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Not the Last Word, but Likely the Last Prosecution: Understanding the U.S. Department of Justice's Evaluation of Whether to Authorize a Successive Federal Prosecution in the Trayvon Martin Killing

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ABSTRACT

In the aftermath of George Zimmerman's state court acquittal in the Trayvon Martin killing, the U.S. Department of Justice is considering whether to bring federal criminal charges against Zimmerman arising out of the same incident. While such a dual or successive prosecution does not violate double jeopardy, the determination whether the federal government should bring charges turns on whether the Petite Policy, an internal U.S. Department of Justice Guideline, has been satisfied. Professor Kurland contends that because the requisites of the Petite Policy, that the prior state trial must have left a substantial federal interest demonstrably unvindicated, cannot be established, a federal prosecution should not be authorized. Rather, more appropriate and constructive nonprosecutorial alternatives should be pursued to address the myriad of criminal justice and social policy concerns impacted by the tragic incident.

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INTRODUCTION

In the aftermath of George Zimmerman's acquittal in the Trayvon Martin killing, U.S. Senator Barbara Boxer sent a letter to the U.S. Department of Justice stating: "I respect the fact that the jury has spoken . . . but I don't think this should be the last word."[1] Her comment implies respect that the jury has spoken, but does not imply respect for the verdict.

The acquittal will not, and should not, be the last word on a myriad of vitally important related issues concerning civil rights, the prism through which African Americans view the criminal justice system, the prevalence of firearms, and expanding notions of self-defense. Absent some overlooking of evidence by state-law enforcement that Zimmerman is really a racist of the Imperial Wizard variety, which still may not be enough, the Florida state prosecution that resulted in Zimmerman's acquittal will likely be, and should be, the last criminal prosecution concerning the matter.

Based on the somewhat controversial dual sovereignty exception to double jeopardy, there is no constitutional barrier for the federal government to commence another prosecution of Zimmerman arising out of these same acts because prosecutions by different sovereigns are not considered prosecutions for the same offense under the double jeopardy clause.[2] Thus, assuming that the federal government can find an applicable federal statute to indict Zimmerman by a grand jury, it can prosecute Zimmerman in addition to the Florida state prosecution.

But that is hardly the end of the matter. There are tens of thousands of state criminal prosecutions each year in which, after the verdict, the federal government could choose to prosecute for the same underlying act if it so desired. Just to name a few examples, bank robbery of an FDIC insured bank, carjacking, loan sharking, and a multitude of drug offenses all can be prosecuted under both state and federal law. Yet, the federal government rarely successively prosecutes such crimes regardless of the outcome of the prior state trial—and with good reason.

Although the federal government rarely engages in such successive prosecutions, much of the commentary in the immediate aftermath of the

1. *Arrests at Protests Over Zimmerman Verdict*, CBS NEWS (July 16, 2013, 4:16 AM), http://www.cbsnews.com/8301-201_162-57593886/arrests-at-protests-over-zimmerman-verdict (alteration in original) (internal quotation marks omitted).

2. For a thorough discussion, see ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS 1–3 (2001).

Zimmerman verdict has focused on whether any federal criminal charges could be used to prosecute Zimmerman, as well as on the difficult proof problems the federal government would face in trying to prove the case beyond a reasonable doubt.[3] The guiding legal framework that U.S. Department of Justice (Justice Department) lawyers—and ultimately the appropriate U.S. Assistant Attorney General—will utilize to determine whether to pursue a federal prosecution is found in two alternative prongs of what is referred to as the Petite Policy (the Policy). This policy is a voluntary internal Justice Department guideline that confers no enforceable rights on a defendant, but the Justice Department is fully expected to adhere to the policy.[4]

The Essay analyzes the two applicable prongs of the Petite Policy and concludes that a successive prosecution of Zimmerman is not warranted. The Essay also discusses what constructive nonprosecution alternatives should be pursued in the aftermath of the state court acquittal.

I. THE PETITE POLICY[5]

A. Defining the Petite Policy

Even though such dual or successive prosecutions are constitutionally permissible, such prosecutions strike most as unfair, unduly oppressive, and violative of the spirit of the double jeopardy—which has its roots in English common law and predates the U.S. Constitution. The Petite Policy recognizes the extreme burden an individual faces as a defendant in one prosecution, let alone multiple prosecutions, for the same underlying conduct—even if it is technically not the same offense under the double jeopardy clause.[6] The Justice Department's decision to go forward or decline need not be publically released, is not subject to

3. *See, e.g.*, William Freivogel, *Now What? After Zimmerman's Acquittal, Few Legal Options*, ST. LOUIS BEACON (July 15, 2013, 11:22 AM), https://www.stlbeacon.org/#!/content/31869/law_scoop_zimmerman_options.

4. In the immediate aftermath of the verdict "[a] spokesperson for DOJ [stated] . . . that federal authorities are trying to figure out if 'federal prosecution is appropriate in accordance with the Department's policy governing successive federal prosecution following a state trial.'" Jacob Gershman, *DOJ's Own Rules Set High Bar for Zimmerman Charges*, WALL ST. J. L. BLOG (July 15, 2013, 6:29 PM), http://blogs.wsj.com/law/2013/07/15/dojs-own-rules-set-high-bar-for-zimmerman-charges/.

5. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.031 (1997) [hereinafter USAM]. The name of the policy is derived from *Petite v. United States*, 361 U.S. 529 (1960) (per curiam).

6. USAM, *supra* note 5, § 9-2.031(A).

disclosure under the Freedom of Information Act, and is not subject to any legal or judicial review.[7]

The Petite Policy includes several pertinent provisions. At the outset, it states:

> The purpose of the policy is to vindicate *substantial* federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions . . . for substantially the same act(s) or transaction(s), [and] to promote efficient utilization of Department resources . . . .[8]

Moreover, the Policy precludes the initiation or continuation of a federal prosecution following:

> [A] prior state . . . prosecution based on substantially the same act(s) or transaction(s) unless . . . the matter . . . involve[s] a *substantial* federal interest; . . . the prior prosecution must have left that interest *demonstrably* unvindicated . . . [and] the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.[9]

The italicized adjectives amplify the otherwise general guidance embodied in the Policy. If this purposely exacting and largely subjective standard is met, a federal prosecution is still not required. Additionally, the traditional elements of federal prosecutorial discretion, as generally set forth in *The Principles of Federal Prosecution*, apply.[10]

The Petite Policy further provides that "[i]n general, the Department will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest."[11] In explaining this provision, I have written previously:

> The policy acknowledges, in effect, that a separate federal interest exists with respect to a federal prosecution based on the same acts (essentially reconfirming the dual sovereignty rationale), but that the separate federal interest is *presumed* to have been satisfied by the prior state prosecution, regardless of the result, so long as the prosecution resulted in either a conviction or an acquittal on the merits. In other words, the policy implies that the federal government's primary interest in a federal prosecution is that the defendant is fairly tried on the

7. *Id.* § 9-2.031(F).
8. *Id.* § 9-2.031(A).
9. *Id.* (emphases added).
10. *Id.* (referencing Principles of Federal Prosecution, USAM, *supra* note 5, § 9-27.110).
11. *Id.* § 9-2.031(D).

> facts and a fair, conclusive determination is reached. This does not mean that the separate federal interest has been "wholly satisfied" by the state prosecution; only that, in a world of concurrent jurisdiction and finite resources, the federal interest is presumed to have been satisfied enough so that an additional expenditure of time and resources of a separate prosecution to vindicate the remaining federal interests is not required. The presumption, however, that the federal interests have been sufficiently vindicated is rebutted, and the successive prosecution *may* proceed, if the requisites of the Petite Policy are met.[12]

The Policy thus presumes that the first state prosecution, regardless of result, sufficiently vindicated the relevant federal interest if the trial was fair and was resolved on the merits. It is extraordinarily difficult to overcome that presumption and thus force an individual to face yet another criminal trial for substantially the same underlying acts.

B. Is There a Substantial Federal Interest?

To start, a detailed analysis of the entirety of federal criminal law reveals the presence of some federal criminal statutes that the federal government could arguably use to charge Zimmerman. Since Zimmerman was not a police officer alleged to have engaged in police brutality, the most common criminal civil rights statutes that proscribe conduct "under color of law"[13] do not apply. Most legal experts, me included, believe that Zimmerman was not acting under color of law while acting as a private neighborhood watch patrol. But relatively recently enacted hate crimes statutes and private civil rights depravation statutes, sometimes awkwardly drafted to encompass seemingly picayune statutory elements necessary to establish federal jurisdiction such as depriving one of their right to use a public street (if the streets within the gated community constitute a "facility of interstate commerce"), reach some conduct of private actors and may offer some plausible applicability—assuming the presence of some evidence of improper racial motivation to follow *and* to kill.[14]

12. KURLAND, *supra* note 2, at 6–8 (footnotes omitted).
13. *See, e.g.*, 18 U.S.C. § 242 (2012).
14. *Id.* §§ 245(b)(2)(E), 249. Sections 249(b)(1)(C) and (D) statutorily codify aspects of the Petite Policy to require Attorney General certification that the federal interest "in eradicating bias-motivated violence" has been left "demonstratively unvindicated" or that the prosecution is "in the public interest and necessary to secure substantial justice."

The determination that the matter involves a substantial federal interest is made on a case-by-case basis.[15] One cannot generically categorize every allegation of a purported civil rights violation as meeting this test. But on these facts, enforcement of the civil rights laws should qualify as a substantial federal interest.

C. Is the Substantial Federal Interest Demonstrably Unvindicated?

The Policy sets forth three distinct avenues to determine whether a federal prosecution is justified. The first concerns when the state trial resulted in an acquittal, which is the present situation. The most common points of inquiry that are analyzed to determine whether the substantial federal interest remains demonstrably unvindicated are incompetence, jury nullification in clear disregard of the evidence, the discovery of new evidence, wrongheaded evidentiary decisions that undercut the government's case, and perhaps failure of proof on an element in the state case that would not be required in a federal case.[16]

None of those applies in the Zimmerman case. There is no objective suggestion that Zimmerman achieved an acquittal due to an incompetent investigation or prosecution. There was, and always will be, the inevitable second-guessing when failing to obtain a conviction. An entire media cottage industry of legal talking heads now exists to engage in this type of punditry and pontificating. The Zimmerman case was no exception. The delay in arresting Zimmerman and the belated focus on a manslaughter charge may have been handled differently given the benefit of hindsight, but nothing so egregiously stands out as sufficient to overcome the presumption that the federal interest was adequately vindicated in the state prosecution. Likewise, the prosecution was criticized because the defense scored some points on cross-examination of prosecution witnesses. But that is what good defense lawyers do. And they often cross-examine far better than prosecutors because, generally, they cross-examine far more witnesses than do prosecutors.

There was also no jury nullification. Reverend Al Sharpton and others have expressed that the acquittal was an "atrocity" and an injustice because there was no proof that Trayvon did anything wrong.[17] That emotional reaction is

15. *See* USAM, *supra* note 5, § 9-2.031(D).
16. *Id.*
17. Shortly after the verdict, Reverend Sharpton appeared on television and stated:
> "I think that this is an atrocity. . . . What this jury has done is establish a precedent that when you are young and fit a certain profile, you can be committing no crime, just bringing some Skittles and iced tea home to your brother, and be killed, and someone can claim self-defense . . . [and be] acquitted. . . . [T]his is a slap in the face to those that believe in justice in this country."

understandable but off point. An American criminal trial determines whether the government has established guilt beyond a reasonable doubt. Many pressing for another trial seem to be relying on a narrative in which a racially motivated vigilante stalks an innocent teenager and intentionally shoots him without any further interaction between the two. For example, *Washington Post* columnist Courtland Milloy put it a little less bluntly, but with the same effect, with his characterization that "Trayvon, an unarmed 17-year-old youth, had been racially profiled, stalked as a burglary suspect and eventually gunned down by a neighborhood watch volunteer in Florida."[18] That recalls the observation of Megan Carter, the investigative reporter played by Sally Field in *Absence of Malice* (by the way one of the best films ever about federal prosecutors and prosecutorial discretion), who, in commenting on a description of her personal relationship with the film's protagonist Michael Gallagher as "involved," noted that it was accurate but not true.[19] If the uncontroverted evidence established anything close to Milloy's scenario, Zimmerman undoubtedly would have been convicted. But that scenario did not comport with the evidence adduced at trial. Eyewitness accounts were conflicting, but some witnesses testified that Martin was on top of Zimmerman and struck him in a violent and aggressive manner. Dueling parents each testified that their respective son was the one screaming for help on the recording. Zimmerman had wounds on the back of his head consistent with his version of events that Martin smashed his head on the sidewalk.[20] Additionally, there is the near-universal rule in state and federal courts that once the defense

Josh Feldman, *Sharpton Outraged at Zimmerman Verdict: 'An Atrocity,' 'Slap in the Face' to People Who Believe in Justice*, MEDIAITE (July 14, 2013, 12:52 AM), http://www.mediaite.com/tv/sharpton-outraged-at-zimmerman-verdict-'an-atrocity'-'slap-in-the-face'-to-people-who-believe-in-justice.

18. Courtland Milloy, *Obama's Bold Remarks May Change the Way America Talks About Race*, WASH. POST, July 23, 2013, http://articles.washingtonpost.com/2013-07-23/local/40863798_1_martin-killing-trayvon-martin-president-obama. In all fairness to Milloy, a well-respected journalist, he stated in a previous column, albeit somewhat incredulously, that the jury believed that Martin confronted Zimmerman and "[a] fistfight ensued." Courtland Milloy, *Verdict in Trayvon Martin Case Leaves Blacks Wondering, Where Do We Go From Here?*, WASH. POST, July 16, 2013, http://articles.washingtonpost.com/2013-07-16/local/40612634_1_trayvon-martin-george-zimmerman-benjamin-jealous.

19. ABSENCE OF MALICE (Columbia Pictures 1981); *see Absence of Malice,* WIKIQUOTE, http://en.wikiquote.org/wiki/Absence_of_Malice (last visited Sept. 18, 2013).

20. For a far more brusque if not politically incorrect characterization how the jury may have viewed the evidence that supports the verdict, one should consult Charles Barkley's comments he made on CNBC. *See* Noel Sheppard, *Charles Barkley: 'I Don't Think the Media Has a Pure Heart' or 'Clean Hands' When It Comes to Race*, NEWSBUSTERS (July 18, 2013, 6:31 PM), http://newsbusters.org/blogs/noel-sheppard/2013/07/18/charles-barkley-i-don-t-think-media-has-pure-heart-or-clean-hands-whe (quoting Charles Barkley concerning his agreement with Zimmerman verdict and noting, "I think Trayvon Martin . . . flip[ped] the switch and start[ed] beating the hell out of Mr. Zimmerman. . . . [I]t was just a bad situation").

meets the burden of production on a self-defense claim, the prosecution must disprove self-defense beyond a reasonable doubt.[21] This, combined with the traditional beyond a reasonable doubt burden of proof in a criminal case, helps to explain the jury verdict.

The Petite Policy does not exist to give federal prosecutors a second chance to obtain a conviction simply because of disagreement with an unpopular verdict. One must tread carefully here. Some of the most vocal voices urging a federal prosecution are not only unhappy with the outcome but appear to suggest that a conviction is the only acceptable outcome.

That is a dangerous world to inhabit. Prosecutors in the old Soviet Union could not comprehend the concept of a conviction rate—an understandable worldview held by actors in a system where the preferred outcome was never in doubt.[22] That is not our system. We leave for juries to sort out difficult and often conflicting facts. We also rely on juries to resolve, guided by the applicable burden and standard of proof allocation, whether the government has proved the defendant guilty of a particular offense beyond a reasonable doubt. Although reasonable people may disagree on the verdict, there is nothing to suggest that the jury did not fairly and conscientiously render its verdict. It is also worth emphasizing that our juries do not determine innocence. As I have said previously commenting on the Casey Anthony verdict, "'innocence' will be adjudicated before a different tribunal that presides on a much higher floor."[23]

It is also doubtful any new evidence will be unearthed sufficient to rebut the presumption that the state prosecution vindicated the federal interest. Even evidence of prior racist tendencies would likely be insufficient because the federal government would still have to prove Zimmerman did not act in self-defense. Even a racist may act in self-defense and, from the trial evidence, it does not appear Zimmerman shot Martin because of his race.[24] Additionally, even factoring in Zimmerman's explicit comment to the 911 operator that "these A-***

21. *See* Eugene Volokh, *Burden and Quantum of Proof as to Self-Defense*, VOLOKH CONSPIRACY (July 14, 2013, 2:29 PM), http://www.volokh.com/2013/07/14/burden-and-quantum-of-proof-on-self-defense (noting that at least forty-eight states are "entirely in line" with Florida's burden and quantum of proof in self-defense cases); *see also infra* note 48 and accompanying text.

22. *Soviet Law*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/557116/Soviet-law/224104/Criminal-law (last visited Sept. 18, 2013) ("Starting in the late 1940s, there was severe pressure from the party hierarchy to secure a 100 percent conviction rate, with the result that thereafter there were almost no acquittals.").

23. Adam H. Kurland, *Reasonable Doubts in the Casey Anthony Trial?*, NAT'L L.J., July 26, 2011, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202508318214&Reasonable_doubts_in_the_Casey_Anthony_trial.

24. *See, e.g.*, Freivogel, *supra* note 3 (noting the weak evidence of racial hatred and profiling resulting in the state trial court ruling that such characterizations could not be used at trial).

(*not* the N-word) always get away with it," who, other than perhaps some fictional fiends in super hero movies, notifies the authorities prior to committing a hate crime?[25]

The next factor concerns where an element that was not proved in the state case is not an element of the contemplated federal offense. Here, however, subject to one possible technical exception discussed below concerning the scope of self-defense doctrine in federal court, any contemplated federal charges would actually require *more*, not less, proof than the state offense. As discussed in more detail in Subpart E, it is inconceivable than any federal civil rights charge requiring proof that Zimmerman killed Martin would not permit a claim of self-defense in some form.

D. Sufficient Evidence to Obtain a Conviction?

In addition, the Justice Department lawyers will also have to assess whether a conviction is a realistic possibility—not merely whether they could obtain a grand jury indictment.[26] After all, we are all familiar with the saying that any decent prosecutor can get the grand jury to indict a ham sandwich.[27] Thus, evidence merely adequate to obtain an indictment would be insufficient because the Policy specifically requires that the "government must believe . . . that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact."[28]

As such, the federal government would have to consider a variety of other vexing evidentiary and procedural factors. Again, these are difficult cases that usually require the government to prove more that what the state was required to prove because of additional statutory elements in the federal charges. Recently,

25. *See* Charles Krauthammer, *The Zimmerman Case: A Touch of Sanity*, WASH. POST, July 18, 2013, http://articles.washingtonpost.com/2013-07-18/opinions/40655110_1_zimmerman-trial-george-zimmerman-zimmerman-case (querying, "Who calls 911 before setting out on a hate crime?" and characterizing the verdict as "[a] touch of sanity").

26. A federal grand jury is only obligated to hear a one-sided presentation of the government's evidence, without the presence of the putative defendant or defense counsel, and further only required to determine, by a vote of at least twelve of twenty-three grand jurors, whether the evidence establishes probable cause that the target of the investigation committed the alleged offense. *See* 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:1, 4:5 (2d ed. 2012).

27. *See, e.g.*, Patricia Morris Buckley, *The Good Wife—Recap & Review—Another Ham Sandwich*, TWO CENTS TV (Jan. 30, 2012), http//twocentstv.com (recapping episode where one protagonist was the target of a grand jury investigation and noting "[a]s the saying goes, the grand jury will indict a 'ham sandwich'"). The popular saying refers to criticism of contemporary grand juries as lacking their historical independence, and now operating as mere rubber stamps for government prosecutors. *See* 1 BEALE ET AL., *supra* note 26, § 1:1.

28. USAM, *supra* note 5, § 9-2.031(D).

many in the punditry have seen parallels with the successful subsequent federal trial in the Rodney King case. The passage of time may have clouded historical accuracy a bit. In that federal trial, in which the evidence included a video of several police officers striking King collectively over fifty times, the federal jury convicted only two of the four defendants.

Moreover, federal law requires a unanimous twelve-person jury to convict.[29] Under Florida law, however, only a six-person jury was required for this noncapital felony case.[30] Empirical research suggests, consistent with common sense, that it is harder to achieve unanimity with twelve decisionmakers as opposed to six.[31] In the context of a criminal trial, the conclusions suggested by the research generally are more detrimental to the prosecution because the prosecution has the burden of proof. The state could not convict Zimmerman with a six-person jury. It will be even harder for the federal government, with more to prove, to convict with a twelve-person jury.

Next, although a federal jury venire will be more geographically dispersed than that of the Florida state court jury venire, it will still be comprised of central Floridians steeped in a culture of widespread gun ownership.[32] Only the defendant, not the government, can seek a change of venue.[33] Zimmerman did not want a change of venue in the state case and has no reason to want one in any federal trial.

Finally, federal evidence law provides fairly broad avenues for the admission of evidence to establish that the alleged victim was the first aggressor.[34] In the first prosecution, several state court pretrial evidentiary rulings favored the prosecution.[35] The federal government would have to analyze controlling circuit case law carefully to determine if a federal trial would admit more negative-character or habit evidence concerning Martin than what was admitted in the state trial. In

29. FED. R. CRIM. P. 23(b)(1), 31(a).
30. FLA. STAT. ANN. § 913.10 (West 2001) (authorizing six person juries in all noncapital criminal cases).
31. *See, e.g.*, Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 451, 451–52 (1997).
32. *See, e.g.*, *Guns in the Sunshine State*, HARTFORD COURANT, Sept. 28, 1993, at C12, *available at* WLNR 4235510 (noting proliferation of gun dealers and high violent crime rate as byproduct of the "gun-loving culture of the Sunshine State"); Greg Allen, *Florida Becomes No. 1 in Concealed Weapons Permits*, NPR (Dec. 27, 2012, 3:00 PM), http://www.npr.org/2012/12/27/168157245/florida-becomes-no-1-in-concealed-weapons-permits.
33. *See* FED. R. CRIM. P. 21(a).
34. FED. R. EVID. 404(a)(2)(B).
35. Tracy Connor et al., *Judge Denies Delay, Bars Evidence in George Zimmerman Trial—For Now*, NBC NEWS, (June 2, 2013, 5:38 PM), http://usnews.nbcnews.com/_news/2013/05/28/18556018-judge-denies-delay-bars-evidence-in-george-zimmerman-trial-for-now?lite.

the end, it is very unlikely that the standard for pursuing a federal prosecution after a state-law acquittal will be satisfied.

The presumption may also be overcome in some circumstances where the first trial resulted in a conviction but where the defendant received a lenient and arguably inappropriate sentence.[36] Zimmerman was acquitted, therefore that prong is not implicated here.

E. A Long Shot Petite Policy Alternative to Overcoming the Presumption of a Vindicated Federal Interest

The last Petite Policy alternative holds the most promise to justify a successive federal prosecution—but is still a long shot. This prong provides that the presumption that the state prosecution adequately vindicated the federal interest also may be overcome:

> [i]rrespective of the result in a prior state prosecution, in those rare cases where . . . the alleged violation involves a *compelling* federal interest, particularly one implicating an *enduring* national priority . . . the alleged violation involves *egregious* conduct, including that which . . . causes loss of life, . . . [and] the result in the prior prosecution was *manifestly* inadequate in light of the federal interest involved.[37]

Again, note the adjectives with an adverb thrown in for good measure. First, all of the factors noted above concerning a prior acquittal would still be relevant under this test, including the realpolitik procedural factors noted above that will make a conviction very difficult to achieve. Nonetheless, this test is slightly more open ended, ultimately turning on a subjective but not wholly untethered judgment that the result in the first trial was *manifestly* inadequate.

This prong perhaps can be explained with reference to the infamous Rodney King case. There police officers repeatedly struck King in an attempt to subdue him after a traffic stop. The incident was caught on videotape and seemed, to some observers, as an open and shut case of police brutality. The defendants however, were not convicted in the state trial.[38]

Some have contended that the decision to proceed with a successive federal civil rights prosecution was merely a political decision designed to help George

36. *See* USAM, *supra* note 5, § 9-2.031(D).
37. *Id.* (emphases added).
38. See K. Winchester Gaines, *Race, Venue and the Rodney King Case: Can* Batson *Save the Vicinage Community?*, 73 U. DET. MERCY L. REV. 271 (1996).

Bush's ultimately unsuccessful 1992 presidential reelection bid.[39] To some analysts, the defense lawyers in the state case skillfully broke the videotape down frame by frame and persuasively argued each individual action by an officer was justified in response to King's actions that immediately preceded each blow.[40] Consequently, those analysts would necessarily contend that a second prosecution could not have been justified on the ground that the prior state court acquittals were the result of clear jury nullification or prosecutorial incompetence. This view was borne out somewhat even in the subsequent federal trial. There, only two of the four defendants were convicted and the district judge imposed relatively lenient sentences, finding that most of the blows were lawful and that King exacerbated the situation by resisting arrest.[41]

The King state court trial, however, took place in the predominantly white Simi Valley area of Ventura County after the defendants exercised their rights under state law for a change of venue.[42] The result was a jury pool with a racial makeup lacking minority representation, thus significantly differing from the jury pool in Los Angeles County where the offense was committed. In addition, the state court jury failed to reach a verdict on one excessive force count against one defendant—although they acquitted that officer on a more serious assault charge.[43] Lastly, the history of Los Angeles Police Department (LAPD) police brutality in the minority community was well documented. Thus, regardless of the state trial's outcome, the combination of an LAPD excessive force incident—impacting on a quintessential "enduring national priority" concerning federal oversight of excessive force allegations against local law enforcement and thus likewise constituting a compelling federal interest—a first trial in a jurisdiction after a lawful change of venue with a juror pool demographic virtually devoid of minorities, and a hung jury on one count, plausibly constituted the type of rare case in which this catch-all prong was designed to sanction a successive prosecution. The combination of these factors likely allowed the Justice Department to conclude that the result of the prior prosecution was "manifestly inadequate in light of the [compelling] federal interest involved."[44]

39. *See, e.g.*, Alfred S. Regnery, *George Zimmerman, the Rodney King Case, and Double Jeopardy*, BREITBART.COM (July 17, 2013), http://www.breitbart.com/Big-Government/2013/07/17/George-Zimmerman-the-Rodney-King-Case-and-Double-Jeopardy.

40. *See, e.g.*, Steven Brill, *In Praise of Justice in Simi Valley*, AM. LAW., June 1992, at 5, 5–6; Roger Parloff, *Maybe the Jury Was Right,* AM. LAW., June 1992, at 7, 78–80.

41. The district court's sentencing decision was ultimately affirmed by the Supreme Court. Koon v. United States, 518 U.S. 81 (1996).

42. Gaines, *supra* note 38 at 275–76, 277 n.46.

43. *Id.* at 277.

44. USAM, *supra* note 5, § 9-2.031(D).

But it is still a stretch to justify a second Zimmerman prosecution under this prong. None of those factors are present in this case.

Even though civil rights charges will be considered, this still will boil down to be a self-defense case by a private citizen who was lawfully armed under state law. As further discussed in Part II, a serious national debate should be undertaken concerning whether stand your ground laws should be rolled back to more traditional self-defense parameters. For Petite Policy purposes in determining whether a particular individual should be subject to second criminal trial, however, there is no enduring national priority or compelling federal interest in examining the current parameters of state-law self-defense doctrine.

In addition, Zimmerman did not seek or receive a change of venue. As mentioned before, a federal trial will have a jury panel drawn from a larger geographical area, but the venire will still consist of roughly the same central Floridian citizenry with a similar worldview concerning firearms that was called for jury duty in the state trial.

Does any factor militate toward establishing that the prior prosecution was manifestly inadequate? As noted above, achieving unanimity in a twelve-person federal jury is thought to be more difficult than with a six-person jury. Nonetheless, even without a change of venue, a twelve-person federal jury affords an increased opportunity to seat some African American and/or male jurors. Such jurors would likely bring a more diverse worldview to the deliberations than did the six female jurors in the state trial, none of which were black. Some empirical juror bias research has noted how the racial composition of the jury, victim, and defendant affects verdicts when the racial variables are changed.[45]

Here, however, the Florida six-person jury and unanimity requirement are constitutional. There does not appear to be any legally cognizable constitutional infirmity as to how the jury was selected. Our system is designed to provide a constitutionally fair trial for the defendant, which occurred. If a rational unanimous verdict from a constitutionally valid six-person jury is deemed "manifestly inadequate," it sets high-handed precedent and erodes the legitimacy of all criminal verdicts in the several states that authorize criminal juries of less than twelve. This effect holds true even with the caveat that each case subject to Petite Policy review is decided on a case-by-case basis.

45. *See, e.g.*, Earl Ofari Hutchinson, *Zimmerman Trial Juror B37 Reconfirms Glaring Juror Racial Bias*, FRIENDLY FIRE (July 17, 2013), http://blogs.dailynews.com/friendlyfire/2013/07/17/zimmerman-trial-juror-b37-reconfirms-glaring-juror-racial-bias (referencing studies showing that juries in Florida and other states are unlikely to contain any black jurors, and that juries are more likely to find nonblacks justified in killing or maiming blacks).

The federal government will undoubtedly review the postverdict comments of some of the jurors, but should give this information short shrift. The jury speaks collectively when it renders its verdict. Any postverdict comment does not represent the collective judgment of the jury and often is a blatant, after the fact, self-serving rationalization by a particular individual.[46] With good reason, these types of comments are viewed with extreme disfavor[47] and, absent truly extraordinary circumstances not present here, should not provide any basis to support a successive federal prosecution.

Lastly, as stated in Subpart C, the federal government will examine whether a particular element in the state trial would not require proof in the federal trial. Although the elements constituting an affirmative defense are not, strictly speaking, elements of the offense, the differences in Florida self-defense law and federal self-defense law, if any, will have to be carefully analyzed.

Despite the lack of stand your ground federal legislation, however, federal self-defense instructions will likely be very similar to the self-defense jury instructions Zimmerman received in his state trial. Federal law contains no statutory self-defense statute. Of course, self-defense exists in federal law, but its contours are a result of judge made common law and could vary slightly in each Federal Circuit. Like Florida law, and the law in virtually all of the states, federal law requires that once self-defense is sufficiently put at issue, the government must disprove self-defense beyond a reasonable doubt.[48] Thus the self-defense burden in a federal criminal case will be on the prosecution in the identical posture as it was in the Florida prosecution. Regardless of which federal homicide charges could be eventually brought against Zimmerman, even if couched in a criminal civil rights charge in which Martin's death is alleged as a homicide, due process mandates that he would receive an applicable self-defense instruction in some form. Thus, the federal jury would be instructed, as was the state jury, that the government shoulders the ultimate burden of disproving the self-defense claim beyond a reasonable doubt.

46. Juror B-29's postverdict comments are unremarkable in this regard. Despite her desire to "apologize" to Martin's parents and her comment that Zimmerman got away with murder, she nonetheless conceded that, "as the law was read to me, . . . you can't say he's guilty." William M. Welch, *Juror B-29: I 'Felt Confused'; Says Zimmerman 'Got Away With Murder,' She Owes Martins Apology*, USA TODAY, July 26, 2013, at 3A.

47. *See* FED. R. EVID. 606(b) (delineating narrow exceptions concerning postverdict inquiry into validity of verdict).

48. JAMES CISSELL, FEDERAL CRIMINAL TRIALS § 15-1 (7th ed. 2008 & Supp. 2012); *see also supra* note 21 (noting that an overwhelming majority of states have identical burden and standard of proof allocations).

Although Zimmerman's attorneys did not try to get his state case dismissed on Florida's Stand Your Ground law, the court still instructed the jury that as long as Zimmerman was not involved in an illegal activity and had a right to be where he was when the shooting occurred, "he had no duty to retreat and had the right to stand his ground."[49] Some have seized on this language in the jury instructions to suggest Stand Your Ground played an important role in the acquittal nevertheless. Federal prosecutors puzzling over whether to proceed would examine whether in a federal criminal prosecution, in which Stand Your Ground is not embodied in federal law, such a defense favorable instruction would be given. If federal self-defense law is significantly less favorable to the defense, this could be a factor militating in favor of a second prosecution. This is a factor that Justice Department Guidelines seem to permit in weighing whether the Petite Policy criteria are satisfied.

On closer examination, however, this is not as clear as it first might seem. It turns out the Florida state court instruction that Zimmerman received was grounded in traditional no-duty-to-retreat principles and was not based on the distinct Stand Your Ground principle. Thus, the state self-defense instruction may not be that different from what an accused would receive in federal court. Any federal criminal prosecution of Zimmerman would take place in a federal district court in the Middle District of Florida, within the jurisdictional confines of the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit pattern instructions do not include a self-defense instruction. Therefore, the federal trial court would have to look to other sources to craft an appropriate instruction. For example, the sister Seventh Circuit pattern self-defense instruction makes no reference to stand your ground in any manner:

> A person may use force when he reasonably believes that force is necessary to defend [himself/another person] against the imminent use of unlawful force. A person may use force that is intended or likely to cause death or great bodily harm only if he reasonably believes that that force is necessary to prevent death or great bodily harm to [himself/someone else].[50]

On the other hand, the self-defense jury instruction found in the authoritative Sand & Siffert federal jury instructions, a source often relied on by federal district judges nationwide in crafting instructions, provides in relevant

49. Freivogel, *supra* note 3 (quoting relevant instruction).
50. SEVENTH CIRCUIT PATTERN FEDERAL JURY INSTRUCTIONS: CRIMINAL § 6.01 (2012).

part, "[t]he law recognizes the right of a person who is not the aggressor to stand his ground and use force to defend himself."[51]

So even for cases in which the evolved federal common law of self-defense would govern in the federal trial, and Florida Stand Your Ground would not, the current applicable traditional federal common law self-defense principles could yield a jury instruction virtually identical to the one tendered in the state trial. This once promising avenue is not as strong as it seems at first blush, and thus is likely insufficient to help justify a successive prosecution.

Perhaps that is just as well. As discussed in Part II, there are more appropriate forums to debate the contours and future of self-defense law. Changing the states' self-defense laws back to traditional notions of self-defense is an important undertaking deserving of significant national debate, but, as part of a Petite Policy analysis, it is not an enduring national priority sufficient to justify a successive prosecution. These factors collectively make it difficult to conclude that the result in the first trial was "manifestly inadequate" so as to warrant a successive federal prosecution of Zimmerman.

II. WHAT IS NEXT ON THE LEGAL FRONT?

Both President Obama and Attorney General Holder, perhaps delicately preparing the most vociferous protesters for the disappointment to come should the Justice Department decline to prosecute, have focused their postverdict comments on general issues of race, the context of what it means to be black in America today, and have called for renewed scrutiny concerning stand your ground laws.[52] Pressure should be brought to bear on state legislatures to rethink their stand your ground laws, particularly in a time of declining violent crime rates.[53] Such debate will likely become swallowed up as part of the larger gun-control debate and the role of firearms in America—because the topics are interconnected—but the debate must be undertaken, state legislature by state legislature if necessary. This is already happening. The Florida legislature seems poised to revisit its Stand Your Ground law in the fall.[54] And the racial

51. 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL ¶ 8.08 (2013).

52. *See, e.g.*, Manuel Roig-Franzia & Sari Horwitz, *Attorney General Eric Holder Denounces 'Stand Your Ground' Laws*, WASH. POST, July 16, 2013, http://articles.washingtonpost.com/2013-07-16/politics/40606714_1_trayvon-martin-george-zimmerman-neighborhood-watch-volunteer; Philip Rucker & Juliet Eilperin, *Obama Pleads for 'Soul-Searching,'* WASH. POST, July 20, 2013, at A1.

53. *See, e.g.*, Terry Frieden, *U.S. Violent Crime Down for Fifth Straight Year*, CNN (Oct. 29, 2012, 2:13 PM), http://www.cnn.com/2012/10/29/justice/us-violent-crime/index.html.

54. *See Florida Lawmakers to Hold Hearings on 'Stand Your Ground,'* WASH. POST, Aug. 2, 2013, http://articles.washingtonpost.com/2013-08-02/politics/41002303_1_stand-your-ground-self-defense-law-unarmed-teenager-trayvon-martin.

crosscurrents cannot be ignored even if there are no easy answers. A state-by-state debate on stand your ground laws, however, will be a long slog.

Congress should do nothing. In the immediate aftermath of the shooting, some members of Congress introduced a "Trayvon Amendment," designed to strip 20 percent of federal anticrime grant funds from states that have enacted stand your ground laws. Fortunately, this type of congressional overreaching and grandstanding went nowhere.[55]

Congress could decide to codify federal self-defense law in any manner it sees fit. For example, Congress legislatively modified the then prevailing federal common law insanity defense in reaction to the shocking and unpopular not guilty by reason of insanity verdict in the *John Hinckley* case. Hinckley, if you remember, shot President Regan in an effort to impress actress Jodi Foster.[56]

But to what end? This would be an extreme overreaction. Federal homicide cases make up only a miniscule percentage of the federal criminal caseload.[57] Congress would not want to change the substantive law radically by permitting self-defense only for cases in which the individual was, in fact, in actual imminent

55. Alex Newman, *Democrat Anti-Self-Defense "Trayvon Amendment" on Hold, for Now*, NEW AM. (May 10, 2012, 9:39 AM), http://www.thenewamerican.com/usnews/congress/item/11336-democrat-anti-self-defense-%E2%80%9Ctrayvon-amendment%E2%80%9D-on-hold-for-now. In addition, U.S. Senator Richard Durbin, Chairman of the Senate Committee on the Constitution, Civil Rights, and Human Rights, announced he would hold hearings to examine the various states' stand your ground laws. Burgess Everett, *Dick Durbin to Hold Hearing on 'Stand Your Ground' Laws*, POLITICO (July 19, 2013, 12:34 PM), http://www.politico.com/story/2013/07/stand-your-ground-law-hearing-94477.html. This, too, seems like questionable political grandstanding since there are no federal stand your ground laws. Senator Durbin sought to justify the hearing by suggesting a somewhat attenuated federal nexus to civil rights and further asserted that continued efforts by the gun lobby to change federal gun laws would exacerbate the troubling impacts of stand your ground laws. *See* Public Announcement, "Stand Your Ground" Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force (Sept. 17, 2013) (on file with the UCLA Law Review) (publicizing the hearing before the Senate Judicicial Subcommittee on the Constitution, Civil Rights and Human Rights). The hearings were postponed at the last minute in light of the Navy Yard massacre that occurred a short distance from the Senate Office Building. Aaron Blake, *Senate 'Stand Your Ground' Hearing Postponed*, WASH. POST (Sept. 16, 2013, 6:29 PM), http://www.washingtonpost.com/blogs/post-politics/wp/2013/09/16/senate-stand-your-ground-hearing-postponed.

56. PETER W. LOW ET AL., THE TRIAL OF JOHN W. HINCKLEY, JR.,: A CASE STUDY IN THE INSANITY DEFENSE 1, 21–27 (1986).

57. From 2008–2012, federal homicide defendants made up less than .02 percent of all federal criminal defendants. In the twelve-month period ending March 31, 2012, homicide defendants accounted for only 149 of 98,845 federal defendants. Even adding in *every* civil rights criminal defendant for that same time period (even though not every criminal civil rights prosecution involves a homicide), raises the total only by 126, for a total of 275 out of 98,845, or approximately .03 percent of all defendants. *Caseload Statistics 2012,* U.S. COURTS, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2012.aspx (last visited Sept. 19, 2013) (click "Table D-2").

danger. Removing the reasonable belief standard would not necessarily have changed the outcome in Zimmerman's case. Moreover, it would eliminate the defense in those tragic, but unfortunate, situations in which law enforcement officers in good faith shoot a suspect who fails to comply with a command to raise their arms and suddenly reaches for what turns out to be a cell phone, or when a civilian shoots and kills someone pointing an empty or realistic looking toy gun at them. Traditional self-defense doctrine has sensibly permitted the use of deadly force in those situations, and should continue to so provide.

Congress could legislatively alter the burden and standard of proof in self-defense cases to make the defendant prove self-defense by, say, clear and convincing evidence, much like it did when it legislatively altered the federal insanity defense after the *Hinckley* verdict.[58] But altering the burden and standard of proof in insanity cases to require the defendant to prove insanity by clear and convincing evidence—instead of requiring the prosecution to prove sanity beyond a reasonable doubt as was required in *Hinckley*[59]—was a sensible change in the law that represented a mainstream alternative. Altering the burden and standard of proof in self-defense cases is an important and complex issue deserving of careful study.[60] But it would be an unnecessary and ill-considered response in the immediate aftermath of the Zimmerman verdict.

CONCLUSION

At some time in the relatively near future, the Justice Department will likely quietly announce it has declined to commence a federal prosecution of Zimmerman, with little or no additional comment. Such a conclusion would be a proper exercise of federal prosecutorial discretion consistent with applicable Justice Department guidelines. The federal government could, on the other hand, decide to prosecute and similarly provide no rationale for its decision. Either

58. *See* 18 U.S.C. § 17 (2012).

59. LOW ET AL., *supra* note 56, at 122. Lest one think that burden and standard of proof allocations are inconsequential, one should consider how any individual, who presumably has never shot a president to impress Jodi Foster, could prove their sanity beyond a reasonable doubt if a trier of fact was presented with all of the crazy things that person had done during their lifetime?

60. For a discussion, see SEVENTH CIRCUIT PATTERN FEDERAL JURY INSTRUCTIONS: CRIMINAL, *supra* note 50, § 6.01 Committee Comment. The Committee comment cites *Dixon v. United States*, 548 U.S. 1 (2006), where the Court approved of a duress instruction, another non-statutory federal defense, which placed the burden on the defense to establish duress by a preponderance of the evidence. Subsequent appellate courts have noted that the "Court's holding [in *Dixon*] was not limited to [the duress] defense," thus creating a level of uncertainty as to what is the burden and standard of proof for all non-statutory federal criminal law defenses. SEVENTH CIRCUIT PATTERN FEDERAL JURY INSTRUCTIONS: CRIMINAL, *supra*, § 6.01 Committee Comment.

way, the federal government's decision is not subject to any judicial review. However, a decision to go forward, though lauded in some quarters, would also be criticized as brazenly political and an abuse of prosecutorial discretion.

Some, including members of my Howard University community, will likely be disappointed and even angry at my conclusions. Not to sound trite, but this has to be a teachable moment. For this current generation of law students, many of whom desire to become prosecutors or defense lawyers, understanding the detailed nuances of the Petite Policy and the framework of how the awesome power of prosecutorial discretion should be responsibly exercised is a vitally important lesson to learn. Criminal trials are not designed—and thus are often ill equipped—to serve as object lessons to address broader social ills. As mere mortals, we are left with imperfect justice. I welcome the robust, constructive, respectful debate that is sure to follow.

Zimmerman's state court acquittal should be the last word from a criminal jury, but certainly not the last word on the subject. The passions and energy sparked by the tragic events in Florida must be channeled in a positive and constructive direction, even if progress is measured in inches. The difficult dialogue is inexorably intertwined with the larger issues of race and the role of firearms in our society. President Obama's intensely personal postverdict comments underscore the reality of what it means to be black in America today. The former law professor in him clearly emerged when he posited whether Martin, "if . . . of age and armed, could he have stood his ground on that sidewalk . . . [and justifiably shot] Zimmerman, who had followed him in a car, because [Martin] felt threatened?"[61] While it will forever remain uncertain whether Trayvon Martin would be alive today if he were white, it seems far more certain that he would be alive if Zimmerman had not been armed. Nonetheless, another prosecution of Zimmerman, which cannot easily be squared under Justice Department policy and is unlikely to result in a conviction, is not appropriate.

61. Rucker & Eilperin, *supra* note 52.