FAILING OUR HOODIES

[photo: Harlequeen via Flickr]

Some of you may have been at Netroots Nation this summer, along with Team Emptywheel. I couldn't go this year.

I stayed home because my teen son needs more parental guidance right now.

My once-sunny 15-and-a-half year-old who carried As and Bs all through grades K-8 suddenly became a difficult student. He failed a class one term, earned a C in another class; he might have done worse in other classes had I not leveraged threats ranging from dropping sports to elimination of all electronics. He's going to have to re-take the failed class.

Girls discovered him. I don't think it was the other way around, having accidentally come across text messages. He began to talk with one girl on a regular basis, bleeding his heart out to her about all the conflicts he used to discuss with me. In her he found a personal fan club; she patted his back about the crap hormonally-overloaded teen boys do to each other, as well as the horrors a "tiger mother" inflicted on her child, especially a parent whose partner is away from home a lot due to the demands of their job. You can imagine some of

the dialog:

HE: *OMG she made me study all eve i hate her*

SHE: *poor thing i feel so sorry for you come over and we'll watch movies*

At the same time, my son was burning his candle at both ends. He ran 30 or more miles a week with the cross-country team, attended at least two meets a week, while juggling advanced classes and the girlfriend. It was just too much for him.

Add dramatic growth spurts to this picture; he shot up nearly eight inches inside a year's time, completely messing with his classmates' and teachers' perceptions of him.

I expected the separation between parent and child; distancing is a necessary part of growing up. But the failed grades and a sketchy first-time relationship? Nope. I have to double-down on supervision before he becomes an even more difficult high school sophomore.

He gets moody, takes off and hides out, cellphone in hand at all hours. The moodiness bugs me all to hell; he's far worse than his older sister ever was. But this is another contributing factor. His sister left for college this year and now all the attention at school and home is on his back with laser-like focus. Because of his track record I need to watch him closely, but appear not to do so at the same time. It's utterly crazy-making for both of us.

In spite of the painful occasional I-don't-want-to/Yes-you-are-right-now screaming matches, I'll be here. I'll protect him as I guide him, with the help of his teachers and coaches. He may tower over me at nearly six feet, but his brain and nervous system have not caught up. I'm sure his IQ suffered on occasion, mirroring results of studies on teen growth. His frequent clumsiness and poor choices attest to ongoing changes (i.e., not studying, playing video games into the wee hours, eating a half-gallon of ice cream in one sitting, so on). He needs me here

to make sure he makes it through this last leg of the marathon from birth to adulthood. Just three or four more years of vigilance and he'll be ready to take on most adult functions by himself.

You've got the picture now: pouty, moody, and alone, roaming the neighborhood in the evening, sweatshirt hood up while he's on his cellphone with his girlfriend. My son is not unlike Trayvon Martin.

Which is why I am absolutely horrified and appalled about the Zimmerman-Martin case.

Who and what was George Zimmerman protecting?

Yes, I've read fellow Emptywheeler bmaz's post about the anticipated verdict. What he says makes sense with regard to evidence and the law.

But what does not make sense to me is how an adult man could shoot a neighbor boy not unlike my own son.

I can't fathom the thought processes and actions that would lead an adult man to confront a lone teen boy in a manner that would ultimately lead to the boy's death. If my son were wandering around alone in the evening in my neighborhood, my neighbors would watch him at a careful distance. They might call the cops if they didn't recognize him. If they knew who he was, I might get a visit from a neighborhood association board member if they were worried about a pattern of behavior.

How could anything my son ever do potentially lead to a gunshot and death, though?

He's still legally a child. Our society has agreed that persons under the age of 18 cannot make informed decisions for themselves, unable to affirm contracts

Which brings me again to George Zimmerman, the adult present that fateful night, the person who should have been able to make mature decisions. As far as I can tell, he made bad ones, several times. I concur with Huffington Post's Ryan

Grim, that Zimmerman could have made different, better decisions.

But the worst decision Zimmerman made Grim did not mention. Zimmerman chose not to protect a teen neighbor boy; he chose instead to protect…

Well, what?

Isn't a neighborhood watch supposed to *watch* the neighborhood, in order to protect it?

Wasn't Trayvon Martin one of the neighbors' kids. who lived in the neighborhood?

Why didn't this boy, so like my own, get protection by the neighborhood watch?

Why did the adult in this case – one who isn't supposed be suffering from hormonal overloads, requisite teen and/or family drama, and too much sugar – make such awful choices?

The law may have found for Zimmerman, but I cannot. He is an adult, believed to be the mature, level-headed person making sound decisions that night. A man who should have listened carefully to the dispatcher and respected their feedback about not following Trayvon Martin.

Here, though, is the problem with our culture, our society. It's the underlying reason why Washington Post's Richard Cohen is permitted a pulpit to write about "the death of a young man understandably suspected because he was black."

We're failing our youth. Men like Zimmerman believe that teen boys, particularly those of color, do not need protection. They don't see them as neighbors or children of their village. These men swing their guns as proxies of their manly dicks, choosing not to be paternal or neighborly, but hostile and confrontational in both words and acts. Boys in their freshly-spun adult bodies, still operating with minds of children, are to be seen as the enemy, not coached or parented but accosted and assaulted.

We don't hold these same men accountable for

failing as the protective guides our sons and daughters alike need during their *katabasis*, the challenging, adrift time between childhood and adulthood when our progeny must delaminate from parents and build new identities as functional adults.

I could dig more deeply into the issue of race, but the problem is bigger than race alone. The same misguided attitude toward our youth has encouraged so many teen boys to access weapons before they are mature enough to make informed decisions. Years later I still cannot imagine how Eric Harris and Dylan Klebold could amass so many weapons without notice by parents and other adults before they shot up Columbine High School and themselves. How many times since then have we read other stories about teens arming themselves before threatening, hurting, or killing others? Why did these children in adults' bodies feel they needed to acquire arms and attack others?

Did they feel unprotected?

How many times have we heard of rapes by youth of this same age, too? Often unarmed violence, but violence all the same – yet no parent or other adult saw any of these hostile acts brewing? With respect to rape, girls may more often be the disposable victim though rape affects both genders. I'm only surprised Richard Cohen hasn't written about the Steubenville case as "the rape of a young woman understandably targeted because she was female."

In Steubenville, the football coach and other adult members of the community rallied behind and supported the football players accused of rape in spite of video evidence. Worse, a coverup of the crime may have been attempted, fortunately thwarted by Anonymous hacking and leaking of materials germane to the case.

Why wasn't the first reaction on the part of the football coach and other adults to call the cops and care for the victim?

Who or what were these adults really protecting?

Certainly not the victim; she was just another disposable teen.

We're failing. It's gone on for far too long, becoming a kaiju of epic proportions given the number of injured, dead, and raped teens every year.

Trace line of thought a bit farther and it's not impossible to imagine that every atrocity committed by our troops in Iraq and Afghanistan, even domestic spying by the NSA, may be a result of this same pervasive problem. Unprotected youths turned into disaffected adults.

Think about it: an at-risk, unprotected generation shaped by years of violent video games, encouraged by our culture to be gun-toting dick-swingers, acting out of self-interest alone, without a proper sense of who or what they are really supposed to protect — then armed to the teeth with guns, or keyboards and software.

Imagine the disposable victims, understandably targeted…when does it end?

UNCOMFORTABLE TRUTH: THE STATE OF EVIDENCE IN THE GEORGE ZIMMERMAN PROSECUTION

I have said this from the get go: In the case of *State of Florida v. George Zimmerman*, under the actual facts of the case from the State of Florida's own disclosure, as opposed to hype from Benjamin Crump and his public relations team, who have self interest from representation of family members in a civil damages case, not

to mention well meaning, even if uninformed, mass and liberal media, there has *never* been a good factual rebuttal to George Zimmerman's own account of self defense. You know why? Because there *is not* any compelling rebuttal within the facts as adduced in the investigation and entered in the record at trial. And the presumption of innocence and burden of proof in the American criminal justice system still mean something.

Yes, I know what I am saying runs counter to the popular meme and what people emotionally feel and want to hear. But everything I have noted from the start of this case has been borne out in the trial evidence and resulting posture as the case heads to closing arguments and to the jury for deliberation.

Did you know that powerful local mayoral office politicians involved themselves, by meeting with only the victim's family and their attorneys, in an improper *ex-parte* manner, to go over the most critical evidence during the early stages of the investigation and before said Martin family members' statements were relied on to file charges? I bet you did not, but that has been the testimony in the trial record.

Did any of you see the young female neighborhood homeowner, Olivia Bertalan, that testified Wednesday as to the crime spree that was ongoing in her and Zimmerman's neighborhood, Retreat at Twin Lakes, including the home invasion where she and her child were victims of one or more home invaders, and who was effusive in her praise for the concern of the neighborhood watch program and George Zimmerman? Did you know that, thanks in part to the actions of Zimmerman and his wife, the juvenile suspect was caught and sentenced as an adult by this same judge, Debra Nelson, to five years in prison? Probably not is my guess. But that, too, is the evidence.

Did any of you see the other neighbors, of all races, in Retreat at Twin Lakes who testified on Zimmerman's behalf about the the facts of the case, that Trayvon Martin was the aggressor on

top of Zimmerman when the shooting occurred, and the crime afflicting the neighborhood and the need for the neighborhood watch program? My guess is you did not. But that, too, is part of the evidence in the trial record.

Did any of you see the parade of witnesses that laid the foundation for the fact Trayvon Martin was the aggressor in the actual critical physical encounter between him and Zimmerman, and was on top of Zimmerman, and beating Zimmerman, both moments before, and at the time of, the key gun shot? And supported by both the case detectives and one of the foremost expert pathologists, Dr. Vincent di Maio, in the world? My guess is you did not. But that, too, is in the trial record as hard evidence.

Yes, all of those facts are exactly what was testified to in open court. Most of the witnesses were literally the state's own witnesses, including the two main case detectives, Detective Chris Serino and Detective Doris Singleton. Did you know that the state's own veteran case detectives, Serino and Singleton, testified they believed George Zimmerman and thought his version of the facts consistent and credible? My guess is you don't know that. Yet all of that is exactly what the sworn testimony has been in open court.

Did you know that the state, by and through Angela Corey, relentlessly engaged in Brady violations with regard to discovery and evidence disclosure and that, as a result, discovery and depositions thereon have been ongoing even during the trial, all to the detriment to, and prejudice of, Defendant Zimmerman? My guess is you did not, but that too

is part of the record.

In spite of all of the above, the political, and cravenly so, prosecution may still tug on enough emotional and falsely racial heartstrings to wrongfully convict Zimmerman. Almost surely there will be no conviction of the always wrongfully charged 2nd degree murder charge; but the possibly of a flawed compromise verdict to a lesser included charge of manslaughter, battery, or other lesser included offense, is very real. If so, it will, despite all the emotions of this case, be a tragedy of justice.

No matter what you think of George Zimmerman personally, the rule of law should militate in favor of an acquittal. Yes, if the burden of proof in the American criminal justice system is truly “beyond a reasonable doubt”, and if there really exists a common law right to “self defense”, then acquittal is exactly what the verdict should be, and must be.

I have no affinity for George Zimmerman. Frankly he strikes me as a hapless dope. Under no circumstances do I support George Zimmerman, or anybody else, wandering around with concealed carry, locked and loaded, firearms on neighborhood patrol (even though he was not on patrol, but only on his way to Target for family shopping). It is a tragic event waiting to happen and nowhere close to what the founders had in mind with regard to the Second Amendment. But my, and your, beliefs are not the law of the land either in Florida or anywhere else in the United States under *District of Columbia v. Heller*. And that is the law of the land, both for the Zimmerman case at bar, and and all others elsewhere.

We shall see how willing to follow the law the jury will be, and what their verdict is. But this case is not now, and NEVER has been, about what has been pitched and portrayed in the media. Never. It is not about racial prejudice and profiling (and the DOJ Civil Rights Division so found), and it is not about murder. It is about a tragic and unnecessary death, but one

that is not a felony crime, despite all the sturm and drang.

State of Florida v. Zimmerman is a straight up traditional self defense case. It has never been pled as a Stand Your Ground defense case, irrespective of all the press coverage, attention and attribution to Stand Your Ground. It's never been Stand Your Ground, and certainly is not now that the evidence is all in on the trial record. It is a straight self defense justification defense, one that would be pretty much the same under the law of any state in the union including that which you are in, and that I am in, now (so don't blame "Florida law").

There is nothing whatsoever unique in the self defense posture that has been effected in this case. Nothing. And it is, whether it is comfortable or not, a compelling self defense case. Actually, let us be honest: It is *not* comfortable. Not even close. But no matter how uncomfortable it is to say, Zimmerman needs to walk, because the self defense case is strong. The burden of proof in the instructions to the jury will read that not only is there a general presumption of innocence afforded Zimmerman but, moreover, the state must also prove *beyond a reasonable doubt* that Zimmerman did NOT act in self defense. Under the facts as adduced in the trial record that ought be, by all rights, an impossible burden for the jury to get past, whether on the pending count of 2nd degree depraved murder or any possible lesser included charge given to the jury.

The facts, the rule of law, and the constitutional burdens of proof compel an acquittal. Uncomfortable to hear; yes, it is. Necessary for an acquittal to occur; also, yes it is.

[UPDATE: Just a couple of quick notes. First off, the jury instructions: Judge Nelson accepted a lesser included for standard voluntary act manslaughter under FLRS 782.02(1). Nelson, thankfully, denied the wild request by the state to give a third degree murder

instruction based on child abuse. It was a ridiculous attempt by the state and would have provided fertile ground for an allegation of reversible error had there been a conviction. So, the jury will deliberate only on the 2nd degree murder and the lesser included manslaughter charges, which is how it should be.

Prosecutor gave a long closing argument this afternoon. Parts of it were pretty good, parts fairly diffuse and rambling. Overall competent though, and he will still have a rebuttal after the defense closing tomorrow by Mark O'Mara.

APPEALS COURT GRANTS ZIMMERMAN JUDGE DISQUALIFICATION MOTION

I have long maintained the George Zimmerman criminal case ongoing in Florida, and the nature of Florida law and procedure, is far different than most in the media and blogosphere understand. The initial investigation was not particularly "botched" at all, the actual known facts and statements do not indicate particular racial animus on Zimmerman's part, the known facts and statements relating to the actual physical "confrontation" are far different than generally painted and arguably do indicate Martin was the aggressor, and Florida law is rather, shall we say, unique in many regards.

One of the areas I have delved into, although not here, is the disqualification motion made by Zimmerman defense attorney Mark O'Mara. The motion was aimed at Judge Lester and, go figure, was denied by him. But O'Mara appealed via a

Writ of Prohibition and, what do you know, the Florida Court of Appeals For The Fifth District just granted the writ and ordered Judge Lester to recuse himself:

> George Zimmerman petitions for issuance of a writ of prohibition. This is the proper mechanism for challenging the denial of a motion to disqualify a trial judge. See, e.g., Lusskin v. State, 717 So. 2d 1076, 1077 (Fla. 4th DCA 1998). Reviewing the matter de novo, see R.M.C. v. D.C., 77 So. 3d 234, 236 (Fla. 1st DCA 2012), we grant the petition.
>
> Florida Rule of Judicial Administration 2.330 requires a trial judge to grant a motion to disqualify without determining the accuracy of the allegations in the motion, so long as the motion is "legally sufficient." R.M.C., 77 So. 3d at 236. "A motion is legally sufficient if it alleges facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." Id. (citing MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990)). Although many of the allegations in Zimmerman's motion, standing alone, do not meet the legal sufficiency test,1 and while this is admittedly a close call, upon careful review we find that the allegations, taken together, meet the threshold test of legal sufficiency. Accordingly, we direct the trial judge to enter an order of disqualification which requests the chief circuit judge to appoint a successor judge.

It was not unanimous, but was, rather, a 2-1 decision. The State of Florida, now operating for appellate purposes, through AG Pam Biondi's office, may well file a petition for review with the Florida Supreme Court, we shall see.

Here is what I said in another forum on July

16th, just after the original motion to disqualify was lodged:

> It is a Florida case and, yes, their law is a bit different. But what Lester has done would be outrageous in any jurisdiction. Denial of a defendant's due process right to be present for a non-emergency bond revocation is a denial of due process anywhere, even in New York I would hope.
>
> That said, in most jurisdictions, including here [where I practice], I think this motion to disqualify would not stand a great chance of success, although I certainly would file it for tactical purposes and to make a record of objection to the court's conduct.
>
> In Florida, however, there is a very good chance the motion is granted. Indeed, there is an argument it MUST be granted.
> Fla. R. Jud. Admin. 2.330 (2012):
>
> > (f) Determination—Initial Motion. —The judge against whom aninitial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action.
>
> That is exactly the subsection O'Mara filed under and, although there was a previous disqualification of a judge in this case, it was under a different subsection. The burden in FL, believe it or not, is whether or not the defendant

> – Zimmerman himself – believes the judge will not be fair and impartial. That sure as hell is not the standard here [where I practice], but it is there, and it is very easily made in Zimmerman's case due to the gratuitous editorializing done by Judge Lester. If Lester is so impertinent as to refuse the motion, I think it would be appealed and reversed.

I have delved rather deeply into the Zimmerman fact set and, as I said above, it really is quite a bit different than commonly portrayed and understood. I have had access to all of the discovery, whether police reports, witness statements, recordings or copies of physical evidence in the case. There is a LOT of evidence and, frankly, I think very few people have really looked at most of it as opposed to reading ill informed news and blog accounts. I have had the privilege of doing this thanks to my friend, and Marcy's, Jeralyn Merritt. I have only engaged with Jeralyn personally on issues for the last few years, but I have known of her, and seen her at NACDL meetings, for at least 20 years; she is a very good criminal lawyer. Jeralyn has spent the hard cash to acquire every bit of the disclosure in this case, and it is not cheap, and she has done some incredible analysis on the case from the outset.

Here is what Jeralyn had to say on August 24th, just after the state filed it's appellate response brief, about the recusal motion and appeal:

> As I wrote here:
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> > Judge Lester impugned George Zimmerman's character, saying he "flouted the system." He said he exhibited disrespect for the judicial process. He said he was a manipulator. He doesn't think Zimmerman is credible. He has suggested there is probable

> > cause for the state to charge him with a crime for misrepresentations in his bail application. He is holding the threat of contempt over Zimmerman's head. The state presented no evidence other than a flimsy affidavit that failed to include information it had contradicting its theory of guilt, and he found the evidence against Zimmerman "strong." In setting bail at a million dollars, he didn't even acknowledge the strength of the defense evidence presented and admitted at the hearing. He even gratuitously threw in he thought Zimmerman might be preparing to flee.
>
> > The question is whether a reasonable person in Zimmerman's situation – a defendant in his court – would fear the judge is biased as a result of his comments and rulings.
>
> I also don't think much of the state's argument that this is O'Mara's second motion to recuse a judge based on impartiality. The motion O'Mara filed in April was based on section (d)(2) of the rule (affinity of judge to an interested person) not the impartiality section (d)(1). (The rule is here.) Although O'Mara mentions impartiality in the first motion, he cites a case law for his statement, not the rule, and it seems obvious to me the first motion is filed only under section (d)(2).

That is good work, and precisely what I would have said had I written a full on blog post on this topic on that date.

Now, again, maybe there will be a petition for review and the Florida Supreme Court reverses the Court of Appeals. But, either way, let it stop being said, by people that are not up to speed, that the disqualification motion was idiotic or ill taken. Win, lose or draw, it was a necessary and tactically smart move by Mark O'Mara to remove either Judge Lester completely or, at a minimum, some of his out of control hubris.

UPDATE: There will be no appeal (technically a petition for review) per Pam Biondi's Florida Attorney General's Office according to the Orlando Sentinel. Case looks to likely be assigned to Judge Debra Nelson, who has a reputation for being tough. So, Zimmerman may not have any net gain in getting a judge change; still, tactically, it was the right play.