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Of Trayvon Martin, George Zimmerman, and Legal Expressivism: Why Massachusetts Should Stand its Ground on "Stand Your Ground"

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INTRODUCTION

My students were positively *glaring* at me. The normal collective visage of polite attention from these ninety-six, first-year Criminal Law students had transformed into expressions of disbelief. I had just said something that, apparently, they found quite controversial, even though I didn't really mean it to have that effect. It was quite clear that everyone in the class was silently demanding a justification for my contentious thesis. It was late March 2012, we had just begun our study of affirmative defenses, and we had broached the topic of self-defense. So, what was my provocative statement?

"The Trayvon Martin case, it seems to me, has nothing to do with Florida's 'Stand Your Ground' statute whatsoever."

Awkward silence. I was addressing a case that was on everyone's mind: the killing of African-American teenager Trayvon Martin by Neighborhood Watch leader George Zimmerman after the latter chased and confronted the former for allegedly looking suspicious. My statement, apparently, contradicted every scintilla of information the public was receiving from media pundits—and one ought not contradict the legal analysis of the likes of Nancy Grace lightly. For days, the nation was captivated by the competing narratives of Zimmerman's lethal interaction with Martin: Was racism Zimmerman's motivation for shooting Martin? What really happened in that gated community in Florida? Was institutional racism the underlying cause of failing to arrest Zimmerman? Was Zimmerman going to get away with this? Amid this fray, the one issue that seemed absolutely beyond contention was the clear relevance of

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Florida's "Stand Your Ground" ("SYG") law—stating that one does not have a duty to retreat before opposing violence with force—thus begetting a fiery debate in the media about the propriety of such provisions.

Yet after a few weeks, legal scholars and criminal law practitioners began to claim that the prosecution of George Zimmerman would not focus on whether he acted in accordance with the SYG statute.[1] These predictions proved prescient, as Zimmerman's defense team later announced that they would instead pursue a "traditional" self-defense strategy.[2] Although his lawyers predicated this decision on their claim that Zimmerman did not have the opportunity to retreat—a fact that was not completely available during the initial firestorm over the case—Zimmerman's initial pursuit of Martin arguably disqualified him from using SYG,[3] and these facts *were* known during the initial claims of the viability of such a defense. Therefore, if the facts disqualifying Zimmerman from asserting a SYG defense were known all along, why were the media and public so quick to entertain the false assertion that the law excused Zimmerman's actions? Put another way, why did our society, including my students, apparently presume that Florida law might allow one to pursue and confront a non-aggressor and still claim self-defense?

This Essay will suggest that the expressive effect of SYG laws can alter the shared norms governing our collective understanding of the moral limits of "self-defense." This alteration, in turn, led to the common assumption that SYG laws permit more than they do. To support this thesis, this Essay briefly explains SYG statutes and legal expressivism. It then details the nature of the expressive function of these statutes and asserts that Massachusetts, which recently considered the adoption of such a provision,[4] should reject this change principally to rebuff the symbolic

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[1] *See, e.g.*, David Kopel, *Florida's Self-Defense Laws*, THE VOLOKH CONSPIRACY (Mar. 27, 2012, 11:59 PM), http://www.volokh.com/2012/03/27/floridas-self-defense-laws ("[E]veryone who has claimed that Florida's retreat rule affect[s] the legal disposition of the controversy is either misinformed or mendacious.").

[2] Kyle Hightower, *George Zimmerman's Lawyer, Mark O'Mara, Pursuing Traditional Self-Defense*, HUFFINGTON POST (Aug. 13, 2012, 8:56 PM), http://www.huffingtonpost.com/2012/08/14/george-zimmermans-lawyer-stand-your-ground_n_1775105.html?utm_hp_ref=black-voices.

[3] *See* Julia Dahl, *Author of "Stand Your Ground" Law: George Zimmerman Should Probably be Arrested for Killing Trayvon Martin*, CBS NEWS (Mar. 21, 2012, 12:31 PM), http://www.cbsnews.com/8301-504083_162-57401619-504083/author-of-stand-your-ground-law-george-zimmerman-should-probably-be-arrested-for-killing-trayvon-martin (noting that the statute's authors believed that pursuing Martin disqualified Zimmerman from SYG defense).

[4] S. 661, 187th Gen. Ct. (Mass. 2012), *available at* http://malegislature.gov/Bills/BillHtml/9011?generalCourtId=1. The Massachusetts Senate issued a study order for the Bill on October 15, 2012, effectively tabling the proposal. S. 661, 187th Gen. Ct. (Mass. 2012),

message these laws convey. More generally, this Essay concludes that legislatures should be careful to understand fully that adopting SYG provisions may likely result in society's collective reinterpretation of the appropriate moral boundaries of the use of force.

I. Stand Your Ground and the Zimmerman Prosecution

The common law rule regarding self-defense is that one is privileged to use deadly force only when one "reasonably believes that its use is necessary to prevent the imminent and unlawful use of deadly force by an aggressor."[5] In Florida and many other states, one can use such deadly force without first satisfying the common law requirement to retreat if it is safe to do so. In other words, under the SYG provisions:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.[6]

Thus, the only function of such a provision is to answer the question: if one can retreat safely, must one do so before using deadly force? In answering in the negative, SYG provisions undo the common law requirement to retreat.

But, this issue is irrelevant in the Zimmerman prosecution. As David Kopel has pointed out, there are two conflicting narratives that ultimately must be sorted out by a jury.[7] One story is that Zimmerman stalked Martin, cornered him, and lethally shot him. If this is indeed the true scenario that unfolded, Florida's SYG provision is inapplicable because Zimmerman was engaged in unlawful activity and was the aggressor.[8] Zimmerman put forth a conflicting story: he approached Martin, the teenager attacked him, and, as Martin pinned him to the ground, Martin smashed Zimmerman's head upon the concrete and told him he was about to die. In this scenario, the SYG law does not apply because there is no issue whether Zimmerman had to retreat since he did not have the ability to do so safely.[9]

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available at http://malegislature.gov/Bills/187/Senate/S00661 (follow link to "Bill History").

[5] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221 (6th ed. 2012) [hereinafter DRESSLER, UNDERSTANDING] (citing United States v. Peterson, 483 F.2d 1222, 1229 (D.C. Cir. 1973)).

[6] FLA. STAT. ANN. § 776.013(3) (West 2012).

[7] Kopel, *supra* note 1.

[8] *See id.*

[9] Ashley Hayes, *George Zimmerman: Trayvon Martin Threatened My Life*, CNN JUSTICE (June 22, 2012, 6:56 AM), http://www.cnn.com/2012/06/21/justice/florida-teen-shooting/index.html; Kopel, *supra* note 1.

Why, then, was the nation so fixated on SYG? It is important to remember for purposes of this Essay's thesis that when news of Martin's killing broke, the only existing narrative was the first one—that Zimmerman stalked out Martin and killed him in cold blood. The media and public perception of the applicability of SYG to that narrative seems beyond belief. But, it is equally important to remember that when Zimmerman's alternative narrative was made public, the seemingly ubiquitous belief in the applicability of the SYG provision continued unabated. Moreover, even police involved in the case, who knew Zimmerman's statements, justified their failure to charge Zimmerman on the SYG provision. It was not until months later, when Zimmerman's attorneys distanced themselves from a SYG defense, that we collectively recognized that SYG was irrelevant.

So, why is it that the nation was so slow to realize the blatant inapplicability of the SYG statute? Why were we mired in a national debate on the propriety of such laws when it should have been clear that the killing of Trayvon Martin had nothing to do with SYG provisions? And why was my Criminal Law class so aghast when I suggested such a notion, when ultimately it was clearly accurate? I suggest that the answer has everything to do with the "expressive impact" of SYG laws.

II. What is Legal Expressivism?

A full discussion of the nuances of the expressive value of law is beyond the scope of this Essay, but a functional definition will help us understand the impact of SYG laws on social norms. Legal expressivism holds that law exerts power not only in its ability to change citizens' actions through direct sanctions, but also through its ability to convey messages about the shared beliefs of the community as communicated by a legal authority.[10] In other words, law impacts citizens' conception of norms by signaling the underlying attitudes of a community or society. Not only does the passage of a law *signal* the underlying norms of a society, but it also arguably amplifies and legitimizes those norms as "right" by using the power of the state as the medium of that expression.

Moreover, legislation connotes consensus.[11] Because the legislature is a body of elected officials broadly representing numerous subcommunities, legislative action inherently implies consensus between those subcommunities.[12] The expressive function of law, therefore, is premised

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[10] Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 358-59 (2000).

[11] *Id.* at 371-72.

[12] *See id.* at 358-59, 364-65, 373; Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 635 (1995) ("[A]n assembly of several hundred men and women might have democratic credentials . . . because taken together their diversity represents, along various dimensions,

on the symbolic attitudinal impact of consensus among subcommunities.[13] Also, because "[l]aw signals the existence of information held by the law-maker,"[14] law has an ability to convey to the governed the collective opinion of the sovereign and of the other members of the society.[15] Democratically elected representatives must suss out the values of their constituents in order to remain popular and electable.[16] "Because legislators have a professional interest in correctly judging approval patterns, their enactments reveal their private information about such patterns. The law, not the sanction, then influences behavior by causing people to update their prior beliefs about what others approve and disapprove."[17]

The following example helps clarify this theory. Recently, Massachusetts made it unlawful to text message while driving, and the statute punished the offense with a fine.[18] Critics of this law argued that enforcing this prohibition would be nearly impossible; even if police were able to see someone allegedly texting while driving, it would be impossible to discern whether the driver is unlawfully texting or lawfully making a phone call. Without any plausible mechanism of enforcement, critics allege that the law is useless.

Yet the conception of law in this manner ignores its expressive value. The expressive function of the anti-texting law is its conveyance of a value, apparently shared by the citizenry and officially sanctioned by the "State," that texting while driving is "wrong." As more members of the community learn of the law and digest its moral message, citizens will shift their attitudes regarding the prohibited conduct and later change their behavior. This shift occurs not just due to fear of punishment, but due to the fear of running afoul of social norms. Similar norm reactions via the expressive impact of law occurred with anti-smoking campaigns and child car seat legislation. So, how does legal expressivism help us comprehend society's misguided obsession with SYG in the Zimmerman prosecution?

III. The Expressive Impact of Stand Your Ground Laws

Understanding the mistaken assumption of the applicability of Florida's SYG law in the Zimmerman prosecution entails deconstructing the messages those laws convey to citizens. Scholars have attributed the expressive aspect of SYG laws to their historical evolution. For instance,

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the diversity of the community at large. . . . In their plurality, they represent the larger plurality of the community . . . .").

[13] *See* McAdams, *supra* note 10, at 342, 358-59, 371-73.

[14] *Id.* at 358.

[15] *See id.* at 358-59.

[16] *Id.*

[17] *Id.*

[18] MASS. GEN. LAWS ch. 90, § 13B (2010).

one of the earlier strains of thought justifying the rejection of the English common law rule requiring retreat was that withdrawal was not an act befitting a "true man." For nineteenth century opponents of the retreat rule, requiring a "true man" to flinch in the face of an attack was downright un-American. As commentator Joseph Beale pointed out, though, the norms that buttressed that proposition were dubious:

> The feeling at the bottom of the [rule] is one beyond all law; it is the feeling which is responsible for the duel, for war, for lynching; the feeling which leads a jury to acquit the slayer of his wife's paramour; the feeling which would compel a true man to kill the ravisher of his daughter. We have outlived dueling, and we deprecate war and lynching; but it is only because the advance of civilization and culture has led us to control our feelings by our will.[19]

Moreover, the courts opposing the retreat rule were located in the South and the West, and as Yale's Dan Kahan explains it: "By virtue of the slave culture in the former and the frontier culture in the latter, both of these regions had inherited rich systems of honor that put a premium on physical displays of courage and on violent reactions to slights."[20] Given these origins of SYG laws, we ought to ask the question: what ideas do these laws convey to citizens? In other words, what is the expressive value of SYG laws?

First, commentators principally justify the common law rule of self-defense, requiring retreat if one can do so in complete safety, on the grounds that this formulation values human life. By contrast, SYG laws subordinate human life to values like honor, manliness, and machismo; if one has the option to retreat, one need not spare the life of the attacker if one instead chooses to act in accordance with one's honor or natural tendency of a "true man" to use violence. This connotes the idea that the definition of a "true man" is logically inconsistent with a predisposition to value human life as the highest value.

Second, commentators have claimed that the National Rifle Association has succeeded in its attempts to expand SYG laws to more states by playing on our increasing fears of violence.[21] Thus, part of SYG laws' expressive power, through the notion that "law signals the existence of information held by the law-maker,"[22] is that the State "believes" that

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[19] Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 431 (1999) (quoting Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 581 (1903)).

[20] Kahan, *supra* note 19, at 432-33.

[21] *See* Joshua Dressler, *Feminist (or "Feminist") Reform of Self-Defense Law: Some Critical Reflections*, 93 MARQ. L. REV. 1475, 1481-82 (2010) [hereinafter Dressler, *Feminist*]; DRESSLER, UNDERSTANDING, *supra* note 5, at 227.

[22] McAdams, *supra* note 10, at 358.

citizens *ought* to be more afraid of violence, that there *is* an increasing threat, and citizens *should* take the punishment of would-be violent criminals into their own hands. This message alters the perception of citizens' relationship to one another to one of fear, distrust, and a zero-sum-game sort of perpetual antagonism.

Third, SYG laws seem also to express a social norm in favor of the "moral forfeiture" theory of self-defense.[23] This theory holds that the original aggressor "no longer merits our consideration, any more than an insect or stone does."[24] By sanctioning a self-defense justification for killing in the context of a choice by the self-defender between retreating or killing, society is countenancing the idea that each individual possesses the *right* to decide the fate of another and that an unnecessary killing is a valid moral choice. Because an aggressor's violence forfeits their right to live, society no longer views them as an entity worthy of consideration as a human being. In a society that usually reserves for the State the power to judge individuals and use violence or coercion against wrongdoers (i.e. via punishment), ceding this power in a way that so fundamentally strips another human being of his or her right to existence is a powerful symbolic message.

So, how then have these expressive features of SYG laws modified shared norms on the scope of self-defense in a way that clouded our collective judgment in the Zimmerman case?

IV. Why America Assumed Stand Your Ground Applied to Zimmerman

The degree to which the nation seemed to buy in to the relevance of SYG provisions is positive evidence of the existence of an expressive power of law. If the law of self-defense had been well-settled for years, it is unlikely that Americans would have been so quick to accept the applicability of the SYG law to Zimmerman's case. Instead, though, the first decade of the 2000s saw a massive upheaval in terms of the adoption of SYG provisions. Between 2005 and 2007 as many as thirty states considered adopting SYG laws.[25] By 2010, "27 jurisdictions had significantly expanded the scope of their self-defense provisions" by focusing on SYG.[26]

Given this recent advertising time in the mind of the public, a condition that is particularly helpful to foster norm changes vis-à-vis the expressive function of law, it is unsurprising that Americans seemed amenable to presuming Zimmerman's right to use unnecessary deadly force. This is especially true given the historical background of such laws

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[23] Dressler, *Feminist*, *supra* note 21, at 1491.

[24] *Id.* (quoting Hugo Bedau, *The Right to Life*, 52 MONIST 550, 570 (1968)).

[25] Dressler, *supra* note 5, at 227.

[26] *Id.*

and the messages they send. There is very little difference between what SYG laws actually do and what they are perceived to do. For instance, because SYG laws subordinate the value of human life to the value of honor, it is unsurprising that Americans might internalize a message that the law subordinates the value of human life to the value of protecting one's territory. Because SYG laws impact the way citizens mediate their perception of the danger posed to them by "others," it should not be shocking that Americans might digest the message that Zimmerman had a "right" to shoot first and ask questions later. Finally, because SYG laws discharge the personhood of the "wrongdoer" and subjugate that person's life to the whim of the "true man," it is not surprising that Americans might accept the principle that Martin was a "wrongdoer" by being someplace he shouldn't and set aside his personhood accordingly.

CONCLUSION

Given this effect, Massachusetts and other states should think seriously about the messages they send by adopting SYG laws. Given the historical antecedents of these laws—specifically the slavery and Wild West cultures—legislators should understand the values they are tacitly embracing. Additionally, given SYG laws' shared moral lineage with lynching, patriarchal views of justified homicide, and dueling, legislators ought to give serious pause before adopting values of this ilk. In considering SYG laws states should be very aware that more is at stake than just whether an accused is convicted or acquitted—our citizens' conception of the value of life, their understanding of their relationship with others, and the way we approach fundamental questions of criminal law all are in question.

Finally, and most importantly, legislators must understand that we cannot rule out the possibility that the expressive impact of SYG laws overly-broadened the scope of the permissible use of deadly force in the mind of George Zimmerman. If that is the case, and Trayvon Martin's death is due to the warped conception of "self-defense" Zimmerman carried forth that day, then SYG laws literally might mean the difference between life and death.