

Summer 2014

## The Trayvon Martin Trial - Two Comments and an Observation, 47 J. Marshall L. Rev. 1371 (2014)

Richard Delgado

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### Recommended Citation

Richard Delgado, The Trayvon Martin Trial - Two Comments and an Observation, 47 J. Marshall L. Rev. 1371 (2014)

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# THE TRAYVON MARTIN TRIAL – TWO COMMENTS AND AN OBSERVATION

RICHARD DELGADO<sup>1</sup>

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## I. INTRODUCTION: DOCTRINAL AND CRITICAL ANALYSIS, BETTER TOGETHER THAN EITHER ALONE

When the jury in the Trayvon Martin trial returned its verdict of not guilty, most minority commentators and many liberals were deeply disappointed.<sup>2</sup> Many posited that had the places of the two central characters, George Zimmerman, the white-looking Hispanic neighborhood watch volunteer, and Trayvon, the black teenager who ended up dead, been reversed, the black teenager would have been convicted of the other's death.<sup>3</sup>

Others focused on Florida's stand-your-ground law, a beefed-up self-defense statute that places no duty on an attacked person to retreat if possible to avoid a dangerous confrontation.<sup>4</sup> Many

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<sup>1</sup> \*John J. Sparkman Chair of Law, University of Alabama School of Law. Thanks to Jean Stefancic for comments and suggestions.

<sup>2</sup> See Lizette Alvarez and Cara Buckley, *Zimmerman is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 13, 2013, available at <http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html> (noting the scene outside the courthouse after the not guilty verdict was returned and comments by disheartened NAACP personnel).

<sup>3</sup> See, e.g., Jon Cohen and Dan Balz, *Race Shapes Zimmerman Verdict Reaction*, WASH. POST, July 22, 2013, available at [http://articles.washingtonpost.com/2013-07-22/politics/40728194\\_1\\_george-zimmerman-trayvon-martin-whites](http://articles.washingtonpost.com/2013-07-22/politics/40728194_1_george-zimmerman-trayvon-martin-whites) (positing that the verdict was dictated by the races of Zimmerman and Martin).

<sup>4</sup> FLA. STAT. ANN. § 776.013(3) (2012). The statute enabled Zimmerman to assert that his shooting of the young Martin was in self-defense, since Martin was on top pummeling him at the time of the shooting and may have been reaching for Zimmerman's weapon. See Editorial, *No Justice for Trayvon Martin*, THE BALTIMORE SUN, July 15, 2013, [http://articles.baltimoresun.com/2013-07-15/news/bs-ed-trayvon-martin-20130715\\_1\\_trayvon-martin-george-zimmerman-own-defense](http://articles.baltimoresun.com/2013-07-15/news/bs-ed-trayvon-martin-20130715_1_trayvon-martin-george-zimmerman-own-defense) (discussing that

noted that these laws increase the chance that an innocent person of color will end up killed and his victimizer acquitted because the jury finds the minority person inherently menacing – the sort of person any of us might easily have shot in a situation like the one supposedly confronting Zimmerman.<sup>5</sup>

I contend that creative application of existing legal doctrine, informed by critical analysis, might have produced a different result in this case. Critical writers can easily overlook doctrinal avenues, focusing instead on the role of broad structural forces such as racial stereotypes in shaping perception and credibility.<sup>6</sup> Sometimes, however, the solution to a problem may lie in the imaginative application of a doctrinal tool found, not in a critical race theory reader, but a legal hornbook. Consider two ways this might have happened in the abovementioned trial.

*A. Charging a less serious offense coupled with felony murder.*

Consider, first, how the state might have secured a conviction if they had charged a lesser offense and proceeded from there. For example, Florida law recognizes several types of stalking, most of them misdemeanors but one a felony.<sup>7</sup> Once the police dispatcher ordered Zimmerman not to get out of his car, his subsequent behavior would seem to have amounted to the kind of hounding of a defenseless person that felony stalking requires – especially when one recalls that he seems to have lost sight of Trayvon for a time and searched until he found him, upon which he resumed confronting the unarmed youth, who was on his way to visit relatives.<sup>8</sup>

Florida law includes felony stalking as one of the predicate crimes for felony murder.<sup>9</sup> Once the Martin incident escalated into a fatal exchange, it began to resemble one of those textbook cases

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this defense encourages vigilante action and induces simple confrontations to turn violent – even deadly).

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TULANE L. REV. 1739, 1749-69 (1993) (noting how racial preconceptions can shape the outcome of criminal trials); Cathy Young, *Young: Look Deeper at Conceptions About Race and Self Defense*, NEWSDAY, July 22, 2013, available at <http://www.newsday.com/opinion/columnists/cathy-young/young-look-deeper-at-conceptions-about-race-and-self-defense-1.5744782> (comparing other mixed-race cases with similar self-defense and stand-your-ground claims to the Trayvon Martin case for a brief analysis of the role race might have played in Trayvon's case).

<sup>7</sup> See FLA. STAT. ANN. § 784.048 (3) (West 2012) (describing several types of misdemeanor stalking and a more serious form that is a felony).

<sup>8</sup> See *Interactive Map: The Trayvon Martin Killing*, <http://www.hlnv.com/interactive/2013/06/17/zimmerman-trayvon-map-interactive> (exhibiting the location and timeline of events leading up to the Trayvon Martin shooting).

<sup>9</sup> FLA. STAT. ANN. § 782.04(2)(n) (West 2012).

of getaway car drivers who find themselves charged with felony murder when things turn sour inside the convenience store and the more active accomplice shoots the manager.<sup>10</sup>

The prosecution's mistake, then, may have lain in charging Zimmerman with murder alone and not thinking precisely about what he did from the perspective of the young victim.

Note that when a male of color is in the dock, the state often over-charges in order to coerce the defendant to plead guilty to a lesser charge, thereby escaping a potentially much longer sentence. By contrast, when the defendant is someone like Zimmerman, whom the authorities were apparently charging reluctantly rather than enthusiastically,<sup>11</sup> might they have been tempted to over-charge, secure in the knowledge that the jury would acquit because the crime did not "add up," and then everyone would be off the hook?

Securing a conviction for stalking would seem to have been much easier than one for homicide, in light of Zimmerman's actual behavior on that fatal night.<sup>12</sup> And the felony-murder rule might have allowed Florida to seek the more serious penalty that attaches when a stalking goes astray and a victim lies dead on the ground.

### B. Jury Nullification

A second avenue, jury nullification, could also have played a role in the proceedings. Paul Butler's well-known article in the *YALE LAW JOURNAL*<sup>13</sup> describes how this mechanism can operate in favor of a black defendant when a juror (often black) believes that the youth is more valuable to society free than behind bars.<sup>14</sup> Butler adds that jury nullification is especially in order when the crime is victimless (*malum prohibitum*), the law unfair and

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<sup>10</sup> The getaway driver parked outside cannot escape liability by pointing out that he only agreed to drive, nor even that everyone agreed beforehand not to use force. See generally Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. (2011) (discussing this doctrine and the scenarios that call it into play).

<sup>11</sup> The state delayed several months before acceding to public pressure and charging Zimmerman with second-degree murder.

<sup>12</sup> This is not to assert that Zimmerman was guilty of stalking or any other crime on the night in question. Rather, amassing evidence of stalking would seem to have been simpler and easier than for murder, which requires proof of specific intent. Further, self-defense would not lie so readily for one engaged in stalking, since a victim's frightened reaction might strike a jury as reasonable. They might reject a stand-your-ground defense for the same reason: no one stands his ground to defend the precious right to stalk another.

<sup>13</sup> Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 713 (1995).

<sup>14</sup> See also Regina Austin, *The Black Community, Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1776-78 (1992) (advancing a similar proposition).

unpopular, and the prosecution tainted by racism.<sup>15</sup>

In these cases, nullification – where the juror votes to acquit despite the law and the evidence – assures a hung jury (if just one votes that way) or an acquittal (if they all do). And an acquittal is unreviewable because of the prohibition against double jeopardy which, in turn, is rooted in ancient traditions.<sup>16</sup>

Although Butler did not say so, nothing would seem to prevent a minority juror from nullifying a *defense*, such as stand-your-ground, that the juror believes would operate unjustly in a particular case. In the Trayvon Martin trial, some of the jurors apparently were initially inclined to convict.<sup>17</sup> One of them, a Puerto Rican woman, said afterward that she had supported a second-degree murder conviction but felt she had to follow the rule of law as laid out in the instructions that the judge provided to the jurors shortly before they retired to deliberate.<sup>18</sup>

In her post-trial interview, this juror seems not to have known about jury nullification.<sup>19</sup> Most black jurors would have because Butler, after publishing his YALE LAW JOURNAL article, went on black radio publicizing this option. Black rappers took up the cry,<sup>20</sup> so that today, many blacks know about jury nullification and can apply it in appropriate cases.

Most Latinos probably do not, in part because no Latino law professor has, to my knowledge, gone on Spanish language radio or TV as Paul Butler did for blacks. Why not? In his article, Butler says that his objective is to use the master's tools to dismantle the master's house.<sup>21</sup> In my mind's eye, I saw an elegant house, made of concrete or stone, with Paul Butler standing nearby, sizing it up. On seeing a tool left behind by the construction crew, he picks it up and begins dismantling the house.

No Latino professor to my knowledge has picked up the same

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<sup>15</sup> See Butler, *supra* note 13, at 679-80, 698, 714-15 (setting out criteria for nullification).

<sup>16</sup> See David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 210 (2005) (placing the origin in the ferment of the Magna Carta).

<sup>17</sup> See Nina Terrero, *Puerto Rican Juror on Zimmerman Trial: "I Fought to the End"*, NBC LATINO, July 26, 2013, <http://nbclatino.com/2013/07/26/puerto-rican-juror-on-zimmerman-trial-i-fought-to-the-end/> (relaying the impressions of the only minority juror who almost caused a hung jury but ultimately joined the otherwise unanimous decision to acquit Zimmerman of all charges after a lengthy deliberation).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination*, 107 HARV. L. REV. 1255, 1258 n.10 (1994) (noting that rap lyrics are widely used to convey messages, like this one, to the black community).

<sup>21</sup> See Butler, *supra* note 13, at 680 (citing a line by AUDRE LORDE, *The Master's Tools Will Not Dismantle the Master's House*, SISTER OUTSIDER: ESSAYS AND SPEECHES (2007)).

tool: going on TV or radio to publicize jury nullification for the benefit of the Latino community. Might the reason be that many of us imagine that we are living inside the master's house and find it comfortable? But our room may be little more than a fixed-up version of former slave quarters and ours to live in just for a while, during good behavior.

Latino culture has plenty of tools for dismantling houses, ranging from guerrilla theatre<sup>22</sup> to *corridos*<sup>23</sup> and counter-storytelling.<sup>24</sup> Maybe we need to brush off our toolkit and get the word out to our community about all of these legal tools lying around unused.

## II. CONCLUSION

Two legal doctrines might have altered the results in the Trayvon Martin case. Charging a lesser crime – coupled with the felony murder doctrine – and jury nullification were both available but overlooked. Under pressure to charge George Zimmerman for the death of Trayvon Martin, the prosecution ignored a two-step maneuver that might have captured what actually happened. By the same token, some jurors were at first inclined to convict, but voted to acquit when it appeared the only avenue available to them under existing law. Jury nullification might have enabled them to vote their conscience, and if even one of them had done so, the first trial jury would have hung. A second trial might have provided the opportunity for a more thorough airing of the evidence of what happened on that fateful night. It might have focused attention on racial profiling, a serious and widespread social problem. It might also have provided a more satisfactory resolution for both Trayvon Martin's family and for some of the country's racial woes.

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<sup>22</sup> See, e.g., *LATINOS AND THE LAW: CASES AND MATERIALS* 569-71, 577-82, 592 (Richard Delgado, Juan Perea, and Jean Stefancic eds, 2008) (illustrating instances where the Latino and minority communities have resisted oppression through positive avenues); see generally YOLANDA BROYLES, *EL TEATRO CAMPESINO: THEATRE IN THE CHICANO MOVEMENT* (1994) (discussing El Teatro Campesino, a community based theater troupe).

<sup>23</sup> See *LATINOS AND THE LAW*, *supra* note 22, at 211-12 (discussing community songs, ballads, and laments highlighting a heroic event or example of injustice).

<sup>24</sup> See generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411, 2434-41 (1989) (describing the role of storytelling and narrative analysis in oppositional discourse and law reform).