive young white woman, the daughter of one of his employers, just nine days earlier"); see IDA B. WELL-BARNETT, ON LYNCHINGS 37-44 (2002) (discussing prevalence of the practice of unjustly lynching Black men in the South).

A white correspondent of the Baltimore Sun declares that the Afro-American who was lynched in Chestertown, Md., in May for assault on a white girl was innocent; that the deed was done by a white man who had since disappeared. The girl herself maintained that her assailant was a white man. When that poor Afro-American was murdered the whites excused their refusal of a trial on the ground that they wished to spare the white girl the mortification of having to testify in court.


The most dramatic incident... was the 1980 [Miami] riot: "McDuffie," as the case is known... [it lasted three days... left 18 dead, $804 million in property damage, and 1,100 arrested... A thirty-three year old black insurance agent named Arthur McDuffie died in Miami... from injuries sustained after being chased by city and county police units. The chase ensued
vigilante,\textsuperscript{14} is an all too familiar and upsetting narrative. The additional circumstance that further exacerbated the wound and prevented its healing was the specious whitewashing of the incidents. In effect, society sanitized the criminality surrounding these suspicious deaths and disappearances where Black boys or Black men were victimized at the hands of primarily white perpetrators.\textsuperscript{15} The repetitive combination of Black males being killed under suspicious, questionable, and irreconcilable facts, coupled with law enforcement’s inaction, acquiescence, or even affirmative cover-up is a chronic injury that the African American community has suffered for decades. Nonetheless, notwithstanding these prior hurtful tragedies, many African Americans were encouraged that, for the most part, America had moved beyond this painful part of its history.\textsuperscript{16} Many had begun to allow themselves to because McDuffie made a rolling stop at a red light plus an obscene gesture toward a nearby officer.


Joe Horn called 911 and told the dispatcher he had a shotgun and was going to kill the men. The dispatcher pleaded with him not to go outside, but Horn confronted the men with a 12-gauge shotgun and shot both in the back. . . . Joe Horn shot [I] two men in November after he saw them crawling out the windows of a neighbor’s house . . . carrying bags of the neighbor’s possessions. . . . “[h]e wasn’t acting like a vigilante,” [Horn's attorney] said. “He was well within his rights to do what he was doing.” . . . [A] panel of citizens drawn from the community has determined that the facts of the incident did not warrant the handing up of an indictment for criminal actions.

\textit{Id.}


believe that justice is available for all citizens, and that America had at least turned a symbolic corner, or at least made substantive progress, by electing a Black President in Barack Obama.  

In spite of the optimism and positive feelings that flowed from the 2008 presidential election, achieving racial harmony and racial equality today remains largely theoretical or academic—essentially a mind experiment upon which one can fantasize. As most remain hopeful that at some point in the future it is still achievable, post-racialism has not yet been achieved. This fact is particularly obvious when one

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African-American woman to become the U.S. secretary of state. For all of these reasons, and more, Rice, 50, [was] the most powerful woman in the world”); Adam Nagourney, Obama Elected President as Racial Barrier Falls, N.Y. TIMES (Nov. 4, 2008), http://www.nytimes.com/2008/11/05/us/politics/05elect.html?pagewanted=all (“Barack Hussein Obama was elected the 44th president of the United States on [Nov. 4, 2008], sweeping away the last racial barrier in American politics with ease as the country chose him as its first black chief executive”); Colin L. Powell, N.Y. TIMES, Nov. 5, 2008, at A1 (“Colin L. Powell is a former secretary of state, national security adviser and chairman of the Joint Chiefs of Staff, the first African-American to serve in any of those positions”).

17. “The irony of the Obama victory serving as the embodiment of the post-race moment is that discussions of race permeated the election.” Barnes, supra note 3, at 13. “President Obama’s ascendance . . . is historic and bound to have lasting implications for race relations in this country. At this point, however, the full effects of his breakthrough are unclear.” Id. at 8. See RANDALL KENNEDY, THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA ADMINISTRATION 12 (2011) (“When people exclaimed that they never thought that they would live to see the day a black man was elected president, they were indicating how little they expected of their fellow Americans.”); Dwight Garner, One Nation, Still Divisible by Race, N.Y. TIMES, Aug. 12, 2011, at C1 (reviewing Randall Kennedy’s book THE PERSISTENCE OF THE COLOR LINE).

18. See Barnes, supra note 3, at 11.

As much as one may wish to choose to believe, America’s history of race relations cautions that we should not embrace an ostensible changed reality that turns out merely to be a dream for the many who will be left behind. . . . if African Americans have, indeed, finally made it over, there are many in our community that have not received the notice.

Id.


Colorblindness is a form of racial jujitsu. It co-opts the moral force of the civil rights movement, deploying that power to attack racial remediation and simultaneously defend embedded racism. It defends racial injustice directly, for instance by insisting that massive racial disparities are “not racism.” And it does so indirectly, and perhaps ultimately more powerfully, by providing cover for racial stereotypes expressed in cultural and behavioral terms, for example through imagery of minorities as criminals.
critically examines the serious disparities and injustices Blacks experience in the criminal justice system: racial profiling, wrongful convictions, mass incarceration, and police brutality. Even with these blatant, indisputable, and depressing institutional indicators of racial inequality, idealists rationalize some of the questionable cases where Black men were victimized by believing that the Black male should not have been doing something wrong in the first place, despite


Today, most Americans know and don’t know the truth about mass incarceration. For more than three decades, images of black men in handcuffs have been a regular staple of the evening news. We know that large numbers of black men have been locked in cages. In fact, it is precisely because we know that black and brown people are far more likely to be imprisoned that we, as a nation, have not cared too much about it.

_id.

24. See GRENIER & STEPICK, supra note 13, at 43-44 (discussing the murder of Arthur McDuffie that occurred in 1980 in the City of Miami); Gregory Howard Williams, Controlling the Use of Non-deadly Force: Policy and Practice, 10 HARV. BLACKLETTER J. 79, 80 (1993).

Police not only use a broad range of force, but their determination of when to use force is often racially based. One recent study that reviewed complaints of police brutality in New York City found that “there exists a perpetual pattern of police violence in New York City led primarily by white officers, and directed at African-American males particularly, and people of color generally.” Regarding police brutality in Los Angeles, the Christopher Report was even more blunt. “The problem of excessive force is aggravated by racism and bias within the Los Angeles Police Department.” A survey of 960 officers found that approximately one-quarter agreed that prejudice against minority citizens exists within the LAPD and may lead to the use of excessive force.

_id. at 80; HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 2 (1998) (studying 14 American cities and concluding that “race continues to play a central role in police brutality in the United States.”).
how unjust he was subsequently treated by the police and/or the prosecution. Yet, even that feeble excuse was not available to soothe the Black community after the Trayvon Martin killing.

The stereotypical “Black-as-criminal” persona25 did not factually fit what happened to Trayvon.26 It could not explain his (senseless) killing. Trayvon was unarmed and not committing any crime. He was merely walking home from the store with a bottle of iced tea and candy. Unfortunately for Trayvon, it seems the only thing he was doing that was suspicious was, being Black.27 The strong emotions that the innocent victim narrative was creating in the Black community and in the media coverage caused some to try and dilute the power of this narrative by interjecting a false, counter-narrative, in which Trayvon was painted as a “thug.”28 This tactic was predictable and followed the historic pattern of blaming the victim with the added benefit of simultaneously diminishing the killer’s criminality. This case highlights,

25. Lee, supra note 3, at 404-05; Lyon, supra note 3, at 747 (“The media tends to reinforce – at great profit – an unconscious assumption that white, middle-class people are at great risk of being violently attacked by people of color.”).

26. The belief that Trayvon seemingly fell prey to a vigilante who was overzealously patrolling the neighborhood and perceived Trayvon as doing something wrong when he was innocently walking home, was a fresh cut in an old wound. Even though Trayvon was still a boy, he nonetheless was a victim of the same targeted and negative stereotyping that traditionally attach to Black men—Black-as-criminal. Compare Serge F. Kovaleski, Martin Spoke of ‘Crazy and Creepy’ Man Following Him, Friend Says, N.Y. TIMES (May 18, 2012), http://www.nytimes.com/2012/05/19/us/trayvon-martins-friend-tells-what-she-heard-on-telephone.html (discussing Trayvon Martin’s girlfriend’s statement), with George Zimmerman 911 call reporting Trayvon Martin, ORLANDO SENTINEL, http://www.orlandosentinel.com/video-gallery/68871920/News/George-Zimmerman-911-call-reporting-Trayvon-Martin (last visited Aug. 8, 2012).

[T]here’s a real suspicious guy... this guy looks like he’s up to no good or he’s on drugs or somethin’... he looks black... [he is wearing] a dark hoodie... he’s just staring looking at all the houses, now he’s just staring at me... he has his hand in his waistband... and he is a black male.

Id. (highlighting one 911 Call).


28. Trayvon was not committing a crime on the night of the killing nor had he ever been convicted of a crime. However, the counter-narrative was introduced to minimize the injustice of his death, attempting to play into the “Black-as-criminal” stereotyping. Lee, supra note 3, at 404-06; see also CNN Wire Staff, New Orleans Police Officer Resigns After Post On Trayvon Martin, CNN (Mar. 27, 2012), http://articles.cnn.com/2012-03-27/us/as_florida-teen-louisiana-officer_1_police-officer-resignation-police-force?_s=PM:US (“Under a news story on Martin, officer Jason Giroir wrote on the website of CNN affiliate WWL: ‘Act like a Thug Die like one!’”).
for a larger audience to see, that an individual’s racial identity has real and sometimes deadly, consequences, for those who are negatively marked by race. One could further argue that this case most poignantly showcases the lack of corresponding punishments imposed when one’s crime targets a victim already marked.

When Trayvon went “missing” after walking to the store to get candy, it prompted a special kind of anxiety, a type of distress not known to all communities, but one that is all too familiar to the Black community. It reinforced the reality that the immutable characteristic of simply being a Black male walking down the street, still creates a life-threatening situation. This kind of thought is painful to acknowledge. Trayvon’s death hits that trigger point. It activates memory akin to a post-traumatic stress response. The killing of Trayvon Martin was a fresh cut in an unhealed wound. The combined circumstances surrounding his death exposed a nerve so raw and so tender that its re-injury provoked impassioned outcry and persistent protest across both the United States and abroad.

Operating from a triggered and agitated state of mind, the Black community collectively dreaded what would happen to Trayvon’s case. Without swift justice, this cut would never heal. Instead, this cut would feaster like a sore, crusting over like a syrupy sweet; or maybe like a heavy load, it might just explode. Analogous to racial stigma, the

29. Barnes, supra note 3, at 9 (Derrick Bell’s “work evinces a commitment to the idea that race not only matters, but operates as a basis to create real consequences in the lives of those negatively marked by it.”) (emphasis added).


The person bearing the racialized attribute [the mark of race] is not only disliked but socially dehumanized, a devalued individual whose ability to participate as a full citizen in society is fundamentally compromised by the negative meanings associated with his or her racial status. In essence, a racially stigmatized person becomes socially spoiled, dishonored, and “reduced in our minds from a whole and usual person to a tainted, discounted one.”

Id. (citations omitted).


32. Lenhardt, supra note 30, at 809:

To be clear, by “racial stigma,” I do not mean racial slurs or insults, stereotypes, or even the denial of a particular opportunity on the basis of one’s race. Looking to the work of social scientists such as Erving Goffman and
weight of this collective burden proved too heavy to bear and emotionally too much to take—even in 2012. Law enforcement turning a blind eye to homicidal conduct directed toward a Black male victim and failing to prosecute it also followed the historic pattern, further flashing the community back to past injustices. Justice delayed had undoubtedly been internalized as justice denied. The Trayvon Martin killing felt like a sequel to those past tragedies and reminiscent of a time period where no one wants to return, a time period which some say we never really left.

The "collective wound" as described here, supplies some of the important external facts, but it does not illuminate the entire picture. In fact, Blacks were not the only group upset by the government’s response, or perceived lack of response, to the Trayvon Martin killing. Although the first complaints and initial protests stemmed directly from the Martin family and, then, from the broader African American community, people of all races felt compelled to speak out regarding the handling of this case. Some focused on the fact it took the police three days to notify Trayvon’s father that his son was not missing, but in fact

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33. See Keith A. Beauchamp, Emmett Till, Trayvon Martin and the Resurgence of Injustice, HUFFINGTON POST (Apr. 24, 2012), http://www.huffingtonpost.com/keith-a-beauchamp/trayvon-martin-emmitt-till_b_1453854.html ("As I watched Trayvon’s mother speak out to the media, I couldn’t ignore the resemblance of the same actions taken by my dear friend, the late Mamie Till-Mobley, when she lost her son, Emmett Louis Till, during the 'Bloody Summer' of 1955."); Kim Vatis, Scholar Sees Parallel Between Emmett Till, Trayvon Martin, NBC CHI. (Mar. 22, 2012), http://www.nbcchicago.com/news/local/chicago-trayvon-martin-shooting-death-protest-143890036.html ("Chicago’s Emmett Till and his horrific murder by white men in the south in 1955 galvanized our nation. Now some see the shooting death of a Florida teen by a neighborhood watchman another turning point in American history."); William Finnegan, Emmett Till in Sanford, NEW YORKER (Mar. 23, 2012), http://www.Newyorker.com/online/blogs/comment/2012/03/trayvon-martin-sanford-florida.html ("With this breadth and level of public attention and outrage, it is becoming possible to imagine the death of Trayvon Martin taking its place alongside, say, the death of Emmett Till as a terrible marker of the ongoing peril of being young, black, and male in this country.").

34. Finnegan, supra note 33.
dead due to a homicide. Others fixated on the fact that Trayvon’s killer was released without any criminal charges. Each became meaningful flash points that people referenced as the basis for their outrage. Additionally, these same facts were used as evidence of the biased motive of the government against this victim. Many hypothesized that a white victim and a young, White victim’s family would not be treated with this level of disregard or indifference. It was further posited that the killer of a young white teen would be charged with a crime immediately. The rising thought was that a standard of impunity was being applied to this case, an upsetting notion.

Impunity was often the preferred prosecutorial response to the suspicious killing of Black men. However, as will become clear in this discussion, impunity may not always serve the majority’s best interest. Further, the palpable, yet unspoken risk of the impunity approach is the subliminal awareness that (eventually) “they will explode,” unless something substantive is done. In response to Trayvon Martin’s killing, the explosion was surely imminent unless something was done, and done soon. It was believed that communities beyond the local Florida town of Sanford would riot.


36. See HUGHES, supra note 31, at 426 (“What happens to a dream deferred? . . . Or fester like a sore—And then run? . . . Maybe it just sags like a heavy load. Or does it explode?”).


The shooting occurred as tensions continue in this small middle class city. One official told ABC News tension could soon reach a boiling point. ABC News has learned that the emergency operation centers of three counties have been activated at Level II, the same level of preparedness used ahead of a hurricane.

Id.; CNN Wire Staff, From Coast To Coast, Protesters Demand Justice In Trayvon Martin Case, CNN (Mar. 26, 2012), http://www.cnn.com/2012/03/26/justice/florida-teen-shooting-events/index.html?ref=allsrch (discussing the “spurring demonstrations” across the United States and justice protests in places such as Atlanta, Iowa City, Houston, Detroit, Philadelphia and many more cities across the country); Marisol Bello et al., The Intersection of Rodney King and Trayvon Martin, USA TODAY (May 6, 2012), http://www.usatoday.com/news/nation/story/2012-04-26/trayvon-martin-reflects-rodney-king/54569324/ (discussing the similarities between the “chants for justice” over the death of Trayvon Martin and that of
Trayvon Martin’s killing was becoming a national movement; communities across the country were showing solidarity on the issues. Communities all over were chanting the slogan: “I am Trayvon.” Students of Trayvon’s age group and younger were walking out of school in symbolic rage regarding the fact that nothing was being done to vindicate his killing. People from all walks of life were wearing hoodies in solidarity with the perceived injustice of the treatment of the case. Although the initial outcry was primarily led by the Black

Rodney King twenty years ago). Trayvon, although killed in Sanford, was from Miami and Miami had already experienced horrific race riots in the 1980s. See generally Williams, supra note 13, at 82-90 ("In the 1980s, riots resulting from police-citizen conflicts in Miami caused more than $100 million in damage."); reprinted in JUAN PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 1117 (1st ed. 2007).


community, the expression of outrage was not limited to Black people. Joe Scarborough, a well-known white conservative republican commentator and anchor of MSNBC’s lead morning news television broadcast Morning Joe, voiced his disgust about the case daily. Scarborough, consistent with the Black community’s view, also called for charges to be filed. Scarborough directly spoke to the issue of racial bias as the basis for the prosecutor not filing criminal charges, a fact many others were labeling as the mistreatment of this case. Scarborough, who is originally from Florida, specifically called out during his television broadcast, the names of the local Florida officials that he felt should intervene to correct this injustice. Scarborough, along with a sea of others without a televised stage, implored the government to do something. At that point, it was still uncertain whether or not the something would be to charge Trayvon’s killer with murder.

II. THE RESPONSE: PROSECUTORIAL DISCRETION AND INTEREST CONVERGENCE

Criticism of the prosecution is at the heart of this case. It is hard to label prosecutors’ decisions as clearly good or bad, just or unjust. Achieving justice is the prosecutor’s duty, but it is debatable if justice is achieved in any particular case. The query requires one to analyze the prosecutor’s dual objectives of rigorously enforcing the law and ensuring that all charges filed can be proven beyond a reasonable doubt.

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40. During his morning show, Joe Scarborough aroused widespread attention when he stated:

If anybody watching this show -- either live or on the Internet -- doesn’t believe that if an African-American shot a 17-year-old white boy walking through a neighborhood carrying ice tea and Skittles...if they do not believe that an arraignment would be scheduled by the next morning for the African-American shooter and that the white boy’s family would be called immediately...that an officer would actually drive to the white boy’s home and sit down with the parents on the couch and console them because they have lost a 17-year-old son. If you don’t believe that this case and the handling of this case by the people in Florida had nothing to do with race, you are living in a fantasy world.

Most cases and their charging decisions are straightforward and uneventful: identify the crime, charge the crime, and then move on to next case.41 But nothing in law is really that simple, and not all crimes that are identified are charged.42 That is what makes charging decisions discretionary, and ultimately controversial. In actuality, there are fundamental policy goals that drive decisions to charge and decisions not to charge. Further, these policy goals often change depending on the politics of the current prosecutor in power, including that prosecutor's vision and priorities.43 Thus, the purely legal issues are not the sole factors considered when making charging decisions.44

These additional factors that require extra evaluation by the prosecutor are difficult to quantify and are seldomly articulated.45

41. Every crime requires proof of mens rea and actus reus. Francis Bowe Sayre, Mens Rea, 45 HARV. L. REV. 974, 974 (1932). "There are two conditions to be fulfilled before penal responsibility can rightly be imposed. . . . [o]ne is the doing of some act by the person to be held liable [actus reus] . . . and the other is the mens rea or guilty mind with which the act is done." Id. It is has been said for hundreds of years that actus non facit reum nisi mens sit rea, "there can be no crime, large or small, without an evil mind." Id. at 974. Mens rea signifies the mental element necessary to convict for any crime. See id. at 974-75. Further, charging decisions follow the legislature's articulation of crime in the relevant jurisdiction. Criminal law is particularly vulnerable to jurisdiction distinctions. For example, blood alcohol levels for intoxication is .08 or .10 depending on the jurisdiction. There are jurisdictional distinctions for self-defense. The unique provisions of Florida's self-defense statues impacted the analysis of the Trayvon Martin killing. See FLA. STAT. §§ 776.012, 776.013, 776.031, 776.032(1) (2012).

42. ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9(b) (1993) states: "[T]he prosecutor is not obligated to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction." Id.

43. See Robert Luskin, Rove questioned about U.S. attorney firings, CNN (May 15, 2009), http://articles.cnn.com/2009-05-15/politics/rove.attorneys_1_robert-luskin-rove-nora-danehy?_s=PM:POLITICS (discussing the firing of nine U.S. attorneys in 2006 under the Bush administration and how Congress held hearings on the firings "amid allegations that the prosecutors were sacked for political reasons.").

44. See also Tracey L. McCain, The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System, 25 COLUM. J.L. & SOC. PROBS. 601, 602-03 (1992) (discussing how racial bias, when coupled with pre-trial publicity, can infect all stages of a criminal case including charging decisions).


[T]he prosecuting decision is complex, taking into account such varied factors as the strength of the evidence, public policy or opinion, and limited
Consider some of the common concerns. What about the close or borderline cases where there is uncertainty about proving the suspect's guilt beyond a reasonable doubt? Maybe the suspect has viable defense arguments that must be factored into the decision. Or maybe statutory immunity potentially applies? What about the controversial cases? What about the emotionally charged cases, where the victim is a child? What about the political cases, where the suspect's father is an important judge in the legal community? Or the suspect is well known by many officers in the police department? What about the racially charged cases, where the suspect is White and the victim is Black and unarmed? What about the cases where the suspect just seems like a huge jerk more than a huge criminal, as some of the technical elements of the crime are lacking? What happens when a myriad of these factors conflate into one case? Maybe the case would look a bit like the Martin/Zimmerman case and present some challenges for the prosecutor in deciding whether to prosecute, and if so, which crime to charge.

Prosecutors in Florida who review homicides that contain colorable self-defense arguments have another factor to consider—"The Stand...
Your Ground Law.” In addition to the typical intangibles that can make a case hard to prosecute, “stand your ground cases” are a particularly difficult breed of cases that Florida prosecutors must closely analyze before deciding to prosecute due to the law’s immunity provisions. The Stand Your Ground Law provides immunity from prosecution to any person who justifiably uses deadly force in bona fide defense of oneself (or of others) from a deadly threat.\(^5\) The immunity further applies to instances where the shooter reasonably perceived the threat to be deadly, even if—in fact, it was not.\(^5\) Therefore, these charging decisions are fact intensive excavations in which the prosecutor is focused on whether there is sufficient evidence to prove the criminality


The Essential question on a theory of self-defense is whether the defendant reasonably feared for his or her own safety. In order to justify a homicide on the grounds of self-defense, the situation must be such as to induce a reasonably prudent person to believe that danger was imminent and that there was a real necessity for the taking of life. If the circumstances are such as to authorize such a belief, a plea of self-defense may be available, although no actual necessity to kill existed. It is not necessary to show that the deceased actually produced a weapon, although an attempt by the deceased to do so, or a demonstration to that effect, might well produce the apprehension which the law contemplates.

Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010).

While Florida law has long recognized that a defendant may argue as an affirmative defense at trial that his or her use of force was legally justified, section 776.032 [The Stand Your Ground law’s immunity provision] contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial. Section 776.032(1) expressly grants defendants a substantive right to not be arrested detained, charged, or prosecuted as a result of the use of legally justified force.

Id. The Stand Your Ground immunity provision does not just provide that an individual that uses justified force cannot be convicted of a crime; it provides that an individual that uses justified force cannot be prosecuted at all. Id. Thus, the self-defense evidence must be closely evaluated before any criminal charges can be filed in Florida. This could explain why the prosecutor’s initial decision cautiously declined to file charges.

51. State v. Coles, 91 So. 2d 200, 203 (Fla. 1956). The Florida Supreme Court stated:

One who seeks to excuse homicide on the ground of self-defense must show that the killing was necessary at the time, . . ., and that it was necessary to protect himself from such great bodily harm as to give him a reasonable apprehension that his life was in immediate danger.

Id. (duty to retreat superseded by statute Fla. Stat. §§ 776.012, 776.013 & 776.031).
of the suspect beyond a reasonable doubt, to the exclusion of any criminal defenses that might be raised. In Florida, the Stand Your Ground Law’s immunity clause injects an additional procedural hurdle that no other criminal prosecution has a pre-trial determination of the defendant’s self-defense claims by the trial judge. If the defendant is successful in proving his self-defense claim at the pre-trial hearing, the criminal case is dismissed, and the defendant is deemed immune from criminal prosecution for the killing. The immunity is granted on the judge’s order alone, with the case never being heard by a jury.

Thus, in Florida, a defendant has a substantive right to immunity from prosecution, not just an affirmative self-defense at trial. When a Florida prosecutor makes the decision to file criminal charges against a defendant claiming self-defense, the prosecutor knows it will be a factually and procedurally hard case, and that the case may not ever make it to the jury. Being the end goal of every charging decision is to obtain a valid conviction, the likelihood of success at trial is a significant factor that all prosecutors contemplate. Due to the proof challenges and procedural obstacles, all “stand your ground cases” are challenging cases to evaluate and to prosecute. In other words, it is normal for a prosecutor to be cautious before charging this type of case, and it may even be reasonable for the prosecutor to elect not to charge it after weighing all the factors. Objectively speaking, it is neither just nor unjust not to charge; instead, it is a commentary on the overall strength of case in the subjective view of the prosecutor at the time the decision is made. Whether right or wrong, it is exclusively within the prosecutor’s discretion to make this weighty determination.

52. Dennis, 51 So. 3d at 464; Peterson v. State, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008).

53. Dennis, 51 So. 3d at 462 (interpreting that the Stand Your Ground Law’s immunity provision, section 776.032, “grants defendants a substantive right to assert immunity from prosecution and to avoid being subject to a trial.”).

54. Every prosecutor has “the power to be selective,” (i.e., to charge or not charge at the discretion of the prosecutor). Dwight L. Greene, Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers, 39 BUFF. L. REV. 737, 751 (1991). “Ordinarily, prosecutorial decision-making . . . proceeds through several precharge phases, each of which can contribute to the scope of prosecutorial discretion and the potential for prosecutorial abuse: interpretation of the law, determining the sufficiency of the evidence, and deciding which charges should be brought.” Id. at 752.


Although the police typically initiate the criminal process by investigating alleged criminal activity and making arrests, prosecutors enjoy the largely unbridled discretion to determine what, if any, charges are actually filed against a defendant. In general, prosecutors may not file a criminal charge unless it is supported by “probable cause” to believe in the person’s guilt.
Notwithstanding the realities of the laws in Florida, prosecutors still file murder charges even in the midst of a defendant’s counter-allegations of self-defense. However, the act of charging itself indicates that the prosecution has confidence in the incriminating evidence and believes that there is a high probability of a conviction at trial, having first overcome all the necessary obstacles. In the case of Trayvon Martin’s killing, in addition to the other issues surrounding the case, the prosecutors were forced to consider the contours of the Stand Your Ground Law and its impact on a successful conviction of the killer. The knowledge of legal and procedural complexities of self-defense cases in Florida may help explain why the initial prosecutorial decision was not to charge murder for this homicide.

In most instances, the prosecutor’s initial charging decision is the final word on the matter. Notably, no court, judge, citizen, or any other person can force a prosecutor to file charges in a case. That is

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56. See Dennis, 51 So. 3d at 458; State v. Gallo, 76 So. 3d 407, 408 (Fla. Dist. Ct. App. 2011); State v. Yaqubie, 51 So. 3d 474, 475 (Fla. Dist. Ct. App. 2010); Peterson, 983 So. 2d at 28.

57. Fla. Stat. § 776.032(1) (2012). A person who uses legally justified force “is immune from criminal prosecution . . . . [T]he term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.” See also §§ 776.012, 776.013, 776.031. The immunity extends to include detention; so if the prosecutor determined that immunity was likely to apply he could have interpreted the Stand Your Ground Law as preventing Zimmerman’s detention and thus statutorily requiring the prosecutor to release the suspect. However, the statutory language does not require release of a suspect and instead states that the criminal investigation should proceed normally. § 776.032(2) (“A law enforcement agency may use standard procedures for investigating the use of force described in subsection (1), but the agency may not arrest the person using force unless it determines that the force used was unlawful.”). While the arrest and charging decisions are legitimately made using a probable cause standard of proof, the pre-trial immunity decision made by the trial judge is based on a preponderance of the evidence standard of proof. Dennis, 51 So. 3d at 460.

58. Abby L. Dennis, Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power, 57 Duke L.J. 131, 131 (2007) (discussing the problem of unbridled prosecutorial discretion, its high potential for abuse, and recommending a system of public oversight). "Virtually immune from judicial sanction, professional discipline, and civil liability, prosecutors enjoy limitless, unmonitored and, for the most part, unreviewable power. This power and insulation from review invite abuse and public mistrust, shaking confidence in the criminal justice system." Id.

59. R. Michael Cassidy, Prosecutorial Ethics 13 (2005) ("If the prosecutor determines that no charges are warranted, neither a private citizen nor a judge may compel the prosecutor to commence criminal proceedings."); see generally Inmates of Attica v. Rockefeller, 477 F.2d 375, 381 (2d Cir. 1973) (explaining that a court cannot order a prosecutor to file criminal charges); Wayte v. United States, 470 U.S. 598, 607 (1985) (discussing that prosecutorial discretion is "ill-suited for judicial review"); see also Dwight L. Greene, Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers, 39 Buff. L. Rev. 737 (1991). "Absolute discretion means unchecked and unreviewable discretion. When no other authority can reverse the choice made, even if it is arbitrary and
the prosecutor’s exclusive realm of authority. However, apart from it being a solo pronouncement by the local state attorney in Sanford, the prosecutor’s initial decision not to charge brought further negative attention to the case. The ensuring public uproar led to an independent, special prosecutor to be appointed to re-evaluate the case and the original charging decision. This re-evaluation by a new prosecutor would also incorporate a re-consideration of the politics and law actively churning around the case, as well as the subjective priorities, policies, and viewpoints that the new prosecutor brought to the analysis of the case facts.

unreasonable, discretion is absolute. Prosecutors are virtually free at the critical early stages in the criminal law process to do as they please. The judiciary gives only lip service to constraining prosecutorial discretion. There are no effective judicially enforced standards or constraints on the executive decisions of whether to prosecute.” *Id.* at 760-61.

60. ABA STANDARDS OF CRIMINAL JUSTICE 3-3.4(a) (1993): “The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.” *Id.* Wayte, 470 U.S. at 607-10 (finding selective prosecution to be constitutional); Bennett L. Gershmann, *The New Prosecutor*, 53 U. Pitt L. REV. 393, 448 (1992) (acknowledging that the prosecutor is the most powerful force in the criminal justice system largely because of his exclusive authority); see also Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. REV. 275, 276 (2007). “Because the most important decisions prosecutors make, the charging and plea bargaining decisions, are made behind closed doors, there is rarely an opportunity to discover abuse or misconduct.” *Id.*

61. In Trayvon’s case, Governor Rick Scott and Attorney General Pam Bondi appointed State Attorney Angela B. Corey. See Crimesider Staff, *Prosecutor to Investigate Trayvon Martin Shooting Death*, CBSNews.com (July 16, 2012, 4:13PM), http://www.cbsnews.com/8301-504083_162-57403216-504083/florida-gov-appoints-special-prosecutor-to-investigate-trayvon-martin-shooting-death/. See generally Florida State Constitution Annotated: Art. 5, § 17: “The Governor may appoint a prosecutor to any other jurisdiction, and where the state attorney fails to adequately do their job the Governor may appoint a member of the Florida bar to proceed in a grand jury proceeding.” *See* Henry v. State, 649 So. 2d 1361, 1364 (Fla. 1994) (denying the defendant’s motion to appoint a special prosecutor where defendant claimed that the prosecutor’s previous employment at the office of the public defender disqualified him from prosecuting the defendant in a subsequent related case). See State v. Kadivar, 460 So. 2d 391, 392 (Fla. Dist. Ct. App. 1984) (finding the trial court “departed from the essential requirements of law” where it granted defendant’s motion to disqualify four attorneys at the State attorney’s office, requested the Governor appoint a special prosecutor, and effectively “disqualified the entire Nineteenth Judicial Circuit”).

62. While individual prosecutor’s personalities can clearly influence a charging decision, it is important to make certain that the Decisions are not made by a one-dimensional process. Rather, it is necessary that the decision making process examines all factors and circumstances in order to make certain that the prosecutor acts as a true “minister of justice.”

Ellen S. Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 461 (2009) (arguing that prosecutorial discretion means considering all of the facts and circumstances surrounding a so-called criminal act; rather than just matching elements to a
Although from the prosecutorial standpoint the charging decision is focused on the criminality of the suspect and not on the individuality of the victim,\(^\text{63}\) it is sometimes hard for the public to separate the two. The statute). It was reported that the special prosecutor, who hailed from another county in Florida, was known for a “reputation for toughness in handling crimes involving fun violence.” Amy Wimmer Schwarb, *Prosecutor in Florida Shooting Case Has Tough Reputation*, Chi. Trib. (Apr. 4, 2012), http://articles.chicagotribune.com/2012-04-04/news/sns-rt-us-usa-florida-shoot ing-coreybren83312u-20120404_1_prosecutor-tough-reputation-lethal-force; see also Lizette Alvarez & John Schwartz, *Prosecutor in Martin Case will Alone Determine its Merits*, N.Y. Times (Apr. 9, 2012), http://www.nytimes.com/2012/04/10/us/grand-jury-review-skipped-in-trayvon-martin-case.html?pagewanted=all. Her viewpoint toward gun violence may have colored her analysis of the facts and influenced her charging decisions. *Id.* “Enhanced use of special prosecutors, appointed by independent executive officials, provides a means of curbing errant prosecutors and restoring public confidence in the criminal justice system. This mechanism has largely been ignored by members of the state executive and legislative branches.” Abby L. Dennis, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 Duke L.J. 131, 162 (2007); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. Rev. 1243 (2011) (considering the question of whether a prosecutor’s exercise of discretion not to charge a legitimate and provable case should be seen as a subspecies of the otherwise valid prosecutorial discretion or as an invalid departure from prosecutorial duties). Governor Rick Scott has the authority to appoint special prosecutor Angela B. Corey as per Florida Statutes. See *Fla. Stat.* § 27.14(1) (2012). Section 27.14(1), Florida Statutes, provides in pertinent part:

If any state attorney is disqualified to represent the state in any investigation, case, or matter pending in the courts of his or her circuit or if, for any other good and sufficient reason, the Governor determines that the ends of justice would be best served, the Governor may, by executive order filed with the Department of State, either order an exchange of circuits or of courts between such state attorney and any other state attorney or order an assignment of any state attorney to discharge the duties of the state attorney with respect to one or more specified investigations, cases, or matters, specified in general in the executive order of the Governor.

*Id.* Dennis, *supra*, at 145-46.

 Totally uninvolved with any social/political complexities attending the particular case, the special prosecutor [can] concern himself with but one thing: the efficient and ethical prosecution of the case. Furthermore, because this form of oversight allows an independent part (i.e., the special prosecutor) to review a local prosecuting attorney’s files, it provides transparency for the process and deters errant prosecutorial conduct. Appointments of special prosecutors arise in these ways: requests by prosecutors, court order, and executive supersede.

*Id.* (citations omitted).

63. Aggravating circumstances in support of sentence of death include when

\[\text{[t]}\]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: . . . aggravated child abuse; abuse of
public perception of criminal law mostly views the case from a victim-centered perspective. Often times when charges are not filed in a case, the public’s objection to the decision highlights a perceived indifference of the prosecutor toward the victim. Despite the public’s opinion, for the prosecutor, most of the analysis of a criminal case is in determining whether the evidence is sufficient to prove guilt beyond a reasonable doubt. The characteristics of the victim may largely be a benign fact and not central to the ultimate decision. However, on the other hand, as every case must be viewed as a whole, considering the totality of all its circumstances, it is never quite so easy to erase the uniqueness of the victim and his humanity in the case. In the instance of hard cases and challenging charging decisions, sometimes the tipping point for the prosecutor to charge the case is to vindicate the victim because what was done to the victim was so egregious. In other instances, the victim, although legally innocent, might be perceived as bad or unworthy, or that he deserved it or in some way contributed to his own harm. Race plays into these perceptions.64 “Bias and prejudice is such an elusive condition of the mind that it is most difficult, if not impossible to always recognize its existence . . . .”65 The impact of such factors surrounding the victim, consciously or unconsciously, might make a prosecutor lean away from charging a hard case if it is perceived that the jury might identify more with the defendant’s actions and blame the victim for his own demise, thus undermining a successful conviction.66

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64. Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465, 1468-69 (2002) (“The racialized adversarial ideology of prosecutors and defenders comes at a cost to defendant, victims, and communities of color, though it is presumed to be crucial to the guarantee of criminal justice. The cost weighs upon their individual dignity and their collective civic standing.”).


66. Racial bias is often unconscious or indirect. This type of prejudice can be coded into another, more neutral and palatable category—convictability. See Harvard Law Review Association, *Race and the Prosecutor’s Charging Decision*, 101 HARV. L. REV. 1520, 1546-47 (1988). Racial prejudice is “often unconscious.” Id.

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an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement.

**FLA. STAT.** § 921.141(5)(d) (2010). Other aggravating circumstances are when “the victim of the capital felony was a person less than 12 years of age” and when “the victim of the capital felony was particularly vulnerable due to advanced age or disability.” § 921.141(5)(l), (m). Furthermore, punishment is heightened when “the commission of [a] felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age of the victim[.]” **FLA. STAT.** § 775.085 (2010).

64. Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465, 1468-69 (2002) (“The racialized adversarial ideology of prosecutors and defenders comes at a cost to defendant, victims, and communities of color, though it is presumed to be crucial to the guarantee of criminal justice. The cost weighs upon their individual dignity and their collective civic standing.”).


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This type of thought process, although routine for prosecutors, echoes back to the "collective wound" experienced by the Black community and explains why the healing of the wound is so tentative. Due to the inherent subjectivity of the exercise of prosecutorial discretion, one could speculate that each of the separate prosecutors assigned to the Trayvon Martin case evaluated the victim factor\textsuperscript{67} differently in reaching opposite conclusions on whether to file murder charges.

As the identity of the victim is often immaterial to the charge, the public's focus in this case was on the victim's race. Race had a striking impact on the analysis. The outrage surrounding Trayvon's death was not simply because it was an example of another senseless killing of a young person; instead, the anger was focused on the perceived injustice and lack of apparent consequences for killing a young Black (male) teen. This narrative projected a suggestion of racial bias as the unspoken motivation for the prosecutor's initial leniency. This assumption is not wholly without merit as empirical studies have confirmed that race routinely impacts charging decisions.

Studies that have examined the prosecutor's initial assessment decision have found a variety of manifestations of racial discrimination. One study, performed by Myers and Hagan, revealed prosecutorial discrimination based on the race of the victim. This study examined defendants charged with felonies in Marion County (Indianapolis), Indiana whose cases were disposed of between January 1974 and June 1976. In looking at prosecutors' decisions to prosecute fully rather than to reject a case and decisions to try a case rather than to plea bargain, the authors found that the probability of full prosecution increased when the victims were white and other relevant factors were controlled for.\textsuperscript{68}

Other scholars have made similar empirical findings that prove the

unique potential of unconscious racism imperceptibly to affect prosecutorial decisionmaking justifies a standard more receptive to statistical evidence as proof of discriminatory motive in the context of racial selective prosecution.

\textit{Id.}

67. Although this Article focuses on the implied imagery that flows primarily from the victim's identity instead of from the criminal defendant, the analysis of the impact of the mental imagery involved is the same. Bernard E. Harcourt, \textit{Imagery and Adjudication in the Criminal Law: The Relationship between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions}, 61 BROOK. L. REV. 1165, 1173 (1995). "[D]ecisionmakers use conscious and unconscious interpretive constructs - such as mental imagery and the time-framing of fact patterns - to reach the result they want." \textit{Id.}

negative impact of the victim’s race on charging decisions.\textsuperscript{69} Knowing that a multitude of factors go into a prosecutor’s assessment of a case and his ultimate decision to charge, it is impossible to specifically know if the Sanford prosecutor was influenced by Trayvon’s race.\textsuperscript{70} Based on the empirical studies on this issue, race likely played some role. Nonetheless, the narrative of racial bias took hold in the protests surrounding the case, as a strong community reaction was surging and receiving zealous media coverage.

Based on the breath,\textsuperscript{71} intensity,\textsuperscript{72} and duration\textsuperscript{73} of the public outcry

\begin{itemize}
  \item \textsuperscript{70} Harvard Law Association, \textit{Race and the Prosecutor’s Charging Decision}, 101 HARV. L. REV. 1520, 1531 (1988) (“Despite the accuracy of statistical studies, a difficult issue arises in applying the statistical results from such general studies to infer discriminatory prosecution in a particular case.”).
  \item \textsuperscript{71} Every media outlet was covering the story. Some networks even hired expert witnesses to analyze pieces of the evidence. Task forces were formed to investigate the Stand Your Ground Law. The police chief of Sanford was forced to take a temporary leave of absence and was later fired. One of the initial officers on the case was subsequently fired, and it was further revealed that he requested to arrest Zimmerman the night of the killing on manslaughter charges. \textit{See} Brock Parker, \textit{Harvard Square Protest Mounted Over Trayvon Martin Shooting}, BOSTON GLOBE (Mar. 23, 2012), http://articles.boston.com/2012-03-23/yourtown/31230778_1_ large-protest-fatal-shooting-protest-organizers; Mark Harper, \textit{Stetson Students Stage Deland Rally for Trayvon Martin}, DAYTONA BEACH NEWS-J. (Mar. 31, 2012), http://www.newsjournalonline.com/news/local/west-volusia/2012/03/31/stetson-students-stage-deland-rally-for-trayvon-martin.html; Felicity Morse, \textit{I am Trayvon Martin: Protestors Hold Demonstration for Murdered 17-Year Old in London}, HUFFINGTON POST UK (Mar. 31, 2012), http://www.huffingtonpost.co.uk/2012/03/31/trayvon-martin-george-zimmerman-us-embassy_n_1393461.html; Jasbir Bawa, \textit{I Am Trayvon Martin Too: Fighting Against Racial Profiling of Communities of Color,} 21 JURIST 13 (2012) (Special Commencement 2012 Issue); Larry Copeland, \textit{Trayvon Martin Rally Draws Thousands in Call for Arrest}, USA TODAY (Mar. 23, 2012), http://wwwusatoday.com/news/nation/story/2012-03-22/trayvon-martin-rally/53717554/1.
  \item \textsuperscript{72} Segal, \textit{supra} note 10 (highlighting the intensity of the “I am Trayvon” movement); see CNN Wire Staff, \textit{supra} note 11; ESPN.COM, \textit{supra} note 11; see also Andy Campbell, \textit{George Zimmerman’s Old Cell Phone Number Given to Junior Guy in Orlando; Death Threats Begin}, HUFFINGTON POST (June 8, 2012), http://www.huffingtonpost.com/2012/06/08/zimmermans-cell-phone_n_1580435.html?utm_hp_ref=email_share (discussing how the man who now has George Zimmerman’s old cell phone number received 70 threatening calls between May 7 and May 16 since Zimmerman’s number was released to the public with the 911 tape); Jeff Weiner, \textit{Orlando police release Zimmerman lawyer’s call to report death threat}, ORLANDO SENTINEL (June 5, 2012), http://articles.orlandosentinel.com/2012-06-05/news/os-george-zimmerman-omara-death-threat-20120605_1_death-threat-police-dispatcher-shooting-death#.UcncyLP8KIE.email (discussing how Zimmerman’s attorney, Mark O’Mara, reported a “profanity laced death threat” made to his Orlando office in May).
  \item \textsuperscript{73} Richard Fausset, \textit{An Uneasy Calm Settles Over Sanford, Fla.}, L.A. TIMES (Apr. 12,
to the Trayvon Martin killing, and the lack of corresponding criminal charges, the atmosphere became increasingly tense. Beyond the existence of a basic legal violation, each case must also have sufficient political will supporting the decision to prosecute. For the Trayvon Martin killing, the will to charge was initially lacking. Yet, as the media attention continued to swarm the case, the politics arguably shifted, and maybe the legal analysis did as well. A re-evaluation of the converging interests in the case appeared imminent.

The special prosecutor’s re-evaluation of the Trayvon Martin killing can be explained through the lens of Derrick Bell’s interest convergence theory, and provides further context for why murder charges that were initially declined, were ultimately filed in this case. The late Professor Derrick Bell is famous for his writings on race and law, and is particularly well known for his view that racism is a constant incurable circumstance. Yet, even within a perpetual state of racism, Bell urged that substantive progress could be made if the interests of the minority and majority converge—referred to as “interest convergence theory.”

2012), http://articles.latimes.com/2012/apr/12/nation/la-na-trayvon-sanford-20120413 (“Many hope that with the arrest, the news vans and out-of-town activists will go away and let things return to normal. But many others, who suspect that latent racism has long skewed the local justice system, question whether the old normal is really worth going back to.”).


75. Bell, Interest-Convergence Dilemma, supra note 74; see also Mario L. Barnes, Reflection on a Dream World Race, Post-Race and the Question of Making it Over, 11 BERKELY J. AFR.-AM. L. & POL’Y 6, 9 (2009).

To the extent that Professor Bell long ago theorized how African Americans might manage the effects of discrimination in a world where racism is permanent, he appeared to be a committed “race man.” In a contemporary context, the phrase is used to connote that Bell also believes in the power and relevance, if not truth, of race.

Id.

In this case it was the converging of the minority, majority, and government's interests that can be pinpointed as the catalyst for the change in the charging decision. The facts did not change, but the perception of the facts changed. Or even the motivation to view the same facts differently changed. It was not just in the best interest of the upset and protesting minority group, that is African Americans saying “I can’t believe this is happening again in 2012 even with a Black President,” but it was more importantly in the interest of the majority group to promote the appearance of race-neutral impartiality, fairness, and justice in the exercise of prosecutorial discretion. Further, it was the collective fear of potential riots that also compelled the special prosecutor to do something to counter the growing view that law enforcement’s inaction or its perceived racially biased application of justice was acceptable. Filing murder charges was a clear sign by the special prosecutor that the killing of Trayvon Martin was not acceptable. The charges confirmed for the public that the killing was allegedly criminal, which is how many already viewed it. The decision to charge murder, as opposed to manslaughter, did much to calm the flames of discontent. Murder was the most serious charge available and further projected that the prosecution was serious about its allegation. There were no riots. Protests were cancelled and the public’s outcry quieted.

Soon after the murder charge was filed and the accused was seen on television being taken into custody, much of the media coverage dissipated. As the case now moves through the criminal justice system, media reports are only occasionally received. It is too early to tell if the special prosecutor was correct in her re-assessment of the case; the jury will ultimately decide, or the judge at the pre-trial immunity hearing. However, this discussion spotlights the relevant factors and the broader context that may have led each prosecutor to reach their independent conclusions, and why murder charges were ultimately filed for the killing of Trayvon Martin.

Some may contend that Trayvon’s race was not a factor in the

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77. "The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification . . . and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter." FLA. STAT. § 782.07 (2012). Murder is “[t]he unlawful killing of a human being; 1. [w]hen perpetrated from a premeditated design to effect the death of the person killed or any human being; or 2. [w]hen committed by a person engaged in the perpetration of, or in the attempt to perpetrate [any felony].” Id. § 782.04. Murder is also “[t]he unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.” Id.

78. FLA. STAT. § 776.032.
exercise of prosecutorial discretion and that Bell’s interest convergence theory is inapplicable to explain the changed decision to file charges against Zimmerman. Instead, the change in charges could be explained as a simple scenario of further criminal investigation and re-assessment of the charging decision which is standard in homicide cases. Particularly in a moment when America is on the verge of post-racialism, it might be suggested that a colorblind approach should be applied to the analysis of this case. One could further recommend, as the law is colorblind so should its enforcement be equally colorblind. Thus discussions that include race and law are not beneficial to achieving the ideals of lady justice, blindfolded as she is. Still, that is the danger of colorblind ideology, as it asks one to pretend blindness and ignore certain uncomfortable circumstances instead of considering all of the circumstances, even if they are painful and uncomfortable. As Professor Ian Lopez describes the argument often posed against addressing issues of race and law: "[i]n the face of a charge that colorblindness has been violated by the mention of race, post-racialism retorts that race is not a factor at all." Notwithstanding the audacity of hope toward a post-racialistic future, this critical look at the Trayvon Martin killing explains why race was a factor in the reaction to the killing and the government’s response, and counter-response to it. It does not ignore the relevant race-neutral factors involved just as it cannot be blind to the racialized factors that color prosecutorial decision making from the assessment of the case’s immediate facts to the prediction of the jurors’ perception, both legal and cultural, of those facts.

The exploration of the Trayvon Martin killing goes beyond one victim and one criminal accusation, and even the prosecutors’ assessment of the case facts. A truly critical analysis of the Trayvon Martin killing must look into the law and public policy surrounding the Stand Your Ground Law, which further makes this case infamous.

III. The Understanding: The Necessary First Step Toward Reform

It is hard to forget the words of Trayvon’s mother during an interview on NBC’s The Today Show before any criminal charges were filed. She said, speaking of George Zimmerman, the man who shot her son: “a person should apologize . . . for what they’ve done.” Nothing

80. Lopez, supra note 19, at 822.
81. During an interview on the Today Show, Sabrina Fulton, Trayvon Martin’s mother,
is more touching than a mother asking for basic humanity for her tragically killed son. Her plea for an apology from the man who caused her son’s death is a concept and an emotion that all mothers, both White and Black can empathize, and it is part of the necessary lesson from the Trayvon Martin killing. “I am Trayvon,” which became a slogan for protestors of this case, symbolized the notion that no one should have to die senselessly—further emphasizing Trayvon’s humanity. Despite all the discussion about the politics surrounding the

stated, “[O]ne of the things that I still believe in is a person should apologize when they are actually remorseful for what they’ve done.” Scott Stamp, Trayvon Martin’s Mom: The Zimmermans are Hurting, But We Lost Our Son, TODAY MSNBC (Apr. 12, 2012), http://today.msnbc.msn.com/id/47027524/ns/today-today-news/t/trayvon-martins-mom-zimmermans-are-hurting-we-lost-our-son/#.UChKqmzsUw. See Beauchamp, supra note 33 (comparing Trayvon’s mother to Emmett Till’s mother). During an exclusive interview on Fox News’ Hannity, George Zimmerman and Hannity discussed Zimmerman’s sentiment about the killing of Trayvon Martin:

HANNITY: Is there anything you regret? Do you regret getting out of the car to follow Trayvon that night?
ZIMMERMAN: No, sir.
HANNITY: Do you regret that you had a gun that night?
ZIMMERMAN: No, sir.
HANNITY: Do you feel you wouldn’t be here for this interview if you didn’t have that gun?
ZIMMERMAN: No, sir.
HANNITY: You feel you would not be here?
ZIMMERMAN: I feel it was all God’s plan and for me to second guess it or judge it—
HANNITY: Is there anything you might do differently in retrospect now that the time has passed a little bit?
ZIMMERMAN: No, sir.

HANNITY: The parents of Trayvon Martin, they lost their son. This is your first interview. What would you like to tell them?
ZIMMERMAN: I would tell them that, again, I’m sorry. I don’t have -- my wife and I don’t have any children. I have nephews that I love more than life. I love them more than myself. And I know when they were born, it was a different, unique bond and love that I have with them. And I love my children, even though they aren’t born yet. And I am sorry that they buried their child. I can’t imagine what it must feel like, and I pray for them daily.


It is undisputed that George Zimmerman’s gunshot was the cause of Trayvon’s death. The only issue remaining for any pending or future legal case(s) is whether there is criminal or civil liability for the killing. Thus, irrespective of whether the killing was accidental, intentional, negligent, reckless, or an act of self-defense, an acknowledgement of regret for the killing of her son was what Trayvon’s mother was seeking. Supra text accompanying note 81.
killing, one should not forget the purely human element of this case. Trayvon was someone’s son, and his mother and father grieve his death unlike anyone else can. Many people, many of whom were not directly connected to the family or the case, symbolically mourned the loss of his life in solidarity with their pain and tragedy.

The slogan "I am Trayvon" subliminally begged another question: Are Floridians too quick to use deadly force? In understanding the Trayvon Martin killing, it is important to recognize the human loss that occurred and its connection to the larger discourse about race, politics, prosecutorial discretion, and the empirical research on the (in)equity in the criminal justice system generally. However, a genuine critique of this killing must also analyze the Stand Your Ground Law specifically and consider whether the law as it applies now is appropriate and adequate to keep Floridians safe from future tragedies.  

The current self-defense laws allow individuals to liberally use their handguns against other human beings when the gun owner perceives a life-threatening encounter. In order for a murder defendant in Florida to successfully argue self-defense, he must establish that he


84. Patrick Johnson, Is Self-Defense Law Vigilante Justice, CHRISTIAN SCI. MONITOR, Feb. 24, 2006 ("The ‘Stand Your Ground’ laws would allow people to defend themselves with deadly force even in public places when they perceive a life-threatening situation for themselves or others, and they would not be held accountable in criminal or civil court even if bystanders are injured.") (emphasis added).

85. Homicide is the killing of a human being by another human being. All homicides are not crimes. It must be an unlawful killing in order to be a crime. The crime of murder is the unexcused and unjustified killing of a human being with malice aforethought. Self-defense is a justification defense that would negate the criminal liability for the killing and instead classify it as a lawful exercise of deadly force. CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW CASES AND MATERIALS 300-01 (2d. ed. 2009).

acted with objective reasonableness in his belief that the threat he faced was first, reasonable to perceive as a threat, and second, was sufficiently life threatening in order to justify his use of deadly force in response. Remember, the shooter need not be correct in his perception of danger and deadly threat, but still must be deemed objectively reasonable in order to satisfy the requirements of self-defense law.\(^87\) This law comes with a high cost, as sometimes the gun owner is wrong in his or her assessment of the existence of a threat and/or its seriousness, and a victim’s life is lost needlessly. Given that the human cost of this law is so high, the law carries with it a significant responsibility that the killings it immunizes are killings that are truly legally justified and consistent with the tenants of self-defense law, not merely culturally justified by racialized or biased notions of “fear-of-other” or “Black-as-criminal.”\(^88\)

Professor Cynthia Lee writes extensively on race and self-defense and summarized the following empirical research in her article *Race and Self-Defense: Toward A Normative Conception of Reasonableness*:

*The Black-as-criminal stereotype may cause people to perceive ambiguously hostile acts (i.e., acts that can be perceived as either violent or nonviolent) as violent when a Black person engages in these acts and non-violent when a non-Black person engages in the same acts.* Birt Duncan tested this hypothesis on 104 White undergraduate students at the University of California at Irvine. Subjects observed two people involved in a heated argument which resulted in one shoving the other. Just after the shove, the subjects were asked to rate the behavior of the person who shoved the other person. The subjects were randomly assigned to one of four experimental conditions: Black shover/White victim, White shover/Black victim, Black shover/Black victim, and White shover/White victim.

Duncan found that when the person shoving was a Black person and the person being shoved was White, 75% of the subjects thought the shove constituted “violent” behavior, while only 6% characterized the shove as “playing around.” When

\(^{87}\) “The conduct of a person acting in self-defense is measured by an objective standard, but the standard must be applied to the facts and circumstances as they appeared at the time of the altercation to the one acting in self-defense. Shreiteh v. State, 987 So. 2d 761 (2008) (citing Price v. Gray’s Guard Serv., Inc., 298 So. 2d 461, 464 (Fla. 1st DCA 1974)).

subjects observed the same events with a White person as the shover and a Black person as the victim, only 17% characterized the White person's shove as "violent," while 42% described the White person's shove as "playing around." Duncan concluded that the threshold for labeling an act as violent was significantly lower when subjects viewed a Black person committing the act than when subjects viewed a White person committing the same act.

In 1980, H. Andrew Sagar and Janet Ward Schofield conducted a similar study, testing whether Black as well as White children perceive ambiguously aggressive behavior by Blacks as more violent or aggressive than similar behavior by Whites. Sagar and Schofield, expanding on Duncan's study which only tested reactions to ambiguously hostile behavior, also examined whether clearly non-aggressive behavior by Blacks also triggered the Black-as-violent stereotype. They found that both Black and White children tended to rate relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites.89

One's individual perceptions and motivations are key legal issues in self-defense cases. Thus, as culture might have a benign or mere political meaning generally, culture possesses legal significance in self-defense cases. Through the investigation of other self-defense cases, scholars have found that cultural perceptions may compromise an individual's view of a threat and its corresponding level of dangerousness.90 Misperceptions in the context of self-defense cases can mean the difference between life and death for the victim. The perception of the behavior of Black individuals as more threatening than the same behavior of whites distorts the reasonableness standard in self-defense law and could lead a jury to accept as reasonably justified a killing that is actually based on racial stereotypes instead of an actual deadly threat.91 Thus, based on this empirical research, even one's perception of a threat involving a Black victim can be unconsciously impacted by race and trigger an over-reaction to an actually non-threatening, non-deadly encounter.

Knowing the vulnerabilities of self-defense law in its practical application, Florida must be particularly meticulous in reviewing and/or subsequently amending the Stand Your Ground Law to make sure that it does not inappropriately encourage negligent or reckless use of firearms

89. Lee, supra note 3, at 404-06 (citations omitted).
90. Id. at 414-23 (discussing the Bernard Goetz case and how racial stereotyping may influence one's perception of the threat).
91. Id. at 423 (pointing out that jurors may have a hard time discerning the difference between beliefs that are reasonable and conduct that is reasonable).
under the guise of self-defense. Further, Florida must confront the reality that the Stand Your Ground Law, as currently written and applied, may give a suspected murderer immunity for conduct that may be a thinly masked excuse for taking the law into one's own hands as an unjustified vigilante, and/or an inappropriate shield for a truly racially biased intentional attack. Encouraging vigilante justice (or hate crimes) and cloaking them with immunity would is contra to the fundamental goals of criminal law generally, as well as inconsistent with promoting a safe and ordered society. Providing immunity from prosecution and immunity from subsequent civil liability, as the Florida statute currently does, goes beyond what any other suspected criminal receives in the American justice system. Yet, the legal or policy rationale for singling out one type of crime and one criminal defense for the special benefit of immunity is not explained by the legislature. Further, it is not clear from the legislative history that there was a stated need or prudent reason for such a drastic departure in Florida's self-defense law. Granting statutory immunity from prosecution for violent conduct, and for which the prosecutor may suspect as criminal, is unprecedented.

92. The legislative history of "Stand Your Ground" does not indicate the intent behind the passage of the law, rather the Senate staff analysis specifically states, "This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate." See STAFF OF S. CRIM. JUSTICE COMM., 109th CONG., S. STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT ON S.B. 436 (Fla. Comm. Print Feb. 10, 2005); see also STAFF OF S. JUD. COMM., 109th CONG., S. STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT ON S.B. 436 (Fla. Comm. Print Feb. 25, 2005). Florida fashioned its Stand Your Ground Law after Colorado's Make My Day Law and the Florida courts have used Colorado case law to interpret the procedural mechanics of the Florida statute's immunity from prosecution provision. See Dennis v. State, 51 So. 3d 456, 459 (Fla. 2010). Compare WILLIAM WILBANKS, THE MAKE MY DAY LAW (1990) (analyzing the impacts of Colorado's "Make My Day Law" which gave citizens immunity for using deadly force in their homes), with Alfredo Garcia, 'The Make My Day Law:' Colorado's Experiment in Home Protection, 24 PROSECUTOR 7 (1990) (book review) (reviewing Wilbanks' book and the revelation that Colorado's Make My Day Law was initiated based on the public's flawed understanding of self-defense law generally). See generally People v. Brown, 6 Cal. App. 4th 1489 (1992); Cal. Penal Code § 198.5 (West 2012) ("Any person using force... within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household... "). California's defense of habitation statute gives a homeowner a presumption of reasonableness when exercising deadly force against an intruder in his or her home, but does not provide immunity from prosecution. In an effort to prevent Colorado from enacting a statute similar to California's defense of habitation, Coloradans ended up with something worse. Garcia, supra, at 8.

93. Based on the statistics of violent crimes, immunity from prosecution seems unnecessary and overbroad in order to ensure legitimate access to one's right to self-defense. See JUAN PEREAA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 1104 (1st ed. 2007).

Most crimes occur between an offender and a victim of the same race; more than 80 percent of all murders are intraracial. For example, from 1976 to 1999,
Without the necessary policy rationale to support such a severe modification to criminal litigation, the 2005 amendment creates a bad law. The courts’ application of the Stand Your Ground Law since 2005 further highlights both the procedural imbalance it creates and the inability for the prosecutor and the jury to genuinely investigate and punish crimes that arise in a potential self-defense context/ scenario. 94

On the one hand, an argument can be made that law abiding citizens who legitimately possess a concealed firearm can use that weapon in justified self-defense; thus, because of that right, they should not be subsequently subjected to the pains, problems, expenses, harassment, or aggravation of the criminal justice system, a criminal prosecution, or the cost of a civil suit. In isolation, that argument might seem persuasive, but this law and its ramifications must be viewed in its larger context. Notably, this same argument of inconvenience and hassle can be made for every law-abiding citizen suspected of a crime for which he or she

86 percent of white murder victims and 94 percent of black victims were murdered by someone of the same race. In addition, most victims of violent crimes are victimized by someone they know rather than a stranger. Nevertheless, fear of crime in the United States often focuses on stranger crime, and particularly on interracial stranger crime. What role might stereotypes play in this divergence of fear from reality?

Id. Under the Stand Your Ground immunity provision a judge can grant immunity even in cases where material issues of fact regarding the criminal charge still remain, although a jury would normally decide such matters. See State v. Gallo, 76 So. 3d 407, 409 (Fla. Dist. Ct. App. 2011) (“The legislature’s enactment of section 776.032 placed the burden of weighing the evidence in ‘Stand Your Ground’ cases squarely upon the trial judge’s shoulders. In this case, that burden required the trial judge to make order out of the chaos that occurred on one fateful night.”). In Dennis v. State, the Florida Supreme Court stated:

At a “stand your ground hearing” a Florida judge can grant immunity even where there is a material issue of fact. If the State specifically alleges that the material facts are in dispute or that the facts refute the defendant’s claim, the motion to dismiss must be denied. Section 776.032 does not limit its grant of immunity to cases where the material facts are undisputed. Thus, treating motions to dismiss pursuant to section 776.032 in the same manner as rule 3.190(c)(4) motions would not provide criminal defendants the opportunity to establish immunity and avoid trial that was contemplated by the Legislature.

Dennis, 51 So. 3d at 456-58; see Peterson v. State, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008) (holding that “when immunity under this law is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes. The court may not deny a motion simply because factual disputes exist.”); see also State v. Yaqubie, 51 So. 3d 474, 476 (Fla. Dist. Ct. App. 2010) (adopting the same standard as the court in Peterson).

94. Dennis, 51 So. 3d at 456; see Peterson, 983 So. 2d at 29 (holding that “when immunity under this law is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes. The court may not deny a motion simply because factual disputes exist.”).
also has a bona fide defense. Yet, no legislature has found it appropriate to single out other criminal defenses for immunity protection. Moreover, it is curious why an immunity statute would be fashioned to apply to the most serious criminal allegation in the penal code—murder.

One may be thinking that if the accused criminal defendant is truly innocent, in that he actually was justified in his use of deadly force, why shouldn't he receive the benefit or privilege of immunity from prosecution. Yet, one must further consider that every criminal defendant can make the same argument about his or her relevant defense(s). From a criminal defense perspective, all defendants could argue that their respective defense case will likely overcome the prosecution's evidence of guilt. Thus, following the self-defense model of immunity, it is unfair to subject any defendant with a colorable defense to criminal prosecution at all. In every case, the adversarial position from the defense perspective is that the prosecution's evidence is weak and the defense is solid, and vice versa from the prosecution's perspective. That is the purpose of a trial: to investigate the government's proof, testing it against the high standard of proof beyond a reasonable doubt, and allowing the jury to decide. If granting individual prosecutorial immunity is a sound policy solution to protect innocent citizens from being charged with crimes, why would the luxury of immunity from prosecution be limited only to criminal defendants asserting self-defense and not other defenses as well?

Compare the treatment of self-defense in a murder case, to the defense of consent in a rape or sexual assault case. Sexual assault is a very serious charge. It is safe to say that even the mere allegation of sexual assault carries a negative stigma. A sexual assault defendant, in the same position of having a bona fide consent defense to the charge of sexual assault, is not provided immunity based on the legitimacy of his defense; he or she is not provided a pre-trial hearing to present to the trial judge the strength of his consent defense. Why not? If the jury believes the alleged sexual encounter was consensual, it would result in a complete defense to the criminal charge and mandate an acquittal. Why isn't statutory immunity from prosecution given to consensual sexual encounters like it is for justified homicides? One good reason is because the defense of consent much like the defense of self-defense is

95. Andrea Rose, *Forever Accused*, BBC NEWS, (Feb. 27, 2009), http://news.bbc.co.uk/2/hi/uk_news/magazine/7265307.stm ("[B]etween 3% and 9% of all reports of rape are found to be false. Yet the lives of those men accused are often devastated. Some even commit suicide, so terrible is the stigma of being charged with sexual assault – even if subsequently cleared"); Judge H. Lee Sarokin, *Which Is the Greater Stigma – Being Identified as a Rape Victim or Being Identified as a Rapist*, HUFFINGTON POST MEDIA (July 11, 2011), http://www.huffingtonpost.com/judge-h-lee-sarokin/which-is-the-greater-stig_b_893628.html (discussing the stigma of being accused of rape even if you are innocent).
extremely fact sensitive and is most appropriate for a jury to weigh these facts in full deliberation at trial. Thus, correctly, the law requires the sexual assault defendant, consistent with all other criminal defendants, to present his or her defense to the jury alongside the prosecution's evidence of guilt and allow the jury to evaluate its merits. Why would an alleged murderer have preferential treatment over an alleged rapist? The same would be true for an alleged thief or alleged burglar who had a bona fide defense such as a legitimate purchase of, or right to the alleged stolen property, or valid permission to enter the allegedly burgled premises. The statute does not carve out special immunity from prosecution for alleged thieves and burglars. This discussion could go on and on with each crime in the penal code. The point is that many criminal defendants have various legal defenses to each crime charged, but none of them are given the luxury of statutory immunity from prosecution. None of them are spared the obligation of presenting said defenses to the jury. Further, even if acquitted by a criminal jury, none of them are shielded from the separate civil tort liability that might nonetheless flow from their non-criminal conduct. However, an alleged murderer claiming he acted in self-defense in Florida is afforded the unique protections of immunity from criminal prosecution and shielded from subsequent civil suit. The unequal treatment does not seem justified.

The immunity from prosecution clause is additionally problematic because a judge administers the immunity, instead of a prosecutor or a jury. The prosecutor's office is the one central place where all criminal allegations must go. Although still an imperfect system due to unconscious bias, more consistency regarding the enforcement of the law regarding both the justified and unjustified uses of force can be established at the charging level by the prosecutor who sees every case

96. Consider even a husband alleged of raping his wife would not be given an early opportunity to present his consent defense to the judge or get an early dismissal of the charges, but instead could only be acquitted by a jury on full review of the case evidence and belief that his defense is legitimate. Consent is a defense to sexual battery in Florida. Florida courts have adopted the same standard in evaluating a defense of consent.

Section 794.011(1)(h) of the new statute defines consent as the "intelligent, knowing and voluntary consent and shall not be construed to include coerced submission." Thus we hold that here, too, "consent" is a relative term to be viewed under the circumstances of each case, but by the standards established by the new statute, rather than the old, and this, too, is essentially a question for the jury.

Hufham v. State, 400 So. 2d 133, 135 (Fla. 5th DCA 1981).


in the jurisdiction, than by a trial judge who sees only a random sprinkling of cases in his or her courtroom. The immunity order by a judge essentially trumps the prosecutor’s charging decision without full due process or juror input, even though the prosecution has already established sufficient probable cause to support the charge moving forward to jury trial. Additionally, immunity from prosecution is an unnecessary safety valve because it is highly unlikely that a prosecutor will charge a case in which the self-defense facts are overwhelming. Remember, when deciding to charge, each prosecutor seriously evaluates the likelihood of success at trial, and cases with strong self-defense facts are highly unlikely to win at trial. Accordingly, such cases are much less likely to ever be charged in the first place. The need for the expansive protection of immunity from prosecution has no basis as a practical matter, and it is theoretically inconsistent with the administration of criminal justice.

The benefit of the law is minimal, but its burden is high. The immunity provision gives Floridians a false sense that they have a right to kill—a license to behave on the margins of criminal conduct because such actions, if classified as self-defense, are immune from criminal prosecution and shielded from civil liability. This understanding is further exacerbated once theories of cultural racism and stereotyping are factored into the practical application of self-defense theory. In short, the Stand Your Ground Law may in fact communicate to Floridians it is more acceptable to kill minorities, Black-as-criminal-types, because such actions will ultimately be viewed as reasonable and justified, and therefore are immune from criminal and civil liability. This is bad

99. Essentially the immunity provision only kicks in where a prosecutor has “overcharged” a case and misinterpreted or underestimated the weight of the accused exculpatory evidence.

100. FLA. R. CRIM. P. 3.133(b) (requiring probable cause determinations at a preliminary hearing). See generally FLA. R. CRIM. P. 3.140 (outlining rules for charges by indictment or information).

101. Alfredo Garcia, The Make My Day Law: Colorado’s Experiment in Home Protection, 24 PROSECUTOR 7, 9 (1990) (summarizing in review of Willbanks’s book that thoroughly analyzes Colorado’s Make My Day Law that one of the problems with the law is that “it encourages reactive (i.e., shoot first, ask questions later) rather than a reflective (i.e., ask questions or reflect before shooting) use of deadly force”); Patrick Johnson, Is Self-Defense Law Vigilante Justice, CHRISTIAN SCI. MONITOR, Feb. 24, 2006 (critiquing the law and cautioning that Florida’s Stand Your Ground Law encourages Floridians “when in doubt, go ahead and shoot and kill the other person . . . [and] [i]t’s anathema to peace and calm in our communities.”); see generally WILLIAM WILLBANKS, THE MAKE MY DAY LAW: COLORADO’S EXPERIMENT IN HOME PROTECTION (1990).

102. In the preamble to the Fla. Stat. § 776.036 the legislature states the following in pertinent part: “[t]he legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in self-defense of themselves and others.” Ch. 2005-27, at 200, Laws of
public policy. Not just for the obvious reason that it undermines the humanity for the victims that Trayvon's mother was desperately seeking, but further it is poor policy because it robs each victim, each victim's family, and the larger community from the opportunity for closure and justice. Every killing that is prosecuted does not yield a guilty verdict. But in every criminal trial, the community has an opportunity, through its representative empaneled jurors, to weigh in on the facts of the case where criminal conduct is charged. The normal immunity that flows in criminal law is given only by a jury of one's peers through a not guilty verdict, which, via the double jeopardy clause in the U.S. Constitution, permanently shields the accused from criminal liability. It is an aberration that a lone judge can give a more powerful shield, immunity from prosecution and civil suit, and simultaneously strip the jury of its opportunity to weigh the facts of the case. Further the judge's order of immunity robs the victim's family

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1. AMY D. RONNER, LAW, LITERATURE AND THERAPEUTIC JURISPRUDENCE 21 (2010) ("Therapeutic jurisprudence scholars agree that when individuals participate in a judicial proceeding, what influences them most is not the result, but their assessment of the fairness of the process itself."). There are three core components of a fair, therapeutic experience, ones which I and Professor Bruce Winick call "the three Vs": a sense of voice, validation, and voluntary participation. The therapeutic process thus begins with individuals experiencing a sense of "voice" or opportunity to tell their story to a decision-maker. A by-product of voice is validation, which occurs when participants in the process feel that they have been genuinely listened to, heard, and taken seriously. Consequently, when litigants emerge from a proceeding with a sense of voice and validation, they tend to be more satisfied and accepting of the outcome. Id. at 23. The immunity from prosecution provision in the Stand Your Ground Law is anti-therapeutic and prevents participation of important constituents, the victim and the jury, which in turn makes it much more difficult for the community to accept the outcome of such cases as fair or just.

4. Except in the instances where a criminal defendant admits to the crime by pleading guilty, or the government or a judge dismisses the charge based on the lack of probable cause or prima facie evidence of a crime, criminal charges are resolved by juries that make the factual determination of whether the crime charged is supported by proof beyond a reasonable doubt to the exclusion of all defenses. FLA. R. CRIM. P. 3.190; see generally In re Winship, 397 U.S. 358 (1970).

5. U.S. CONST. amend. V; see generally Blockburger v. United States, 284 U.S 299 (1932) (discussing the standard used to determine when double jeopardy applies).

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105. U.S. CONST. amend. V; see generally Blockburger v. United States, 284 U.S 299 (1932) (discussing the standard used to determine when double jeopardy applies).

106. In state courts, where most self-defense criminal cases are litigated, judges are extremely vulnerable to public opinion and the politics of the day due to their need to be re-elected. Considering the political pressure that judges are under further exacerbates the problems with the immunity provision of the Stand Your Ground Law, and makes judges ill-suited to determine questions of fact in these cases.

107. Dennis, 51 So. 3d at 464 (approving the reasoning of Peterson on immunity hearings); Peterson v. State, 983 So. 2d 27, 29 (2008) ("We now hold that when immunity under this law is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes. The court may not deny the motion simply because factual
of any opportunity to pursue civil torts that may naturally flow from the killing—providing more protection than any acquitted murderer receives.\footnote{108}

From a substantive criminal law perspective, the community involvement is significant and required.\footnote{109} Professor Henry Hart famously outlined: “What distinguishes a crime from a civil sanction, and all that distinguishes it, it is ventured, is the \textit{judgment of community condemnation} which accompanies and justifies its imposition.” It is the community’s condemnation that makes conduct criminal and a conviction valid, not simply the legislative enactment of the law.\footnote{111} Professor Gardner further echoed the necessity that a criminal conviction and its punishment involve the community’s voice: “It is the expression of the community’s hatred, fear, or contempt for the convict which alone characterizes physical hardship as \textit{criminal} punishment.”\footnote{112} Therefore, the reverse inference should be equally meaningful. The immunization of a criminally accused should not occur without the community’s approval or endorsement of the conduct, which accompanies and justifies the imposition of a verdict of acquittal.

\footnotesize{\textit{FLA. CONST.} art. I, § 16.}

\footnote{108} The Florida Constitution addresses victim’s rights:

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

(b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

\footnote{109} Liotta v. State, 939 So. 2d 333, 334 (2006) (“The question of self-defense is one of fact, and is one for the jury to decide where the facts are disputed.”) (citing Dias v. State, 812 So. 2d 487 (Fla. 4th DCA 2002)).

\footnote{110} Henry M. Hart, Jr., \textit{The Aims of the Criminal Law}, 23 \textit{LAW \& CONTEMP. PROBS.} 401, 404 (1958) (emphasis added).

\footnote{111} \textit{Id.}

The significant legal distinction between receiving statutory immunity by a judge and being acquitted by a jury should not be overlooked in the analysis. However, the Stand Your Ground Law prevents the community’s vote and implants a judicial decree in place of the jury’s verdict. From both a theoretical and a practical standpoint, the current version of Florida’s Stand Your Ground Law creates bad policy.

The Florida legislature should amend its law to remove the immunity clause from the statute. Even without the immunity clause, a law-abiding citizen faced with a bona fide threat can defend oneself as well as defend others with proportionate and even deadly force. The current self-defense law adequately allows this, and does not require one to retreat first to avoid the encounter. Before the 2005 amendment and the enactment of the Stand Your Ground Law, killing in self-defense was already legally justified. The Stand Your Ground Law did two main things: it eliminated one’s duty to retreat even in circumstances where the threat occurs outside one’s home or car, thus allowing one to stand and defend one’s self anywhere one has a lawful right to be, and it provided immunity from criminal prosecution and protection from civil suit for acts committed in justified self-defense. However, it is the immunity clause that distorts the law and prevents prosecutors and jurors from legitimately evaluating cases that fall outside the legal bounds of self-defense. The mechanism of the immunity clause creates more problems than it solves and does not adequately protect Floridians from vigilantes or the reckless and negligent use of firearms. The immunity clause, as a practical matter, allows, and maybe even encourages, an overzealous use of force and shields the actor from the normal inquiries that all suspected criminal conduct undergoes—a jury trial. In order to keep Floridians safer and avoid future tragedies, it is

113. A judge’s order of immunity prevents the case from going forward and takes the case away from the jury entirely—based on a pre-trial hearing only on the defense issues; whereas, a jury’s verdict of acquittal is predicated on a substantive review of the merits of the entire case considering all of the prosecution’s evidence and all of the defendant’s evidence.

114. The procedural aspects of the application of the Stand Your Ground Law are another point of contention and controversy. As interpreted by the Florida Supreme Court, a defendant claiming self-defense is entitled to a pre-trial hearing on self-defense, essentially forcing the government to prove its case twice; first to the judge on defendant’s pre-trial motion for immunity, and second to the jury on the full charges. Yet, the case is only eligible for a valid conviction during the second presentation to the jury. As a practical matter, this process expends an extraordinary amount of resources and appears to give unnecessary procedural deference to a select group of defendants. See generally Dennis v. State, 51 So. 3d 456 (2010); Peterson v. State, 983 So. 2d 27 (2008).

115. FLA. STAT. § 776.013(3).

116. FLA. STAT. § 776.032.

better public policy to deny civilian citizens immunity from prosecution for any crime. All Floridians’ conduct, when it crosses the bounds of legality, should be equally subjected to criminal investigation, criminal prosecution, and a jury’s deliberation—both criminal and civil.

**CONCLUSION**

The beginning of this Article inquired of its reader to consider what the Trayvon Martin killing was about: race, self-defense, vigilante justice, prosecutorial discretion, or the Stand Your Ground Law. This case is an amalgamation of these issues and how race impacts each. This case is about the killing of an unarmed Black teen walking with candy and iced tea that did not make it home alive. Due to the broader context of this case, the facts are dense and charged, emotionally, culturally, and legally. It is so electric it may even lead to an amendment of Florida law.

This Article encouraged its reader to consider that the impact of race can vary for different people depending on whether or not one is negatively marked by race. Irrespective of one’s individual racial identity, race is uniquely embedded, consciously or unconsciously, in the legal analysis of criminal law. Race played a role in each major part of this case: the public’s outcry, the prosecutors’ discretion, and the self-defense law. Race is salient in the discussion of discretionary charging decisions. Race is salient in evaluating a jury’s reaction to a Black victim, and its assessment of the defendant’s credibility on the reasonableness of acting in self-defense against the Black aggressor/victim. Racial stereotypes are still part of American culture, and, by default, part of the American criminal justice system. Instead of being color-blind, an impossible exercise, the impact of race must be addressed head-on and become openly part of the legal critique. It must be discussed where necessary to amend laws that enable race, or the fear of race, to be a guise to harm the disfavored race. This is our task if we choose to accept it.

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118. Lee, supra note 3, at 402 ("In self-defense cases involving defendants or victims of color, race or, to be more precise, racial stereotypes may influence our assessment of whether the defendant’s use of force against the victim was reasonable."). Lee, supra note 68 ("The nation’s response to the shooting of Trayvon Martin reinforces the fact that even today, Blacks and Whites can experience and perceive the exact same events in vastly different ways."). See generally Krissah Thomapson & Jon Cohen, Poll Finds Sharp Racial Divides Over Martin Case, WASH. POST, Apr. 11, 2012, at A1.