

Why the Zimmerman Verdict Will Be All or Nothing

By Paul H. Robinson

The jury in the second-degree murder trial of George Zimmerman for the killing of 17-year-old Trayvon Martin will soon decide the defendant's guilt or innocence. While the media firestorm has focused on Florida's Stand Your Ground law, and Mr. Zimmerman's claim that he shot Martin in self-defense, the law in Florida is such that if the jury views the killing of Martin as a "reasonable" mistake, the defendant must be found innocent of second-degree murder.

By now the basic facts of the case are all too familiar. In the early evening of Sept. 26, 2012, Mr. Zimmerman, the neighborhood-watch coordinator for his gated community in Sanford, Fla., mistook Martin for a trespasser—when he was in fact staying at his father's fiancée's house in the gated community. Mr. Zimmerman followed Martin, a confrontation ensued, and he ended up fatally shooting the unarmed African-American teenager. Mr. Zimmerman claims that Martin attacked him, knocked him down and was beating him, and that the shooting was in self-defense.

Florida's Stand Your Ground law means that Mr. Zimmerman had no obligation to retreat while in a public place before he used such force. Yet nothing in that law takes away the fundamental requirement that such a shooting be necessary to defend against great bodily harm.

The chaos of such defensive-force situations means that people commonly make mistakes. The law does not require that a person get it exactly right. It may be enough that the person honestly believed his force was necessary.

This will be the jury's primary focus. If they find a "reasonable mistake"—if the reasonable person would have made the same mistake in Mr. Zimmerman's situation—then he is not guilty. But what if he made an honest but *unreasonable* mistake—perhaps he was reckless or negligent in judging whether he needed to shoot in order to save

himself? This would make him less blameworthy than a murderer, who intends to kill without any thought of self-defense, but more blameworthy than if he acted reasonably.

The 1962 Model Penal Code of the American Law Institute, upon which the criminal codes of three-quarters of the states are based, provides an elegant solution to the problem: If the jury concludes that the defender honestly but

Most states use a sliding scale of charges that might penalize a reckless mistake. Florida doesn't.

unreasonably believed he had to kill to save himself—i.e., a reasonable person in his situation would not have made the same mistake—then he is liable for something less than murder but gets more than a complete acquittal. His liability would follow a sliding scale to match the culpability of his mistake: A negligent mistake gets him negligent homicide; a reckless mistake gets him reckless homicide (manslaughter).

But some states, including Florida, have not adopted this sliding-scale approach of the Model Code but instead use an all-or-nothing formulation. Either the defendant's mistake was reasonable, in which case he is innocent of murder, or it was not, in which case he is liable for murder.

This formulation was meant to be tougher on people who kill in self-defense, holding them to a high standard if they use deadly force. But in practice the rule commonly has the opposite effect. Juries are loath to treat as a murderer a person who made mistakes, even culpable mistakes, during the chaos of self-defense. So presented with an all-or-nothing choice, juries can end up giving defendants a free pass when they actually deserve some (perhaps mitigated) punishment.

Recall the case of New York "subway vigilante" Bernhard Goetz. On Dec. 22, 1984, Goetz claimed he was surrounded in a subway car by four young African-American men who attempted to rob him. After they asked him for money (they later claimed they were merely panhandling), Mr. Goetz pulled his gun and began firing rapidly as they scattered, hitting each of them at least once.

It might have been enough for Mr. Goetz to simply pull his gun. The display alone might have sent his alleged assailants running. Shooting might not have been necessary. Yet Mr. Goetz reasoned that if he hesitated in shooting, one of the four, all at close quarters, could have grabbed him or his gun, leaving him unable to save himself. This is the kind of situation where a jury is likely to give the defendant the benefit of the doubt and conclude that he "reasonably believed" he needed to shoot.

But that is not the end of this story. After the group scattered in the subway car, all wounded, Mr. Goetz walked over to Darrell Cabey, who was grasping a seat near the conductor's cab and said, according to Mr. Goetz's own statement to police, "You don't look so bad, here's another." Mr. Goetz told police he then shot Mr. Cabey again, leaving him paralyzed and with brain damage. Mr. Goetz was charged with four counts of attempted murder, among other charges.

Could Mr. Goetz have "reasonably believed" that this last shot was necessary to protect him from a person "about to use deadly physical force," as the New York defense required? That seems doubtful. Yet the jury gave Mr. Goetz self-defense, finding him innocent on all four counts of attempted murder and guilty only of carrying an unlicensed

weapon in a public place. Why?

New York, like Florida, had adopted the all-or-nothing approach rather than the Model Code's sliding-scale formulation. Thus, to deny Mr. Goetz's claim of self-defense meant the law would treat him the same as someone who simply shot another person out of the blue, without any self-defense context.

The jury faced two bad options: give Mr. Goetz a complete "reasonable" self-defense, which he probably did not deserve, or find him fully liable for the shooting and guilty of attempted murder. Given the choice between allowing a failure of justice and doing an injustice, a jury in such a case will commonly consider the former unattractive but the latter intolerable.

The Zimmerman jury, with Florida law operating under the same all-or-nothing approach, could end up with the same two bad choices. And it would not be surprising if they resolved their dilemma in the same way—to hold Mr. Zimmerman's conduct to be "reasonable" even if it really was not. For the alternative that Florida law offers them is to treat him as if he was a murderer who shot Martin in cold blood.

Whatever happens, even if George Zimmerman really did "reasonably believe" he had to shoot to save himself, an acquittal won't make that clear and won't morally vindicate him. The acquittal could as easily be the result of the flaw in Florida law as the result of a jury judgment of his reasonableness.

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