Cleveland State Law Review

Volume 64 | Issue 3 Note

6-1-2016

Standing Up to "Stand Your Ground" Laws: How the Modern NRA-Inspired Self-Defense Statutes Destroy the Principle of Necessity, Disrupt the Criminal Justice System, and Increase Overall Violence

Daniel Sweeney
Cleveland-Marshall College of Law

STANDING UP TO "STAND YOUR GROUND" LAWS: HOW THE MODERN NRA-INSPIRED SELF-DEFENSE STATUTES DESTROY THE PRINCIPLE OF NECESSITY, DISRUPT THE CRIMINAL JUSTICE SYSTEM, AND INCREASE OVERALL VIOLENCE

DANIEL SWEENEY*

ABSTRACT

A majority of states have enacted "Stand Your Ground" laws. Proponents argue that such laws enhance the important right of self-defense. In application, however, "Stand Your Ground" laws have had a negative impact on society. First, "Stand Your Ground" laws ignore the common-law element of necessity that traditionally provided a check on unreasonable self-defense. Second, "Stand Your Ground" laws create presumptions that remove important discretionary powers from law enforcers, prosecutors, and judges. Third, studies have shown that "Stand Your Ground" laws may actually increase violent crime. The "Stand Your Ground" movement continues to enjoy a great degree of political success due to its formula of politicizing violent street crime, and exploiting the public's fear of victimization, as well as its overall distrust of the criminal justice system.

CONTENTS

* J.D. candidate, May 2016. I would like to thank professors Jonathan Witmer-Rich and Peter Garlock for their assistance in writing this Note.

INTRODUCTION

On the night of November 5, 2004, Jimmie Morningstar, a forty-three-year-old cable salesman, was planning on having an enjoyable evening in Palm Beach, Florida.[1] This was the first night of a two-week vacation from work, and he decided to celebrate the occasion at the local alehouse.[2] While at the bar, Morningstar drank heavily and became intoxicated to the point that he was cut off from further drinks, and was asked to leave.[3] Morningstar, who was described that night as "unruly," refused to leave.[4] A bar employee, presumably trying to both convince Morningstar to leave and also make sure he reached home safely, called him a cab.[5]

The cab driver, Robert Smiley, arrived at the bar and drove Morningstar to his apartment, which was less than a mile away.[6] Upon arriving at the apartment, Morningstar refused to get out. Smiley then forcibly removed him by zapping him with a stun gun.[7] Although it is unclear exactly what transpired after this, it appears that Morningstar, who was now outside of the taxi, tried to get back in. Smiley, who had a firearm, responded by first yelling at Morningstar, then firing two warning shots, and finally shooting him twice in the chest, killing him.[8] Smiley later testified at trial that Morningstar flashed a knife, although one was never found.[9]

On October 1, 2005, less than a year after Smiley killed Morningstar, and while the case was pending, the Florida legislature passed a new bill that significantly altered the state's self-defense laws.[10] This bill, called the Protection of Persons/Use of Force Bill,[11] is commonly known as the "Stand Your Ground" law.[12] The

---

[1] Missy Diaz, *Plea Deal Averts Trial for Taxi Driver*, SUN SENTINEL (Feb. 23, 2007), http://articles.sun-sentinel.com/2007-02-23/news/0702230082_1_plea-deal-jimmie-morningstar-robert-smiley.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Adam Liptak, *15 States Expand Right to Shoot in Self-Defense*, N.Y. TIMES (Aug. 7, 2006), http://www.nytimes.com/2006/08/07/us/07shoot.html?_r=1&pagewanted=print ("[T]here is evidence to support that the victim came at Smiley after Smiley fired two warning shots, and that he did have something in his hand.") (quoting Smiley's defense attorney).

[10] 2005 Fla. Laws 199, 202 (codified at FLA. STAT. §§ 776.013, 776.032).

[11] *Id.*

[12] *See, e.g.*, Steve Bousquet, *Legislature Say's Let the Force Be With You*, ST. PETERSBURG TIMES ONLINE (Apr. 6, 2005), http://www.sptimes.com/2005/04/06/State/Legislature_say_s_let.shtml (characterizing it as the National Riffle Association's "right to murder" bill); Liptak, *supra* note 9 (stating that critics of the law characterize it as a "shoot first" law).

controversial new bill expanded a person's right to use deadly force by creating a presumption that a defender, in his or her home, has a reasonable fear of imminent death or bodily harm when an intruder unlawfully enters, granting criminal and civil immunity, and abolishing the common law "duty to retreat."[13] Robert Smiley, who eventually pleaded guilty to manslaughter after two mistrials,[14] waged a lengthy legal battle in which he moved the court to permit jury instructions based on the newly enacted "Stand Your Ground" law.[15] Although his motion was ultimately denied, a Florida District Court of Appeals acknowledged that if Smiley did not have a duty to retreat, "[it] would substantially affect the legal consequences attached to Smiley's conduct."[16] The implication being, of course, that if Smiley had done the same act just a year later, after the passage of the new bill, he may have been legally justified in his use of deadly force.

Following Florida's lead, a majority of states have enacted "Stand Your Ground" laws.[17] Despite the widespread success that legislators have had in passing these bills, there is fierce and growing opposition to the laws, due in large part to several high profile cases. Perhaps most notable among these is the Trayvon Martin-George Zimmerman incident[18] that occurred in Florida in 2012, where Zimmerman, a

---

[13] *Florida Legislation—The Controversy Over Florida's New "Stand Your Ground" Law—FLA. STAT. § 776.013 (2005)*, 33 FLA. ST. U. L. REV. 351, 355-56 (2005) [hereinafter *Florida Legislation*].

[14] Diaz, *supra* note 1.

[15] State v. Smiley, 927 So. 2d 1000, 1001 (Fla. Dist. Ct. App. 2006).

[16] *Id.* at 1002-03

[17] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 229 (5th ed. 2009) [hereinafter DRESSLER, 5th ed.].

[18] There is considerable debate as to whether Florida's "Stand Your Ground" provisions had an effect on Zimmerman's trial. *See* Kris Hundley, *Despite Backlash, "Stand Your Ground" Laws Did Not Apply to Zimmerman Case*, TAMPA BAY TIMES (July 15, 2013), http://www.tampabay.com/news/courts/criminal/despite-outcry-zimmermans-acquittal-was-not-based-on-stand-your-ground-laws/2131629 ("Experienced prosecutors and law professors agreed that they think jurors were swayed by basic self-defense arguments made by Zimmerman's attorneys: Regardless of who initiated the encounter, at the moment the deadly shot was fired, Zimmerman feared for his life."); *Zimmerman to Argue Self-Defense, Will Not Seek "Stand Your Ground" Hearing*, CNN (May 1, 2013), http://www.cnn.com/2013/04/30/justice/florida-zimmerman-defense (explaining that the "Stand Your Ground" law was not at issue because Zimmerman waived his right to a pretrial immunity hearing); *see also* Dan Abrams, *No, Florida's Stand Your Ground Law Did Not Determine Either Zimmerman or Dunn Case*, ABC NEWS (Feb. 17, 2014), http://abcnews.go.com/US/floridas-stand-ground-law-determine-zimmerman-dunn-cases/story?id=22543929 ("[N]either defendant [referring to Michael Dunn trial as well] invoked the controversial aspects of Florida's law. In fact, both defendants argued basic self-defense law that would have been similar in just about every state in the nation . . . . [T]he duty to retreat was not an issue in either Dunn or Zimmerman. In both cases the defendants argued that deadly force was used because they 'reasonably' believed that it was necessary to prevent imminent death or great bodily injury. That, is at its core, no different than the law in almost every other state."); *Report: Zimmerman Told Police Teen Punched Him Before Fatal Shooting*, CNN (Mar. 26, 2012), http://www.cnn.com/2012/03/26/justice/florida-teen-shooting (stating that under Florida's "Stand Your Ground" law, Sanford police could not initially arrest Zimmerman). *But see* Nicole Flatow, *Why Stand Your Ground Is Central To George Zimmerman's Case After All*, THINKPROGRESS (July 15, 2013,

neighborhood watch volunteer, shot and killed unarmed seventeen-year-old Trayvon Martin.[19] Zimmerman, claiming that he acted in self-defense, was ultimately acquitted of second-degree murder charges by a Florida jury.[20] This verdict ignited a passionate and divisive national debate on the issues of racial profiling[21] and civil rights, and also brought a great deal of attention to Florida's "Stand Your Ground" law.[22]

This Note will argue that "Stand Your Ground" laws destroy the common-law element of necessity; disrupt the criminal justice system by taking away important discretionary power from law enforcement, prosecutors, and judges; and increase violence. Part I will give a brief overview of the common-law elements of self-defense. This section will also discuss several states' departure from the "duty to retreat" with the prevalence of the "true man doctrine" and will then explore Florida's self-defense statute that expanded the lawful use of deadly force.

Part II will begin by arguing that Florida's "Stand Your Ground" law is problematic for three reasons. Section A will argue that the "duty to retreat" is an important aspect of the necessity element, and that its removal undermines the societal value of preserving human life. Section B will argue that statutory presumptions and immunity provisions disrupt the criminal justice system and offer little guidance to law enforcement, prosecutors, and judges. Section C, relying on recent empirical evidence, will argue that "Stand Your Ground" laws not only fail to deter violent crime but actually increase it. Finally, Section D will examine the politics of the "Stand Your Ground" movement by analyzing the three core components of the movement's formula.

1:59 PM), http://thinkprogress.org/justice/2013/07/15/2301621/why-stand-your-ground-is-central-to-george-zimmermans-case-after-all (arguing that, although Zimmerman's lawyer never specifically raised "Stand Your Ground" as a defense, the jury instructions explicitly stated that "he had no duty to retreat and had the right to stand his ground and meet force with force").

[19] Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html.

[20] *Id.*

[21] For example, President Obama spoke in highly personal terms about the Trayvon Martin verdict:

> You know, when Trayvon Martin was first shot I said that this could have been my son. Another way of saying that is Trayvon Martin could have been me 35 years ago. And when you think about why, in the African American community at least, there's a lot of pain around what happened here, I think it's important to recognize that the African American community is looking at this issue through a set of experiences and a history that doesn't go away.

Barack Obama, President, Remarks by the President on Trayvon Martin (July 19, 2013, 1:33 PM), http://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin.

[22] Alvarez & Buckley, *supra* note 19.

I. BACKGROUND

A. Common-Law Tradition of Self-Defense Law

1. Elements of the Use of Deadly Force in Self-Defense

Every jurisdiction in the United States recognizes an individual's right to use force, including deadly force, in self-protection.[23] Self-defense, which is considered a "justification"[24] defense, has several elements: At common law, a non-aggressor is justified in using [deadly][25] force upon another if he reasonably believes such force is necessary to protect himself from imminent use of unlawful [deadly] force by the other person.[26] This rule contains three principal elements: (1) necessity; (2) proportionality; and (3) reasonable belief.[27]

a. Necessity

The necessity element requires that force, including deadly force, should only be used to the extent that it is necessary.[28] The underlying principle behind necessity as

---

[23] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221 (6th ed. 2012) [hereinafter DRESSLER, 6th ed.] (noting that if a state legislator were to abolish the right of self-defense, it would likely violate the Second Amendment, under *District of Columbia v. Heller*, 554 U.S. 570 (2008)). Historically, English common law has long recognized the idea of justified homicide. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *186.

[24] DRESSLER, 5th ed., *supra* note 17, at 222 ("Justified conduct is conduct that under ordinary circumstances is criminal, but which under the special circumstances encompassed by the justification defense is not wrongful and is even, perhaps, affirmatively desirable."). Dressler also provides a brief summary of various justification principles, such as "Public Benefit," "Moral Forfeiture," "Moral Rights," and "Superior Interest." *Id.* at 222-25.

[25] The definition of "deadly force" varies by jurisdiction. DRESSLER, 6th ed., *supra* note 23, at 223. Some jurisdictions take an objective approach and look at whether the force was "likely" or "reasonably expected" to cause death or serious bodily injury. *Id.* These jurisdictions consider the actor's state of mind irrelevant. *Id.* Other jurisdictions take a subjective approach, and include a mental-state element by defining deadly force as force "intended" to cause death or serious bodily injury. *Id.* Still other states take a hybrid approach. In Ohio, "deadly force" means any force that carries a substantial risk that it will proximately result in the death of any person. OHIO REV. CODE ANN. § 2901.01(A)(2) (West 2016).

[26] DRESSLER, 6th ed., *supra* note 23, at 221-22. "Deadly" is in brackets because the same rule is applied to self-defense situations not involving deadly force. Although the principal elements of common law self-defense are well established, courts often apply them with varying formulas. *See, e.g.*, United States v. Peterson, 483 F.2d 1222, 1229-30 (D.C. Cir. 1973) ((1) "There must have been a threat, actual or apparent, of the use of deadly force against the defender. [(2)] The threat must have been unlawful and immediate. [(3)] The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom. [(4)] These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances."); State v. Gheen, 41 S.W.3d 598, 606 (Mo. Ct. App. 2001) ("[T]he defendant (1) must not have acted as an aggressor, (2) must have reasonable grounds for believing he faced immediate danger of serious bodily injury; (3) must not have used more force that what appears reasonably necessary; and (4) must do everything in his power, consistent with his own safety, to avoid the danger and retreat if possible.").

[27] DRESSLER, 6th ed., *supra* note 23, at 221-22.

[28] *Id.*

it relates to deadly force is that all human life, even the life of a violent criminal, is valuable and worthy of protection.[29] Accordingly, having the right to use force that is capable of killing another human being should be reserved only for those situations in which a person being attacked has no other alternatives. Under the common law, force is only considered necessary when confronted with an *imminent* or "immediate" threat.[30] This rule precludes a preemptive attack, even if it appears an impending threat is inevitable.[31] The necessity element also precludes the use of deadly force to combat an imminent deadly assault if a non-deadly response would be sufficient to repel the attack.[32] Lastly, and most controversially, the necessity element, in some jurisdictions, does not allow the use of deadly force against an attacker when there is a completely safe avenue of retreat.[33] This last aspect of the necessity element is known as the "duty to retreat," and will be covered in more detail later in this Note.

b. Proportionality

The proportionality element places a limit on the maximum amount of force that one may use to protect oneself.[34] The amount of force used to protect oneself must not be excessive in relation to the harm with which one is threatened.[35] For example, in a common-law jurisdiction, a person may not use deadly force to protect his or her property even if deadly force was the only way to prevent the property from being stolen or damaged. The proportionality element reflects the societal value that it would be a great injustice to allow one to use deadly force against someone committing a non-violent offense such as trespassing, theft, or vandalism.

c. Reasonable Belief

The reasonable belief element in self-defense law contains both a subjective and an objective inquiry.[36] The first question is whether the actor subjectively believed that deadly force was necessary to repel an imminent unlawful attack.[37] The second question is whether the actor's belief was one that a reasonable person in his same situation would have possessed.[38] This objective view of a subjective state-of-mind standard means that an individual may satisfy this element even if it later turns out that the threat was not, in fact, imminent, or there was a completely safe avenue of

---

[29] *Id.* at 228.

[30] *E.g.*, State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989).

[31] DRESSLER, 6th ed., *supra* note 23, at 230; *see, e.g.*, Ha v. State, 892 P.2d 184, 191 (Alaska Ct. App. 1995).

[32] DRESSLER, 6th ed., *supra* note 23, at 222.

[33] *Id.*; *see also* Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 241 (2008) (explaining historical basis for the "duty to retreat" on theory that the English Crown had a monopoly on violence).

[34] PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 86-88 (1984).

[35] DRESSLER, 6th ed., *supra* note 23, at 222.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 222-23.

retreat.[39] As long as the actor's subjective belief that the force was imminent or that there was not a safe retreat available is a belief that a reasonable person *in his same situation*[40] would have possessed, the reasonable belief element is met.

2. The Duty to Retreat and the Castle Doctrine Exception

As explained previously, jurisdictions are split on whether an individual under imminent attack has a "duty to retreat" before using deadly force if he knows of a completely safe avenue of retreat.[41] Today, a majority[42] of jurisdictions have eliminated the "duty to retreat" and allow one to use deadly force even if he knows he can retreat in complete safety.[43] However, a sizeable minority still adheres to the common-law rule that requires retreat when there is a known and safe place to escape to.[44] Supporters of the "duty to retreat" argue that it is an essential component of the necessity element. If one is confronted with deadly force, but knows for certain that he can escape the altercation, then using deadly force against his attacker is not truly necessary.[45] Requiring retreat is also an acknowledgment that both the law and society value the preservation of human life above one's "manly" or "brave" response of confronting an attacker.[46] Supporters also point out that the rule does not increase the risk of harm to innocent people because retreating is only required when one is both subjectively aware of a place of complete safety and also believes he can actually retreat with safety.[47]

Supporters of the "no-retreat" rule argue that the law should be in accordance with the behavior of reasonable men.[48] A rule that discourages the "manly" response of standing one's ground by requiring the "cowardly" act of retreat conflicts with society's values of bravery and standing up for oneself.[49] Another argument is that a "no-retreat" rule deters violent crime because criminals are now put on notice that innocent civilians can fight back.[50] Additionally, a "no-retreat" rule instills confidence in law-abiding citizens and lets them know that in the event they find

---

[39] *Id.* at 223.

[40] *See* People v. Goetz, 497 N.E.2d 41, 52 (N.Y. 1986) (emphasis added).

[41] DRESSLER, 6th ed., *supra* note 23, at 226.

[42] *See* AM. BAR ASS'N, NAT'L TASKFORCE ON STAND YOUR GROUND LAWS, A REVIEW OF THE PRELIMINARY REPORT AND RECOMMENDATIONS 52-53 (Aug. 8, 2014), http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_justice/aba_natl_task_force_on_syg_laws_preliminary_report_program_book.authcheckdam.pdf.

[43] DRESSLER, 6th ed., *supra* note 23, at 227.

[44] *Id.* at 228.

[45] *See id.* at 226.

[46] *Id.* at 228. The idea of having the right to stand up to an aggressor, and not being required to engage in the "cowardly" act of retreat will be explored later. *See infra* Part I.B.1.

[47] DRESSLER, 6th ed., *supra* note 23, at 228.

[48] *See* State v. Abbott, 174 A.2d 881, 884 (N.J. 1961).

[49] *Id.* ("[T]he advocates of no-retreat say the manly thing is to hold one's ground, and hence society should not demand what smacks of cowardice.").

[50] DRESSLER, 6th ed., *supra* note 23, at 227.

themselves in a life-threatening situation the law will support their decision to defend themselves, rather than second-guess it.[51] Finally, supporters of the "no-retreat" rule argue that a "duty to retreat" is an archaic doctrine that has no place in a modern society with firearms.[52]

The common-law exception to the "duty to retreat" is the "castle doctrine," which allows one to use deadly force to protect oneself in his or her home, even if a safe retreat is available.[53] The doctrine, expressed by the maxim that "every man's house is his castle,"[54] provides that "a non-aggressor is not ordinarily required to retreat from his dwelling, even though he knows he could do so in complete safety, before using deadly force in self-defense."[55] Every jurisdiction has a castle doctrine, and in some states it has been expanded to places beyond the home such as hotel rooms and vehicles.[56] The "castle doctrine" is justified because it preserves two important societal values: (1) "defense of habitation"[57] and (2) the idea that one's home is viewed as a final "sanctuary"[58] to protect oneself from external threats.[59]

B. Rise of "Stand Your Ground" Laws

1. Historical Roots: The "True Man" Doctrine

More than a century before Florida passed its controversial self-defense law, a number of jurisdictions in the United States outright rejected the English common-

---

[51] Liptak, *supra* note 9; *see also* Adam Cohen, *The Growing Movement to Repeal "Stand Your Ground" Laws*, TIME (Apr. 16, 2012), http://ideas.time.com/2012/04/16/the-growing-movement-to-repeal-stand-your-ground-laws (stating that "Stand Your Ground" laws prevent citizens from being second-guessed by the legal system).

[52] *See* Robert Leider, *Understanding "Stand Your Ground,"* WALL ST. J. (Apr. 18, 2012), http://www.wsj.com/articles/SB10001424052702304432704577350010609562008 ("With the prevalent use of firearms, the retreat requirement has limited application today. Individuals usually cannot know that they can retreat in complete safety when facing aggressors armed with guns."); *see also* State v. Gardner, 104 N.W. 971, 975 (Minn. 1905) ("The doctrine of 'retreat to the wall' had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms."); P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes*, 35 S.U. L. REV. 1, 15 n.77 (explaining that advances in weaponry have made retreating from an attack impracticable, and that the law should reflect these advances).

[53] DRESSLER, 6th ed., *supra* note 23, at 228.

[54] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *288 ("[E]very man's house is looked upon by the law to be his castle.").

[55] DRESSLER, 6th ed., *supra* note 23, at 228.

[56] DRESSLER, 5th ed., *supra* note 17, at 230-31.

[57] The "defense of habitation" value stresses the sanctity of one's home and the proprietary interest in protecting it from intruders. Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 658 (2003).

[58] The value of the home as a "sanctuary" from attack suggests that one's home is precisely the kind of "known and safe place" envisioned by the "duty to retreat" rule. *Id.*; *see also* Weiand v. State, 732 So. 2d 1044, 1052 (Fla. 1999).

[59] *See* Carpenter, *supra* note 57, at 672-73.

law "duty to retreat."[60] The idea that a citizen had a right to stand his ground and kill in self-defense without being required to retreat came to be known as the "true man" doctrine.[61] This doctrine, rooted in notions of honor[62] and the "American mind,"[63] idealized the "true man" who stood up to his adversaries, and was especially prevalent in the newly expanding South and West.[64] In the late nineteenth century, even the United States Supreme Court expressed its approval of the "true man" doctrine, holding that:

> The weight of modern authority, in our judgment, establishes the doctrine that when a person, being without fault, and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable.[65]

In that same case, the Court upheld an earlier decision by the Supreme Court of Ohio, which famously held that "a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."[66]

Although the "true man" doctrine was never codified, and some of its followers, such as Texas,[67] eventually reverted back to common-law principles, it left a lasting

---

[60] *See* Leider, *supra* note 52.

[61] *See* Suk, *supra* note 33, at 243-46.

[62] *See* Joseph H. Beale, Jr., *Retreat From a Murderous Assault*, 16 HARV. L. REV. 567, 577 (1903).

[63] *See* RICHARD M. BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 17 (1991).

[64] *See* Leider, *supra* note 52; Suk, *supra* note 33, at 243.

[65] Beard v. United States, 158 U.S. 550, 562 (1895).

[66] Erwin v. State, 29 Ohio St. 186, 199-200 (1876). Although at first glance this holding seems to support the idea that Ohio rejected the common-law "duty to retreat," this is not quite the case. The court, reviewing and commenting on several treatises on English criminal law, distinguished between *justified* and *excused* homicide. If the killing was *justified*, there was no duty to retreat, but if it was *excused*, there was such a duty. *Id.* at 197-99. The court explains the distinction by quoting Chief Justice Theophilus Parsons, of the Supreme Judicial Court of Massachusetts:

> "[a] man may repel force by force in defense of his person against any one who manifestly intends, or endeavors by violence or surprise, feloniously to kill him. And he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defense. But a bare fear, however well grounded, unaccompanied by any overt act indicative of such intention, will not warrant him in killing. There must be an actual danger at the time."

Id. at 198 (quoting Commonwealth v. Selfridge (Mass. 1806)).

[67] *See* Denise M. Drake, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 ST. MARY'S L.J. 573, 577-85 (2008) (explaining the history of self-defense law in Texas: "Self-help was the remedy of choice, often handled by 'Judge Winchester' or 'Judge Lynch'"). In 1973 the Texas legislature imposed a duty to retreat to help overcome its "Wild

impression on American jurisprudence. The ideals of bravely defending oneself from wrongful aggressors and "standing one's ground" in any place one had a right to be would resurface in the twenty-first century and would soon become the rule among the majority of states.

2. Florida S.B. 436

On April 26, 2005, Florida Governor Jeb Bush signed into law Senate Bill 436, which expanded the right to use deadly force in Florida.[68] The bill, which received overwhelming support[69] from both Republicans and Democrats, was originally only intended to codify the common-law "castle doctrine," which allows a person to use deadly force when attacked in the home.[70] However, the National Rifle Association ("NRA"), which lobbied vigorously for the Bill and was instrumental in its passage,[71] was able to convince the Florida legislature to remove a provision saying that one had a "duty to retreat" when attacked outside the home.[72] Prior to the passage of this bill, Florida followed the common-law "duty to retreat" rule, which did not allow the use of deadly force unless the person used "every reasonable means to avoid the danger, including retreat."[73] The new law not only removed the provision requiring a "duty to retreat," but went a step further and explicitly denounced it, stating:

> A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force

West image." *Id.* at 582-83. In 2007, however, Texas became a "Stand Your Ground" state and eliminated its duty to retreat. *See* TEX. PENAL CODE ANN. § 9.32(c) (West 2016).

[68] Abby Goodnough, *Florida Expands Right to Use Deadly Force in Self-Defense*, N.Y. TIMES (Apr. 27, 2005), http://www.nytimes.com/2005/04/27/us/florida-expands-right-to-use-deadly-force-in-selfdefense.html?_r=0.

[69] Florida's House of Representatives approved the bill 94-20, and the Senate passed it 39-0. *Id.*

[70] Steve Bousquet, *Legislature Says Let the Force Be with You*, ST. PETERSBURG TIMES (Apr. 6, 2005), http://www.sptimes.com/2005/04/06/State/Legislature_say_s_let.shtml.

[71] *See* Jennifer Randolph, Comment, *How to Get Away with Murder: Criminal and Civil Immunity Provisions in "Stand Your Ground" Legislation*, 44 SETON HALL L. REV. 599, 612 (2014) (explaining how Florida's 2005 self-defense legislation was conceived by former NRA President Marion P. Hammer); Ross, *supra* note 52, at 16.

[72] Bousquet, *supra* note 70.

[73] *See, e.g.*, State v. James, 867 So. 2d 414, 416 (Fla. Dist. Ct. App. 2003). The rationale for requiring retreat was explained by Justice Overton of the Florida Supreme Court: "Human life is precious, and deadly combat should be avoided if it all possible when imminent danger to oneself can be avoided." State v. Bobbitt, 415 So. 2d 724, 728 (Fla. 1982); *see also Florida Legislation*, *supra* note 13, at 354.

> is not engaged in a criminal activity[74] and is in a place where he or she has a right to be.[75]

In addition to removing the "duty to retreat," Florida's new self-defense law also strengthened its "castle doctrine"[76] by creating a presumption that one attacked in his home, temporary place of lodging, or vehicle has a "reasonable fear of imminent death or great bodily harm" when another "was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle."[77] This presumption is significant because the same Florida statute only allows the use of deadly force if a person "reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony."[78] The law created yet another presumption that "[a] person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence."[79] Although there are exceptions to these presumptions,[80] it appears that if the presumption does, in fact, apply, it is conclusive and cannot be rebutted.[81]

---

[74] Florida's self-defense provisions provide that aggressors or those engaged in criminal activity have a duty to retreat. FLA. STAT. ANN. § 776.041 (West 2016).

[75] FLA. STAT. ANN. § 776.012(2) (West 2016).

[76] The Florida Supreme Court explained the rationale for it:

> "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. More than 200 years ago it was said by Lord Chief Justice Hale: In case a man 'is assailed in his own house, he need not flee as far as he can, as in other cases of se defendendo [self-defense], for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight.' *Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home . . . The rule is the same whether the attack proceeds from some other occupant or from an intruder*."

Weiand v. State, 732 So. 2d 1044, 1049-50 (Fla. 1999) (quoting People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914) (Cardozo, J.)).

[77] FLA. STAT. ANN. § 776.013(1)(a) (West 2016). The expansion of the "castle doctrine" also includes attached porches, any type of vehicle, and a place of temporary lodging, including tents. JUDICIARY COMM., S.B. 436 STAFF ANALYSIS 6 (2005).

[78] FLA. STAT. ANN. § 776.012(2) (West 2016).

[79] *Id.* § 776.013(4).

[80] Presumptions about the intent of the intruder do not apply if the intruder: (1) has a right to be in the house, lodging, or vehicle; (2) is seeking to remove a person lawfully under his or her care from a home, lodging, or vehicle; or (3) is a law enforcement officer, acting lawfully, and the defender had a reason to know that the intruder was a law enforcement officer. JUDICIARY COMM., *supra* note 77, at 5.

[81] *Id.* at 6; *see also* Drake, *supra* note 67, at 590-92 (2008) (explaining that the "critical distinction" between Texas and Florida's self-defense statutes is that Florida's presumption

Lastly, the new law grants criminal and civil immunity to those who use force in accordance with the statute.[82] Immunity from criminal prosecution means that a person cannot be arrested, detained in custody, or charged.[83] Law enforcement officers are not permitted to arrest a person claiming self-defense "unless [they] determine that there is probable cause that the force that was used or threatened was unlawful."[84] In addition, those charged with a crime have the right to a pre-trial immunity hearing where a judge decides whether the facts establish a self-defense immunity.[85]

Following Florida's lead, a majority of states[86] have passed bills that remove the "duty to retreat" and many other states are considering similar bills.[87] The NRA openly declared that it plans to introduce "Stand Your Ground" bills in every state and has a systematic plan for attaining "broad national support."[88] Unsurprisingly, these laws also face a great deal of opposition, especially from police chiefs and prosecutors who consider the laws unnecessary and likely to lead to increased violence.[89]

II. ANALYSIS

A. The Elimination of the "Duty to Retreat"

Having a legal right to use deadly force is an incredible power. If granted, a state is permitting a private citizen to take the life of another human being. Because human life is sacred, and the killing of another person is such an extraordinary measure, a society must determine the limited instances in which it will lawfully

---

was intended to be conclusive, while the Texas presumption is rebuttable); Daniel Michael, *Florida's Protection of Persons Bill*, 43 HARV. J. LEGIS. 199, 201 (2006).

[82] FLA. STAT. ANN. § 776.032(1) (West 2016) ("[A] person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force . . . .").

[83] *Id.*

[84] *Id.* § 776.032(2). This provision may explain why George Zimmerman was not initially arrested after killing Trayvon Martin.

[85] *See* Peterson v. State, 983 So. 2d 27, 28 (Fla. Dist. Ct. App. 2008).

[86] AM. BAR ASS'N, *supra* note 42, at 52-53. States that have statutorily removed the "duty to retreat": Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Id.*

[87] Liptak, *supra* note 9.

[88] Goodnough, *supra* note 68. NRA Vice President Wayne LaPierre revealed that his organization's strategy would be to start in Republican-controlled states first: "We will start with red and move to blue . . . . In terms of passing it, it is downhill rather than uphill because of all the public support." *Id.*

[89] *States Signing onto NRA-Backed Law to Expand Use of Deadly Force*, USA TODAY (May 24, 2006, 8:41 PM), http://usatoday30.usatoday.com/news/nation/2006-05-24-deadlyforce-laws_x.htm.

authorize deadly force. The British common law, upon which the American common-law system is based, allowed a non-aggressor to use deadly force in self-defense if he reasonably believed that it was necessary to protect himself from the imminent use of unlawful deadly force by another.[90] This rule, justified on grounds of self-preservation,[91] placed a limit on the extraordinary power of deadly force by requiring its use to be *necessary*. As the D.C. Circuit in *United States v. Peterson* explained:

> The law of self-defense is a law of necessity; the right of self-defense arises only when the necessity begins, and equally ends with the necessity; and never must the necessity be greater than when the force employed defensively is deadly. The necessity must bear all semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable as excusable.[92]

Similarly, the same court in *Laney v. United States* stated:

> It is a well-settled rule that, before a person can avail himself of the plea of self-defense against the charge of homicide, he must do everything in his power, consistent with his safety, to avoid the danger and avoid the necessity of taking life. If one has reason to believe that he will be attacked, in a manner which threatens him with bodily injury, he must avoid the attack if it is possible to do so, and the right of self-defense does not arise until he has done everything in his power to prevent its necessity.[93]

In both *Peterson* and *Laney*, the court stressed the common-law understanding of necessity and believed "avoidance" and having a lack of "alternatives" to be crucial components. As explained previously, a society that restricts the use of deadly force to only those situations when it is *necessary* to protect oneself is saying that all human life, even that of criminals, is sacred.[94] It would be an obvious affront to human dignity if the law, for example, allowed the use of deadly force when it was merely "convenient." The high standard of the necessity requirement promotes the high value society places on preserving human life because a potentially deadly altercation will either be, (1) avoidable, in which case the adversaries are not lawfully permitted to use deadly force, or (2) unavoidable in which case the non-aggressor will be lawfully permitted to use deadly force to protect himself. Notice that both situations promote the value of preserving life: in the first situation neither side was harmed, and in the second situation, since the harm was unavoidable, the law allowed the innocent party to use deadly force to preserve his or her own life.

---

[90] DRESSLER, 6th ed., *supra* note 23, at 221.

[91] BLACKSTONE, *supra* note 23, at *186 ("[T]he great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish.").

[92] United States v. Peterson, 483 F.2d 1222, 1229 (D.C. Cir. 1973) (internal citations omitted).

[93] Laney v. United States, 294 F. 412, 414 (D.C. Cir. 1923).

[94] *See* DRESSLER, 6th ed., *supra* note 23, at 228.

One way that courts can determine whether a deadly altercation was avoidable, and thus unnecessary, is to see whether the person who employed the deadly force could have safely withdrawn from the situation.[95] At the common law, if a safe escape route was available, the person had a "duty to retreat" and could no longer use deadly force.[96] As the court in *Peterson* explained, "[t]his doctrine was but an application of the requirement of strict necessity to excuse the taking of human life, and was designed to insure the existence of that necessity."[97]

In *Brown v. United States*, Justice Holmes rejected the lower court's jury instructions regarding the "duty to retreat," and remarked, "*the failure to retreat is a circumstance to be considered* with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt."[98] In *State v. Abbott*, the New Jersey Supreme Court, after conducting a thorough review of the "duty to retreat" held, "[w]e are not persuaded to depart from the principle of retreat. We think it salutary if *reasonably limited*."[99] Both courts understood that the "duty to retreat" was only an aspect of necessity, which could help determine whether the requirement was properly satisfied.

Another important limitation on the "duty to retreat" is it is only required if there is a *completely safe avenue of retreat*.[100] In order for there to be a completely safe avenue of retreat the person under attack must, (1) subjectively know of a safe location; and (2) subjectively know that he or she can escape without being injured, even slightly.[101] Under these strict requirements a court would not, for example,

---

[95] *See Peterson*, 483 F.2d at 1234.

[96] *Id.* ("Within the common law of self-defense there developed the rule of 'retreat to the wall,' which ordinarily forbade the use of deadly force by one to whom an avenue for safe retreat was open.").

[97] *Id.*

[98] Brown v. United States, 256 U.S. 335, 343 (1921) (emphasis added). The lower court's jury instruction stated, "[I]t is necessary to remember, in considering the question of self defence, that the party assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm." *Id.* at 342. Further, the *Brown* Court emphasized, "[T]he instruction was reinforced by the further intimation that unless 'retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm' the defendant was not entitled to stand his ground.'" *Id.*

[99] State v. Abbott, 174 A.2d 881, 884 (N.J. 1961) (emphasis added).

[100] *See* DRESSLER, 6th ed., *supra* note 23, at 222.

[101] *See Abbott*, 174 A.2d at 885-86 (1961) ("What constitutes an opportunity to retreat which will defeat the right of self-defense? As . . . the Model Penal Code states, deadly force is not justifiable 'if the actor knows that he can avoid the necessity of using such force with complete safety by retreating.' We emphasize 'knows' and 'with complete safety.' One who is wrongfully attacked need not risk injury by retreating, even though he could escape with something less than serious bodily injury. It would be unreal to require nice calculations as to the amount of hurt, or to ask him to endure any at all. And the issue is not whether in retrospect it can be found the defendant could have retreated unharmed. Rather the question is whether he knew the opportunity was there, and of course in that inquiry the total circumstances including the attendant excitement must be considered.").

require retreat from a person being threatened by a firearm.[102] While it is rare for courts to require retreat, when courts do require it, it often involves cases in which a person, involved in a confrontation, leaves, then later returns to the scene with the intent to kill his adversaries.[103] In sum, a person's failure to retreat before using deadly force in self-defense can, in limited circumstances, be an important consideration for a court when determining whether the person acted out of necessity.

Explaining the limitations of the "duty to retreat" is important because proponents of "Stand Your Ground" laws often exaggerate its significance, and characterize the duty as an unfair burden that prevents law-abiding citizens from defending themselves.[104] According to Florida State Representative Dennis Baxley, who sponsored the "Stand Your Ground" Bill, the "duty to retreat" puts a person "at great risk."[105] Marion Hammer, an NRA lobbyist in Florida, suggests that a court applying the common-law rule would require a woman to retreat if someone "tried to drag [her] into an alley to rape her."[106] While "Stand Your Ground" supporters continue to make bold and provocative mischaracterizations that distort the "duty to retreat," they never seem to cite a specific example from a case where a court unfairly required one to retreat.[107] Instead, the campaign to expand the use of deadly

---

[102] *See id.* at 884 ("[I]t is correctly observed that one can hardly retreat from a rifle shot at close range. But if the weapon were a knife, a lead of a city block might well be enough.").

[103] *See, e.g.*, Laney v. United States, 294 F. 412 (D.C. Cir. 1923); Rowe v. United States, 370 F.2d 240 (D.C. Cir. 1966); *see also Florida's Stand Your Ground Law*, TAMPA BAY TIMES (Aug. 30, 2009), http://www.tampabay.com/stand-your-ground-law/cases/case_27 (describing an incident that occurred in Florida in 2009: Two men got into an argument at a party; one briefly left to retrieve gun from his car, then returned, shooting and killing the other; the state attorney dropped the charges because the defendant "had no duty to retreat").

[104] *See States Signing onto NRA-Backed Law*, *supra* note 89 (explaining that the "duty to retreat" gives victims an "unfair burden"); *Florida House Subcommittee Stands Firm on Self-defense*, NRA, INST. LEGIS. ACTION (Nov. 8, 2013), https://www.nraila.org/articles/20131108/florida-house-subcommittee-stands-firm-on-self-defense ("A duty to retreat in the face of attack protects the life and safety of an attacker and jeopardizes the life and safety of a victim.") (quoting Marion Hammer, former president of the NRA).

[105] *Op-Ed: Why I Wrote "Stand Your Ground" Law*, NAT'L PUB. RADIO (Mar. 26, 2012, 2:40 PM), http://www.npr.org/2012/03/26/149404276/op-ed-why-i-wrote-stand-your-ground-law (interview with Florida State Representative Dennis Baxley).

[106] Mary Anne Franks, *Stand Your Ground's Woman Problem: Laws Expanding Self-Defense Raise Questions About Gender as Well as Race*, HUFFINGTON POST (Mar. 3, 2014), http://www.huffingtonpost.com/mary-anne-franks/stand-your-grounds-woman-_b_4886650.html.

[107] Representative Baxley's explanation for why Florida needed the law involved a self-defense situation in which the person using deadly force was never even indicted:

> [T]he impetus for Florida came after five hurricanes. We had communities being looted. A 77-year-old gentleman brings in an RV to stay there to protect his property from looting. He was invaded in the RV by a perpetrator. He shot this individual, and it was months before he knew whether he might be charged for a crime for simply defending himself, and, of course, he had to hire defense attorneys to do so.

Op-Ed: Why I Wrote "Stand Your Ground" Law, *supra* note 105.

force has been motivated by misleading rhetoric, and, as one commentator puts it, "a panicked bunker mentality."[108]

What is interesting about Florida's current self-defense law is that it has removed the duty to retreat, but retains the necessity element. Section 776.012 of Florida's "Stand Your Ground" law states, "[a] person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is *necessary* to prevent imminent death or great bodily harm to himself or herself . . . ."[109] This provision is essentially the common law self-defense rule, with slightly different wording.[110] The statute then removes the "duty to retreat," stating:

> A person who uses or threatens to use deadly force . . . *does not have a duty to retreat* and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.[111]

As expected, these two provisions are problematic because they create a potential contradiction. First, the law only allows the use of deadly force if the person using it reasonably believes it is necessary to prevent imminent death or great bodily injury. However, the law explicitly allows one to "stand his ground" and use deadly force, even if, for example, the individual could escape with complete certainty. In other words, the law requires necessity, but also refuses to take into consideration a fact that may rebut it. Florida's definition of necessity is conditional: to use deadly force a person must reasonably believe that the force was necessary to protect himself, but the fact that the altercation may have been completely avoided by departing from the scene is irrelevant.

The Jimmie Morningstar-Robert Smiley incident factually illustrates the problems with the law. Smiley, the cab driver, likely had a "completely safe avenue of retreat" once he had forced Morningstar out of his cab. Morningstar, who at this point was extremely intoxicated and likely still recovering from being tased, was unarmed and standing in the road. All Smiley had to do to diffuse the situation was to drive away. It is difficult to imagine a jury would find that Smiley reasonably believed shooting Morningstar was necessary to protect his life, as required by common law. One simple way to show that the act was unnecessary is to show Smiley had the opportunity to safely retreat. Florida's new law, however, explicitly prevents courts from considering this. Instead, the jury instruction might say something like:

> If Robert Smiley was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force if he reasonably believed that it was necessary to do so to

---

[108] David Simon, *A Brutal Reprise in Florida*, MIAMI HERALD (Mar. 25, 2012), http://davidsimon.com/a-brutal-reprise-in-florida. David Simon is the creator of the critically acclaimed HBO show *The Wire*.

[109] FLA. STAT. ANN. § 776.012(2) (West 2016) (emphasis added).

[110] *See* DRESSLER, 6th ed., *supra* note 23, at 223.

[111] § 776.012(2) (emphasis added).

> prevent death or great bodily harm to himself or another or to prevent the commission of a forcible felony.[112]

While a jury might find Smiley guilty under these instructions, the inclusion of the phrase "he had no duty to retreat and had the right to stand his ground and meet force with force" as well as the jury's inability to even consider whether he could retreat, certainly could have impacted the outcome. This is especially troubling because it defies common sense: what better proof is there that Smiley's act of shooting Morningstar was *not* necessary than the fact that he could have easily driven away from the situation? In any event, a Florida court's acknowledgement that a "no-retreat" rule "would substantially affect the legal consequences attached to Smiley's conduct" shows just how significant a role the "duty to retreat" could play in certain cases.[113]

B. Statutory Presumptions and Immunity Provisions

One obvious challenge with Florida's (and other states') comprehensive overhaul of its self-defense laws is its application by law enforcement, prosecutors, judges, and by extension, juries.[114] Section 776.013 of Florida's law states:

> (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using or threatening to use defensive force that is intended or likely to cause death or great bodily harm to another if:
>
> (a) The person against whom the defensive force was used or threatened was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
>
> (b) The person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.[115]

While this may seem like a somewhat reasonable provision at first glance, consider how difficult it would be, if not impossible, for a prosecutor to convict someone of using unlawful deadly force on his or her property. Take, for example, a situation involving neighbors in Clearwater, Florida, in which an argument over the

---

[112] These are the jury instructions used in the George Zimmerman case. Jury Instructions, State v. Zimmerman, 2012 CF 1083 A (Fla. Cir. Ct. 2013), http://law2.umkc.edu/faculty/projects/ftrials/zimmerman1/Zimjuryinstructions.pdf.

[113] *See* State v. Smiley, 927 So. 2d 1000, 1003 (Fla. Dist. Ct. App. 220). Not only would it be more difficult to convict Morningstar under Florida's new self-defense laws, he could not even be arrested unless police can "determine that there is probable cause that the force that was used or threatened was unlawful." FLA. STAT. ANN. § 776.032(2) (West 2016).

[114] *See* Kris Hundley et al., *Florida "Stand Your Ground" Law Yields Some Shocking Outcomes Depending on How Law is Applied*, TAMPA BAY TIMES (June 1, 2012), http://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133.

[115] FLA. STAT. ANN § 776.013 (West 2016).

local garbage rules turned deadly.[116] Kenneth Allen, a retired police officer, filed a complaint against his neighbor Jason Rosenbloom because Rosenbloom put out eight bags of garbage, two more than the local ordinance limit of six. Soon after, Rosenbloom confronted Allen at his front door, and the two "exchanged heated words."[117] From here, the accounts of both parties differ. According to Rosenbloom, Allen initially closed the door, but then reopened it and, without saying a word, shot him in the stomach and chest. Allen, on the other hand, said that Rosenbloom had his foot in the door, attempting to "rush into the house."[118]

Because Allen claimed self-defense, the burden was on law enforcement to determine whether there was probable cause that his two shots were an unlawful use of force.[119] This inquiry is problematic because it requires police officers to not only engage in legal analysis that is beyond their normal training, but it also requires police officers to provide evidence that there is an absence of lawful use of force.[120] Taken at face value, Allen's story would give him a *conclusive and irrebuttable* presumption[121] that he held a "reasonable fear of imminent peril or death," because, in his version, Rosenbloom's attempt to enter his house would mean he was "in the process of unlawfully and forcefully entering a . . . residence." It should not come as a surprise, then, that the police never arrested Allen, even though Rosenbloom was unarmed and shot in the front yard. Although this particular provision, which is essentially an upgraded castle doctrine, may have been intended to protect people from violent intruders, it will undoubtedly be invoked by anyone who uses deadly force against someone in his or her house, or even vehicle.[122]

Even if law enforcement determines there is probable cause that a person used unlawful force and a prosecutor decides to bring criminal charges, a defendant also has a right to a pretrial evidentiary hearing to determine whether he or she should be granted immunity.[123] During the pretrial immunity hearing, the court determines "whether the defendant has shown by a preponderance of the evidence that the immunity attaches."[124] In 2010, for example, a judge in Palm Beach County granted immunity to a sixty-five-year-old man named Michael Monahan after he was charged with first-degree murder for shooting two unarmed men on his sailboat.[125]

---

116 *See* Liptak, *supra* note 9.

117 *Id.*

118 *Id.*

119 *See* FLA. STAT. ANN. § 776.032(2) (West 2016).

120 *See* Randolph, *supra* note 71, at 618-19.

121 *See* JUDICIARY COMM., *supra* note 77.

122 Section 776.013 could very well have been used by Smiley, since he claimed that Morningstar tried to reenter his vehicle. If successful, Smiley would have enjoyed a conclusive presumption that he held a "reasonable fear of imminent peril or death." *See* FLA. STAT. ANN. § 776.013(1) (West 2016).

123 Dennis v. State, 51 So. 3d 456, 463 (Fla. 2010) (adopting the immunity procedure set forth in *Peterson v. State*, 983 So. 2d 27 (Fla. Dist. Ct. App. 2008)).

124 *Peterson*, 983 So. 2d at 29.

Monahan, who was physically disabled, claimed the two men cornered him intending to remove him from the boat.[126] Prosecutors stressed that neither man had a weapon nor had they touched Monahan.[127]

Proving self-defense cases ending in the death of one person is difficult because the deceased person is unable to offer his or her side of the story, but the person claiming self-defense is. Monahan might have been right; both men might have made verbal threats and they might have intended to act upon them. But what if that was not the case? What if Monahan acted out of anger, rather than a reasonable fear, and later offered a fabricated story that conveniently fit into one or more of Florida's lawful use of force provisions? This is one of the major flaws in the law and may help explain why Florida's justified homicide rate has tripled since the new laws went into effect.[128] "Stand Your Ground" laws give defense attorneys a number of tools to keep their clients away from the criminal justice system. According to a case study done by the *Tampa Bay Times*, which studied nearly two hundred "Stand Your Ground" cases, in almost a third of the cases analyzed, defendants initiated a confrontation, and either shot an unarmed person or pursued their victim, and still avoided criminal prosecution.[129] It should not come as a surprise that Florida's "Stand Your Ground" laws have been consistently invoked to justify killings ranging from drug dealers' turf battles to road rage incidents.[130]

C. "Stand Your Ground" Laws, Deterrence, and Violent Crime Rates

Until very recently, empirical evidence has been largely absent from the "Stand Your Ground" law debate. New research on the issue may force some "Stand Your Ground" law proponents to reevaluate whether increased self-defense laws actually accomplish their intended purpose. Consider, for example, a quote from Representative Kevin Calvey who authored a law similar to Florida's in Oklahoma: "["Stand Your Ground" laws are] going to give the crooks second thoughts about carjacking and things like that. They're going to get a face full of lead."[131] However,

---

[125] Alexia Campbell, *More Accused Hope to Use "Stand Your Ground" Law to Gain Freedom*, SUN SENTINEL (Sept. 12, 2011), http://articles.sun-sentinel.com/2011-09-12/news/fl-boat-shooting-defense-20110912_1_murder-charges-michael-monahan-controversial-state-law.

[126] *Id.*

[127] *Id.*

[128] *Op-Ed: Why I Wrote "Stand Your Ground" Law*, *supra* note 105.

[129] Hundley et al., *supra* note 114.

[130] John F. Timoney, Op-Ed, *Florida's Disastrous Self-Defense Law*, N.Y. TIMES (Mar. 23, 2012), http://www.nytimes.com/2012/03/24/opinion/floridas-disastrous-self-defense-law.html.

[131] Robert Tanner, *States Signing on to Deadly Force Law*, DAILY HERALD (May 24, 2006), http://www.heraldextra.com/news/states-move-to-validate-use-of-deadly-force/article_0c0a7f31-9980-5545-a37e-68d3c90ac961.html. Oklahoma law removes the duty to retreat in any place one has a right to be, creates a presumption of reasonable fear, and removes civil liability in certain situations. *See* OKLA. STAT. ANN. tit. 21, § 1289.25 (West 2016).

new research by two economics professors at Texas A&M indicates that "Stand Your Ground" laws do not deter crime.[132]

Cheng and Hoekstra's paper on "Stand Your Ground"[133] laws significantly attempts to conduct empirical research on the effects of the laws. Framing the issue from an incentives standpoint, the authors hypothesize that laws expanding the legal justification for the use of legal force would lower the expected cost of using lethal force while increasing the expected cost of committing violent crime.[134] In other words, with stronger self-defense rights, people will be more willing to use deadly force (less chance of being prosecuted or even arrested), and potential criminals will be less likely to engage in violent crime (higher chance that the victim will use deadly force in self-defense). Despite this logical hypothesis, Cheng and Hoekstra conclude that while it would be "reasonable to expect that strengthening self-defense law would deter crime, we find this is not the case."[135]

To reach these findings Cheng and Hoekstra examined the twenty-one states that expanded their castle doctrine to places outside the home[136] and compared each state's crime data from 2000-2010, using the FBI Uniform Crime Reports ("UCR"). Cheng and Hoekstra then looked at "within-state" variation, meaning they looked at the individual state's crime rate before and after it passed its "Stand Your Ground" law. Accordingly, the data revealed that "Stand Your Ground" laws did not deter violent crime specifically the crimes of burglary, robbery, or aggravated assault.[137] Cheng and Hoekstra concluded: "Thus, while castle doctrine law may well have benefits to those legally justified in protecting themselves in self-defense, *there is no evidence that the law provides positive spillovers by deterring crime more generally*."[138]

The next issue Cheng and Hoekstra addressed was whether "Stand Your Ground" laws led to an increase in homicides.[139] Recall that Cheng and Hoekstra's hypothesis

---

[132] Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine*, 48 J. HUM. RES. 821, 849 (2013).

[133] Cheng and Hoekstra use the term "castle doctrine" and "stand your ground" laws interchangeably. By "castle doctrine" they are referring to laws that "eliminate the duty to retreat from a list of specified places, and often remove civil liability for those acting under the law and establish a presumption of reasonableness as to the beliefs and actions of the individual claiming self-defense." *Id.* at 822.

[134] *Id.*

[135] *Id.* at 849.

[136] Stated another way, there are twenty states that have removed the "duty to retreat" in a place other than the home.

[137] *Id.* at 827. Cheng and Hoekstra use the FBI definitions for burglary ("the unlawful entry of a structure to commit a felony or a theft"), robbery ("the taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear"), and aggravated assault ("an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury"). *Id.*

[138] *Id.* at 836 (emphasis added).

[139] Cheng and Hoekstra define homicide as "the sum of murder and non-negligent manslaughter." *Id.* at 822.

is that reducing the cost of using deadly force by expanding self-defense rights would result in more violence. To effectively measure the increased homicide rates, the authors again observed within-state variation of states that have adopted "Stand Your Ground" laws. Another important measure was to compare the within-state variation of "Stand Your Ground" states with the within-state variation of non-"Stand Your Ground" states. When comparing different states, Cheng and Hoekstra normally compared ones in the same geographical region to limit variability (weather, demographics, etc.). Interestingly, the data showed that the "homicide rates of ["Stand Your Ground" law] states have a similar trajectory to those of [non-"Stand Your Ground" law] states *prior* to the adoption of the law."[140]

Several states that subsequently adopted "Stand Your Ground" laws experienced a "large and immediate increase in homicides."[141] While some adopting states did not experience an increase in homicides, they also did not experience the "relative drop in homicide rates that other states nationwide did."[142] In either scenario, states with "Stand Your Ground" laws either experienced an increase in their homicide rate, or, in the event of a decreased rate, did not experience the same degree of homicide rate decrease as non-adopting states did. Cheng and Hoekstra conclude:

> [R]esults indicate that Castle Doctrine laws increase total homicides by around 8 percent. Put differently, the laws induce an additional 600 homicides per year across the 21 states in our sample that expanded castle doctrine over this time period. This finding is robust to a wide set of difference-in-differences specifications, including region-by-year fixed effects, state-specific linear time trends, and controls for time-varying factors such as economic conditions, state welfare spending, and policing and incarceration rates. *These findings provide evidence that lowering the expected cost of lethal force causes there to be more of it*.[143]

A second research paper, written by economists Chandler McClellan and Erdal Tekin, corroborates Cheng and Hoekstra's findings, suggesting that "Stand Your Ground" laws both fail to effectively deter violent crime and also cause an increase in homicides.[144] This corroboration is significant for several reasons: First, McClellan and Tekin relied on different data; in this case monthly crime data from the U.S. Vital Statistics (as opposed to UCR data); second, they used slightly more restrictive criteria for what constitutes a "Stand Your Ground" state; and third, they also tracked additional data such as emergency room visits and hospital discharges related to firearm inflicted injuries.[145]

Focusing specifically on states that abolished the "duty to retreat" (or extended the "castle doctrine" to places outside the home), they concluded: "In this paper, we

---

[140] *Id.* at 836 (emphasis added).

[141] *Id.*

[142] *Id.*

[143] *Id.* at 849 (emphasis added).

[144] *See* Chandler B. McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries* 31 (Nat'l Bureau of Econ. Research, Working Paper No. 18187, 2012), http://www.nber.org/papers/w18187.pdf.

[145] *Id.* at 10-12.

show[ed] that SYG ["Stand Your Ground"] laws that extend the right to self-defense to areas outside the home are associated with a significant increase in the number of homicides."[146] Interestingly, they found that the increase in homicides was "primarily driven by the deaths among whites, especially white males," while finding that there was generally "no effect on blacks."[147] Although these laws may not directly impact the black community, the percentage of the black population in a given state is one relevant indicator of whether that state will pass a "Stand Your Ground" law: "In particular, SYG states have a higher percentage of black population, more likely to have a Republican governor, a high incarceration rate and a larger number of law enforcement agents. These states also tend to be more urban, and have a higher poverty rate."[148]

Addressing the issue of what motivated "Stand Your Ground" laws to be passed in the first place, McClellan and Tekin state:

> However, one thing that is clear is that these laws could not have been introduced as a reaction to a wave of crime epidemic in the states that have passed these laws. On the contrary, *crime rates have been on the decline virtually everywhere in the U.S. during this period*.[149]

Next, McClellan and Tekin tackle the issue of whether the increase in homicides is the result of more justifiable killings, which could indicate that the laws are working as intended.[150] Prefacing their findings with the disclaimer that there are "problems related to the reliability of [the FBI's Supplemental Homicide Reports] data, especially with its breakdown of justifiable and non-justifiable homicides," the authors conclude the findings show that "SYG laws do in fact cause an increase in the total homicides including those that fall under the non-justifiable category."[151] One possible explanation for the increase in homicides is that a situation involving a non-violent criminal encounter (say a trespass, or a theft) between an attacker and a citizen, which ordinarily would not result in a death for either party, is now more

---

[146] *Id.* at 31.

[147] *Id.* The authors offer several theories to explain why "Stand Your Ground" laws are significantly associated with an increase in homicides among white males. First, these laws may be associated with an increase in gun ownership, and specifically an increase in concealed carry guns, of which the "overwhelming majority of concealed guns are owned and carried by white males in the United States." *Id.* at 32-33. Second, the laws will have the biggest effect on those who have knowledge of the laws, and it is "plausible to think that white males, who are more likely to own and carry guns and who constitute the vast majority of the membership for pro-gun organizations like the NRA, are the ones who have more interest in following the legislative activity related to guns." *Id.* at 33. Also there is a "bystander" theory, which reasons that "[i]f gun owners, who are more likely to be white males, are also more likely to be surrounded by whites and especially white males, then this may suggest that the SYG law should have a stronger impact on this group." *Id.*

[148] *Id.* at 15.

[149] *Id.* at 17 (emphasis added).

[150] *See Op-Ed: Why I Wrote "Stand Your Ground" Law*, *supra* note 105 (explaining that Dennis Baxley, the sponsor of Florida's "Stand Your Ground" law, suggests that an increase in "justifiable homicides" indicates that the law is working).

[151] McClellan & Tekin, *supra* note 144, at 25-27.

likely to result in a death. While the use of lethal force in that situation may or may not be justified under the circumstances, the authors state that "it cannot be argued in that case that the SYG laws are saving the lives of innocent people as these individuals would not have been killed in the first place."[152]

There are several flaws in the theory that the increase in overall homicides may indicate that the laws are working as intended. First, although there has been an increase in killings labeled "justifiable homicides," there have also been continued increases in "non-justifiable homicides."[153] In other words, in application these laws have not resulted in an increase in "justifiable" homicides; it seems the laws have simply resulted in more homicides—be they "justifiable" or "non-justifiable." That is not to say that these laws have not resulted in any cases of legitimate "justifiable homicide," but to draw the categorical conclusion that an increase in overall homicides is indicative of these laws' efficacy is naïve and misinformed. Another reason this conclusion is erroneous is that "the net rise in homicides cannot be accounted by a one-to-one substitution between the killings of assailants and the killings of victims unless multiple assailants are killed in some instances."[154] In other words, for the "Stand Your Ground" proponents' theory to hold up, there would need to be a number of instances in which law-abiding citizens killed multiple assailants, for the numbers to add up properly. This is certainly not impossible, but it does challenge the credibility of the argument.

In conclusion, McClellan and Tekin specifically single out the "Stand Your Ground" laws' abolishment of the "duty to retreat" as the driving force behind the overall increase in homicides:

> *Our results suggest that it is indeed the most controversial aspect of these laws, i.e., the provision that extends no duty to retreat to any place a person has a legal right to be, that causes the increase in homicides*. In particular, we show strong evidence to indicate that our results are not driven by other self-defense provisions adopted by states. Taken together, our findings raise serious doubts against the argument that the stand your ground laws serve as a deterrent for crime. On the contrary, we show consistent evidence that these laws are associated with an increase in crime, at least measured by homicides, especially among white males.[155]

D. The Politics of the "Stand Your Ground" Movement: Violent Street Crime, Victimization, and Distrust of the Criminal Justice System

As one digs deeper into the "Stand Your Ground" issue, one interesting question arises: Why has the "Stand Your Ground" movement enjoyed such a great deal of political success? As noted previously, proponents of "Stand Your Ground" laws do not point to any specific criminal cases to justify the laws, nor do they cite any empirical data to argue that the laws are needed to combat a rise in violent crime

---

152 *Id.* at 24.

153 *Id.* at 32.

154 *Id.* at 24 (citing Cheng & Hoekstra, *supra* note 132).

155 *Id.* at 32 (emphasis added).

rates.[156] As it turns out, the success of the movement has little to do with the actual prevalence of violent crime or the search for legitimate solutions but is rather a product of powerful political rhetoric. The "Stand Your Ground" movement's use of rhetoric to exploit both the public's fear of violent crime and its distrust of the criminal justice system's competency to address properly violent crime is simply a new application of a time-tested and successful political formula. There are at least three reasons the "Stand Your Ground" movement has had political success: (1) it politicizes violent street crime, particularly by using a volitional explanation model; (2) its justification is centered on protecting the innocent victim; and (3) the laws encompass the public's tendency to distrust the criminal justice system, particularly the discretion that it often gives to judges and juries.

1. The Politicization of Violent Street Crime

In his book *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* legal scholar Jonathan Simon argues that in the late 1960s, Americans began to build "a new political and civil order structured around the problem of violent crime."[157] There are several interesting explanations for this shift, including, the government's inability to manage the economy,[158] the increase in the public's *experience* of crime due to expanding media coverage (among other factors),[159] the constitutional "immunity" of

[156] Despite the bleak picture painted by "Stand Your Ground" law proponents, violent crime rates have actually been decreasing steadily over the past twenty years. *See Uniform Crime Reports (UCRs), Crime in the United States 2012*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls (last visited Mar. 16, 2016). As the FBI's table shows, the estimated violent crime rate has decreased steadily from 1993 to 2013. In those twenty years, the estimated violent crime rate has only gone up, from year to year, on two occasions, and has overall went from 747.1 in 1993, to 386.9 in 2012 (nearly a twofold reduction). *Id.* Despite recent evidence that major cities are seeing an increase in murder rates, see Monica Davey & Micah Smith, *Murder Rates Rising Sharply in Many U.S. Cities*, N.Y. TIMES (Aug. 31, 2015), http://www.nytimes.com/2015/09/01/us/murder-rates-rising-sharply-in-many-us-cities.html?_r=0), the latest FBI UCR Reports show a continued decrease in violent crime between 2013 and 2014. *See Uniform Crime Reports (UCRs), Crime in the United States 2014*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/violent-crime (last visited Mar. 13, 2016).

[157] JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 3 (2007). Simon actually traces the roots of the "war on crime" as far back as Prohibition, but states that "there is little doubt that the Omnibus Crime Control and Safe Streets Act of 1968 is the legislative enactment marking the birth of "governing through crime" in America. *Id.* at 89-90.

[158] *Id.* at 22 (citing STUART SCHEINGOLD, THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION (1991)) ("[P]oliticization of crime was a response largely to the governmental crisis of the 1970s and 1980s, when the national government seemed to stumble in its ability to manage an economy that had produced growing affluence in the 1950s and 1960s.").

[159] SCHEINGOLD, *supra* note 158, at 32; *see also* SIMON, *supra* note 157, at 24 ("American crime rates went up in the 1960s, including rates for the kinds of crime that most matter to ordinary people, such as robberies and stranger murders, and, more important, the *experience*

criminalizing and punishing actions,[160] the rise of a new conservative movement built around majority morality and populist punitiveness,[161] and even as a way to implicitly support racism in a society that no longer allowed legal racial segregation in education and other public accommodations.[162] Putting aside a more thorough examination of these various rationales, the main point is: framing violent "street crime" as a vitally important social problem that must be addressed by the state has "offered the least political or legal resistance to government action" and has provided a means for politicians to gain legitimacy with little or no downside.[163]

What makes the politicization of violent street crime especially attractive to politicians in America is that it fits perfectly with existing cultural preferences—particularly a moralistic culture[164] that values "personal responsibility and will over social context and structural constraints on freedom."[165] Legal scholar Stuart Scheingold explains that there are two competing theories for viewing street crime: (1) a *structural* explanation, which focuses on social disorganization with its roots in hierarchy, deprivation, coercion, and alienation; and (2) a *volitional* explanation, which, by contrast, is associated with individual pathologies—be they moral, emotional, or genetic.[166] In other words, a *structural* model focuses on "material conditions of the society" when explaining crime while a *volitional* model sees crime

---

of crime increased as well, sometimes directly, but more usually from the media, politicians, and local knowledge within communities.").

[160] SIMON, *supra* note 157, at 29 ("Crime has provided a precious wedge for government. Because the power of the state to criminalize conduct and severely punish violations was one unquestioned in the Constitution, the ability of the state to take drastic action against convicted wrongdoers provides an unparalleled constitutional avenue of action.").

[161] *Id.* ("These were the years in which conservatives were rebuilding themselves and shaping a new agenda around the themes of the Goldwater campaign, including anticommunism, states' rights, mistrust of the New Deal-style government, support for public enforcement of majority morality, and, already, the rise of street crime."); *id.* at 23 (Simon uses the term "populist punitivism" to describe the "highly moralistic criminal law" policies of the 1980s).

[162] *Id.* at 25 (citing KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997)) ("Politicians began to turn to crime as a vehicle for constructing a new political order before the crime boom was recognized. Some, especially white southern politicians, found crime a convenient line of retreat from explicit support for legal racial segregation in education and other public accommodations.").

[163] *Id.* at 31.

[164] *See, e.g.*, Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 HOUS. L. REV. 1, 28 (2002) ("[I]f [America is] a very Protestant, moralistic culture in some broader cultural or spiritual sense, it is not so great a paradox to say that our national sense of vindictive moralism about disorder leads to exceptional violence.").

[165] SIMON, *supra* note 157, at 25.

[166] SCHEINGOLD, *supra* note 158, at 4. Note that Scheingold believes neither model is sufficient by itself to explain crime. *See id.* (referring to the structural/volitional dichotomy as "false and misleading" and stating that "street crime is attributable to an interdependent web of social forces and individual characteristics.").

as a "matter of personal choice."[167] Scheingold suggests that Americans generally favor *volitional* explanations due to their "Lockean and Hobbesian premises," as opposed to *structural* explanations rooted in Rousseau and Marx.[168] Another way of explaining the dichotomy is whether criminality is the consequence of *flawed individuals* making the wrong choices, or a *flawed society* failing to offer adequate alternatives to crime.[169]

The American preference for a *volitional* explanation of violent crime is significant because it is essentially the scaffolding upon which the overarching "war on crime," (which includes the "Stand Your Ground" movement) described by Simon, is built on, politicians who seek legitimacy or political capital by pursuing legislation designed to curb violent crime, almost always frame it in a volitional way. Framing violent crime volitionally is not only effective because it conforms with a large segment of the American public's views, but also because volitional explanations, by definition, absolve society of all blame and instead place it entirely on the perpetrators of violent acts.[170] Blaming crime on violent individuals provides "easy, reassuring, and morally satisfying responses"—namely retributive punishment.[171] Contrast this view with the implications of a structural analysis:

> Structural explanations refocus attention from individual criminals to the criminogenic features of the prevailing social order—ordinarily identified with extreme inequality. Thus, we are all seen as responsible in some measure and expected to accept far-reaching, open-ended, and redistributive changes in the social order. In short, structural interpretations lead in more contingent directions and call upon more generous impulses rooted in distant and elusive ideals of social justice.[172]

Although the volitional explanation of crime seems to be the dominant view in contemporary American political discourse, this has not always been the case. In the mid-1900s, most notably during the New Deal era, the prevailing notion was that "collective security" was best attained through rehabilitative policies and an overall balancing of risks between criminals and society.[173] This "solidarity project," which seems to be in line with a structural explanation of crime (or at least partially structural), led to the creation of institutions like parole, probation, and juvenile justice.[174] This welfarist outlook was ultimately undermined due to the emergence of inflation, civil disorder, and high crime rates.[175]

---

[167] *Id.*

[168] *Id.* at 5. A volitional explanation of crime is also rooted in the "Old Testament with its prescription for an eye for an eye." *Id.* at 21.

[169] *Id.* at 12.

[170] *Id.* at 22.

[171] *Id.* at 6.

[172] *Id.*

[173] SIMON, *supra* note 157, at 23.

[174] *Id.* (citing DAVID GARLAND, THE CULTURE OF CONTROL 199 (2001)).

[175] SIMON, *supra* note 157, at 23.

While it is debatable whether violent criminal acts are more the result of flawed individuals or a flawed society (and reasonable minds disagree on the issue), it is not debatable which model garners more political capital in today's society. One example that accurately illustrates both the political strengths of a volitional model, as well as the political weaknesses of a structural or "solidarity project" model, is the infamous Willie Horton case. During the 1988 presidential election between George H. W. Bush and Michael Dukakis, it came to light that a convicted murderer was temporarily released from prison as part of a Massachusetts furlough program.[176] While free, the escaped prisoner kidnapped a couple, and raped the woman in the process.[177] This information was devastating to the Dukakis campaign because the incident took place while Dukakis was Governor of Massachusetts. In addition, it turned out that Dukakis had vetoed a bill that would have instituted the death penalty, just weeks before Horton was sentenced for his first-degree murder conviction in 1975.[178]

Both permitting the furlough program as well as opposing the death penalty created significant vulnerabilities for Dukakis, which the Bush campaign readily exploited. Attacks on Dukakis were framed volitionally, as seen by the memorable Willie Horton ad, which charged Dukakis with "allow[ing] first degree murderers to have weekend passes from prison" and then describing Horton's acts of murder, kidnapping, and rape of innocent victims in gruesome detail.[179] The implications, framed volitionally, were obvious: Dukakis supported a furlough program that allowed immoral monsters like Willie Horton to kidnap and rape innocent victims; his opposition to the death penalty granted mercy and leniency to evil and wicked savages like Horton who are inherently predatory creatures, and deserve the ultimate punishment.[180]

Scheingold describes this volitional view, exemplified in the Horton case, as a "simple morality play," which liberates society from moral dilemmas.[181] Scheingold

---

[176] Roger Simon, *How a Murderer and Rapist Became the Bush Campaign's Most Valuable Player*, BALT. SUN (Nov. 11, 1990), http://articles.baltimoresun.com/1990-11-11/features/1990315149_1_willie-horton-fournier-michael-dukakis.

[177] *Id.*

[178] *Id.*

[179] *Willie Horton 1998 Attack Ad*, YOUTUBE (Nov. 3, 2008), https://www.youtube.com/watch?v=Io9KMSSEZ0Y.

[180] Some believe that there was also a racial component to the Horton strategy: namely to "play[ ] on fears of black criminals." Opinion, *George Bush and Willie Horton*, N.Y. TIMES (Nov. 4, 1988), http://www.nytimes.com/1988/11/04/opinion/george-bush-and-willie-horton.html. Willie Norton was depicted as:

> He was big. He was black. He was every guy you ever crossed the street to avoid, every pair of smoldering eyes you ever looked away from on the bus or subway. He was every person you moved out of the city to escape, every sound in the night that made you get up and check the locks on the windows and grab the door handles and give them an extra tug. Whether you were white or black or red or yellow, Willie Horton was your worst nightmare.

Simon, *supra* note 176.

[181] SCHEINGOLD, *supra* note 158, at 21-22.

then states why a structural explanation is often considered inadequate, and also suggests that a volitional view is necessary to effectively politicize crime:

> It is hard to see how any comparably consoling myth could be derived from either structural criminology or from the complexities of hard-core criminological discourse. Indeed, insofar as the stick of punishment is the objective, it is not only structural criminology that is marginalized. Also unwelcome are the non-punitive forms of volitional criminology – the carrots of job training, drug rehabilitation, and other liberal measures. We do not want to hear that we are all responsible or that there is no quick fix. That would amount to giving up the consoling certainties of crime and punishment, the basic reason for reframing social problems as criminal problems.[182]

Thus, the problem with structural explanations is that they are simply not as politically compelling as volitional explanations. Nobody wants to hear that violent crime often results from "economic marginality" or "purposelessness, alienation, and deprivation."[183] Instead, many people adopt the belief system, which Scheingold calls "the myth of crime and punishment," in which problems of "race, economic productivity, moral conflict, and poverty" are neatly bundled up and thought of as "street crime," and where criminals are viewed as "unknown predators who seek out opportunities to prey upon us and disrupt our lives."[184] The Willie Horton case from the 1988 election is just one of many examples where politicians embraced crime control and a volitional view of crime to further political ends.[185]

Turning to the "Stand Your Ground" movement, one can see how its justifications and rhetoric are deeply rooted in a volitional explanation of crime. For example, take the suggestion by Marion Hammer, former President of the NRA, that a court applying the common-law "duty to retreat" rule would require a woman to retreat even if someone "tried to drag [her] into an alley to rape her."[186] Although this language invokes the image of the "innocent victim," it also plays right into the good versus evil, highly moralistic view of criminals as "unknown predators who seek out opportunities to prey upon us."[187] There is no mention of any potential adverse effects of how removing the "duty to retreat" might affect an encounter between two seemingly law-abiding citizens, like in the Kenneth Allen-Jason

---

[182] *Id.* at 22.

[183] *Id.* at 11 (citing ELLIOT CURRIE, CONFRONTING CRIME 117 (1986)).

[184] *Id.* at 21.

[185] Two other famous examples include: President Richard Nixon's criticism of the Warren Court for being too favorable towards criminals, and his subsequent appointments of Warren Burger, Harry Blackmun, and William Rehnquist, who were picked, in part, for their "readiness to strengthen the constitutional position of law enforcement," *see* SIMON, *supra* note 157, at 53, and then-Governor Bill Clinton's dramatic departure from the New Hampshire primary during his 1992 presidential campaign to "oversee an execution of an Arkansas prisoner with limited mental capacity who had killed a police officer," *id.* at 58-59. Contrast these with the political backlash that President Gerald Ford endured after pardoning Nixon, following his resignation. *Id.* at 56.

[186] Franks, *supra* note 106; *see also* Tanner, *supra* note 131.

[187] SCHEINGOLD, *supra* note 158, at 21.

Rosenbloom incident.[188] A nuanced structural analysis that looks at the potential societal consequences of laws that de-criminalize certain uses of lethal force is rarely, if ever, discussed.

What effect will a law that gives homeowners free reign to use deadly force against harmless, non-violent juvenile trespassers have on our "collective security"? Is absolute personal security so paramount that it trumps any notion of a "solidarity project" or furthering civic virtue? Jonathan Simon argues that "practices that sacrifice civic virtue in the name of personal security against lethal violence" might actually undermine security:

> Repressing violence is a task of first order for governance of all sorts, but we must reverse the perception that violence frees its potential victims of all responsibilities for the well-beings of others or the burdens of collective survival. Moreover, politics must remind people of the securities that emerge from social solidarity.[189]

2. The Imagined Possibility of Victimization

Closely tied to the justification for politicizing violent street crime is the need to protect the "vulnerabilities and needs of victims."[190] The reverence for the crime victim[191] as an "idealized subject of the law" not only extends to the actual "experience of victimization" but also includes "(much more commonly) the *imagined possibility of victimization*."[192] This latter category is significant for at least three reasons: (1) it encompasses a significant segment of the population, particularly "white, suburban, middle-class"[193] individuals who, even if they have not been the victims of violent crime, nonetheless live in fear that it could happen at any moment; (2) it fits nicely with the volitional and moralistic explanation of violent crime and fosters an "us against them" mentality; and (3) by bringing such a large portion of society under the umbrella of "potential victims," it creates a political culture where any legislation that is passed in the name of "crime victims" is seen as standing for the "general good."[194]

According to David Garland, not only are victims an important subject of the law, but their interests are also "counter-posed" against the offender's interests. This

---

188 *See supra* Part II.B.

189 Jonathan Simon, *Guns, Crime, and Governance*, 39 HOUS. L. REV. 133, 148 (2002).

190 SIMON, *supra* note 157, at 76.

191 Janet Reno, former Attorney General for President Bill Clinton had this to say about victims:

> I draw most of my strength from victims for they represent America to me: people who will not be put down, people who will not be defeated, people who will rise again and again for what is right . . . you are my heroes and heroines. You are but little lower than the angels.

Id. at 89.

192 *Id.* at 77 (emphasis added).

193 *Id.* at 76.

194 *Id.* at 110.

counter-position creates a zero-sum game where any concern for a criminal suspect's rights is seen as an affront to the victims:

> The new political imperative is that victims must be protected, their voices must be heard, their memory honoured, their anger expressed, their fears addressed. The rhetoric of penal debate routinely invokes the figure of the victim— typically a child or a woman or a grieving family member— as a righteous figure whose suffering must be expressed and whose security must henceforth be guaranteed. Any untoward attention to the rights or welfare of the offender is taken to detract from the appropriate measure of respect for victims. A zero-sum policy game is assumed wherein the offender's gain is the victim's loss, and being 'for' victims automatically means being tough on offenders.[195]

There are many examples of this "zero-sum policy game" at work in politics. One example is the California gubernatorial election of 1966 in which Ronald Reagan soundly defeated incumbent Pat Brown. Although Pat Brown, as the Governor of California, imposed the death penalty, he declared publicly that he opposed it on religious and moral grounds.[196] Reagan attacked Brown's position by suggesting that he was "valuing cold-blooded killers' lives over their victims' lives."[197] Bill Clinton's "dramatic departure from the New Hampshire primary during his 1992 presidential campaign to 'oversee an execution of an Arkansas prisoner with limited mental capacity who had killed a police officer'"[198] was likely motivated in part by his desire to identify with the police officer who had been the victim of a violent murder. Lastly, the Violent Crime Control and Law Enforcement Act of 1994[199] contained several provisions targeted at crime victims, including guidelines to enhance punishment for violent assaults committed against elderly victims, and an amendment to the Federal Rules of Criminal Procedure, which allows victims the opportunity to speak at sentencing hearings.[200]

This zero-sum game between criminals and victims is especially prevalent in the "Stand Your Ground" rhetoric. Consider this exchange between NPR Radio's Neal Conan and Dennis Baxley, who sponsored the "Stand Your Ground" legislation in Florida:

> CONAN: Before your law, Florida law said that if there's a safe line of retreat— and this is still the case in many states—someone who's threatened has an obligation to take those steps back before resort to force. What's wrong with that?

---

[195] GARLAND, *supra* note 174, at 11. One way the feelings and interests of victims is expressed is by naming laws after them: "Megan's law; Jenna's law; the Brady bill." *Id.*

[196] SIMON, *supra* note 157, at 56.

[197] JOHN HAGAN, WHO ARE THE CRIMINALS? THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN 24 (2010).

[198] SIMON, *supra* note 157, at 58-59.

[199] Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[200] SIMON, *supra* note 157, at 105-06.

> BAXLEY: The duty to retreat puts the person at great risk, and it's a Monday morning quarterback situation. We can all sit and analyze for hours what someone could have done. But in fact, a *victim of a violent attack* has seconds to decide if they want to live or they want to die or they want to be a *victim of violence, such as rape or a beating*. And I think in those circumstances, we need to give that law-abiding citizen the benefit of the doubt and stand beside them and say if you can stop a violent act from occurring that's going to *victimize you and your family*, that we're going to stand with you.
> CONAN: There are those who say that, I think, since this law went into effect the number of cases described as justifiable homicide has tripled in Florida.
> BAXLEY: I think that actually indicates that the law is working because it says that a number of people have not been prosecuted for defending themselves. It says that in those cases, *the perpetrator bore the brunt of their choice rather than being able to brutalize or victimize another person*.[201]

Baxley's message is clear: "Stand Your Ground" laws are justified because they are designed to protect a specific class: law-abiding *victims* of violent attacks. In addition, there is also the suggestion that those in favor of the common-law "duty to retreat" are not only putting people "at great risk" but are also unwilling to "stand with" law-abiding citizens, nor willing to give law-abiding citizens "the benefit of the doubt." Baxley's assessment that the tripling of the justifiable homicide rate "indicates that the law is working" is premised on the zero-sum formula between victims and criminals: by empowering potential victims, it is criminals who now bear "the brunt of their choice" and are no longer able to "brutalize or victimize" others.

3. The Public's Distrust of the Criminal Justice System

One consistent justification for "Stand Your Ground" laws is various actors in the criminal justice system, including law enforcement, prosecutors, judges, and juries, are unfit to properly determine whether the use of lethal force was lawful or not.[202] Whether this is true or not, the concern is deeply embedded in the Florida law, which creates various presumptions that force was lawfully used, and also adds a criminal immunity provision which prohibits law enforcement officers from arresting a person claiming self-defense "unless [they] determine that there is probable cause that the force that was used or threatened was unlawful."[203]

The idea of blaming the "system," and particularly pointing to judicial discretionary as a problematic hindrance in the fight against crime is a tried-and-true method for politicians. As Simon explains in *Governing Through Crime*, there are "two principles underlying the federal crime legislation model:"

> (1) The system is the problem; (2) the victim is the key. Nothing has moved legislatures more than the idea that public safety has been

---

201 *Op-Ed: Why I Wrote "Stand Your Ground" Law*, *supra* note 105 (emphasis added).

202 *Id.*

203 FLA. STAT. ANN. § 776.032(2) (West 2016).

> sacrificed to the convenience or indifference of the judiciary and the correctional bureaucracy. Since the 1970s, a steady flow of laws has attacked virtually every step of the criminal justice system for decisions perceived as favorable to criminals, ranging from bail law, to the insanity defense, to sentencing law, to corrections law. Discretion at any of these steps is viewed as something being used to favor criminals.[204]

In this same vein, the idea of a judge or jury "second-guessing" one who claims self-defense by questioning whether "there was a completely safe avenue of retreat," is viewed, perhaps ironically, as favoring the "criminal" against whom the "law-abiding" citizen was defending himself.[205] What is interesting about these laws, as opposed to a lot of the criminal reforms of the 1970s, 80s, and 90s, is that the focus is not on shifting the balance from criminal suspects to law enforcement, or from judges to prosecutors, but instead on essentially de-criminalizing the use of lethal force by taking it out of the system entirely. In other words, it is not just judicial discretion that is problematic, but rather discretion among *all* criminal justice actors.

CONCLUSION

Florida's "Stand Your Ground" law has been extremely controversial, and yet it enjoys an increasing amount of political success across the nation. "Stand Your Ground" laws are particularly problematic because they destroy the necessity element, disrupt the criminal justice system, and ultimately fail in their goal to deter crime. What is particularly worrisome about these laws is they seem to be the result of a systematic political movement by the NRA rather than a solution to a societal problem. Indeed, empirical evidence suggests that crime rates were actually on the decline prior to the laws' passages in various states.

The "Stand Your Ground" movement has been particularly effective because it is able to successfully politicize and exploit the public's fear of violent street crime. These laws are further justified by their stated desire to protect innocent crime victims, and also to take power away from actors in the criminal justice system that are likely to second-guess the actions of law-abiding citizens. This movement raises serious concerns about how powerful ideologies and special interest groups can seemingly shape and influence policy regardless of whether it is truly in the state's best interest. As former Miami Police Chief, John Timoney put it, "The only thing that is worse than a bad law is an unnecessary law. Clearly, this was the case here."[206]

---

[204] SIMON, *supra* note 157, at 101.

[205] I use the term "ironic" because the rationales behind these laws presuppose that one of the persons involved in a deadly confrontation is justified, and to hold him accountable to the "duty to retreat" standard would unfairly punish him. Practically speaking, it seems that removing the "duty to retreat" inquiry would tend to favor violent criminals, who are much more likely to engage in deadly altercations.

[206] Timoney, *supra* note 130.