

2015

"Stand Your Ground" and Self Defense

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Repository Citation

Ward, Cynthia, ""Stand Your Ground" and Self Defense" (2015). *Faculty Publications*. 1800.
<https://scholarship.law.wm.edu/facpubs/1800>

Article

“Stand Your Ground” and Self-Defense

Cynthia V. Ward*

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I. Introduction: Stand or Retreat

Someone is threatening you with imminent and deadly force. You could safely retreat from the threat but you choose, instead, to stand your ground and meet force with force. In doing so, you kill the aggressor. Are you guilty of murder?

In most of the United States, the answer is no. By statute, court rulings, or a combination of both, more than thirty states have adopted a “Stand Your Ground” (No Retreat) rule which bars the prosecution of people who use deadly force against a deadly aggressor without first attempting to retreat, or offers such persons a valid self-defense claim against a charge of criminal homicide.¹ By contrast, a minority of states enforce a “Retreat” requirement, or “Duty to Retreat,” under which a defendant may not successfully claim self-defense if the defendant could have safely retreated, but did not, before using deadly force against a deadly attacker.²

A longstanding legal debate between the Retreat and Stand Your Ground approaches erupted onto the national landscape in the summer of 2013, after a Florida jury acquitted George Zimmerman in the shooting

1. “*Stand Your Ground*” Policy Summary, LAW CENTER TO PREVENT GUN VIOLENCE (July 18, 2013), <http://smartgunlaws.org/stand-your-ground-policy-summary>. Since 2005, 26 states have adopted statutory No Retreat rules, and an additional seven states have adopted some form of Stand Your Ground approach through a combination of court rulings, statutory provisions, and jury instructions. See, e.g., FLA. STAT. § 776.032(1) (2014) (“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”); *Dorsey v. State*, 74 So. 3d 521, 526 (Fla. Dist. Ct. App. 2011) (discussing the legislative intent of section 776.013 that was to “[abolish] the common law duty to retreat,” the favorable jury instructions provided by the “‘Stand Your Ground’ instruction” to the defendant, and the creation of “a new affirmative defense” where a person may use deadly force without first retreating).

Under § 776.012, a person’s use of deadly force is justified “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 or another or to prevent the imminent commission of a forcible felony.” FLA. STAT. § 776.012(2) (2014). In such a situation, the person “does not have a duty to retreat and has the right to stand his or her ground if the person . . . is not engaged in a criminal activity and is in a place where he or she has a right to be.” *Id.*

2. See, e.g., CONN. GEN. STAT. § 53a-19(b) (2014) (“[A] person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety (1) by retreating”); see also *Burch v. State*, 696 A.2d 443, 458 (Md. 1997) (citations omitted) (noting that Maryland’s common-law retreat rule provides that a person has a duty “to retreat or avoid danger if such means were within his power and consistent with his safety” as an essential element to self-defense); *DeVaughn v. State*, 194 A.2d 109, 112 (Md. 1963) (“[T]he distinction that is made between defense of the home and defense of the person is merely that in the former there is no duty to retreat.”).

The Model Penal Code (MPC) also proposes a retreat rule under which deadly force is not justifiable if the actor knows “he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take.” MODEL PENAL CODE § 3.04(2)(b) (Proposed Official Draft 1962). Like the criminal codes of most Retreat states, the MPC includes a version of the Castle Doctrine, providing that persons are not required to retreat if they are faced with a deadly assault in their home and did not provoke or initiate that assault. *Id.* § 3.04(2)(b)(ii)(i).

death of Trayvon Martin.³ The facts suggest that Florida’s Stand Your Ground law had (at best) only a distant connection to the shooting of Trayvon Martin and to the subsequent acquittal of Zimmerman on multiple homicide charges.⁴ Nonetheless, the political tsunami generated by the Zimmerman case has cut the Stand Your Ground doctrine from its historical moorings and obscured its purpose, role, and impact on the law of self-defense.⁵

3. See Arian Camp-Flores & Lynn Waddell, *Jury Acquits Zimmerman of All Charges*, WALL ST. J. (July 14, 2013, 7:21 AM), <http://online.wsj.com/news/articles/SB10001424127887324879504578603562762064502> (“[The Zimmerman case] set off nationwide protests and searing debates over racial justice and self-defense laws.”).

4. See *Zimmerman to Argue Self-Defense, Will Not Seek “Stand Your Ground” Hearing*, CNN (May 1, 2013, 5:43 AM), www.cnn.com/2013/04/30/justice/florida-zimmerman-defense/ (noting that Mr. Zimmerman’s attorneys waived his right to a Stand Your Ground pretrial immunity hearing, opting instead to try the case as one of self-defense); see also *infra* text accompanying note 5 (discussing controversy over relevance of Stand Your Ground to the jury’s verdict in the Zimmerman case).

5. Three especially incendiary charges are that Stand Your Ground laws are inherently racist, that the wave of recently enacted Stand Your Ground statutes resulted from a campaign to promote gun ownership that was spearheaded by the National Rifle Association, and that the Stand Your Ground approach encourages and increases the rate of deadly violence generally. See Alyssa Giannarakis, *Tavis Smiley: You Can ‘Stand Your Ground Unless You Are a Black Man’*, ABC NEWS (July 14, 2013, 10:56 AM), www.abcnews.go.com/Politics/tavis-smiley-you-can-stand-your-ground-unless-you-are-a-black-man/blogEntry?id=19662909 (quoting comments by radio talk show host Tavis Smiley on ABC News’s ‘This Week With George Stephanopoulos’: “It appears to me, and I think many other persons in this country, that you can in fact stand your ground unless you are a black man.”). A number of celebrities have decided to boycott Florida or all Stand Your Ground states until the laws are repealed, principally on grounds that Stand Your Ground laws are racist. E.g., Alan Duke, *Stevie Wonder Says He’ll Boycott ‘Stand Your Ground’ States*, CNN (July 17, 2013, 9:32 AM), www.cnn.com/2013/7/16/showbiz/stevie-wonder-florida-boycott (quoting Stevie Wonder, who told an audience at a concert in Quebec that wherever a Stand Your Ground law exists, he “will not perform in that state or in that part of the world”). The controversy continued in 2014 with such nationally promoted events as “Stand Your Ground Week” in Florida. See Keitha Nelson, *‘Standing Our Ground Week’ Begins in Jacksonville*, FIRST COAST NEWS (July 25, 2014, 11:38 PM), www.firstcoastnews.com/story/news/local/2014/07/25/marissa-alexander-stand-your-ground/13195383/ (describing events organized to bring awareness to the trial of Marissa Alexander, who was repeatedly denied a Stand Your Ground Hearing after allegedly shooting at her estranged husband and his children).

Thus far, the post-Zimmerman scholarly literature has generally echoed, or expanded, these concerns, at least in the legal academy. See generally D. Marvin Jones, *He’s a Black Male . . . Something is Wrong With Him!*, 68 U. MIAMI L. REV. 1025 (2014) (linking the proponents of Stand Your Ground, and the acquittal of George Zimmerman, with an underlying racist “culture of fear” which associates black men with danger and crime); 2014 Annual Meeting Program: Session Details, Self-Defense, Stand Your Ground Laws, and the Shooting of Trayvon Martin, ASS’N OF AM. LAW SCH., https://memberaccess.aals.org/eweb/DynamicPage.aspx?Site=AALS&WebKey=d2d0f6f9-5d93-4b37-8671-6dfac46c48ad&RegPath=EventRegFees&REg_evt_key=70c8b3ea-5ec9-404d-b7ec-88f6b1fa3020&ParentObject=CentralizedOrderEntry&ParentDataObject=Registrant&DoNotSave=yes&action=Add (“This panel will explore the applicable law, race, and masculinity, using a multidisciplinary approach. Issues covered will include . . . how implicit racial bias can influence juror perceptions of reasonableness in self-defense; and the dialogic relationship between race, masculinity and the criminal law.”).

Especially surprising has been the frequency with which expert commentators, including expert legal commentators, have misrepresented the basic law of self-defense in this discussion. See, e.g., Robert Leider, *Understanding Stand Your Ground*, WALL ST. J. (Apr. 18, 2012, 6:58 PM), <http://online.wsj.com/article/SB10001424052702304432704577350010609562008.html> (“Jeffrey Toobin, CNN senior legal analyst, erroneously claimed that the [Florida Stand Your Ground] law ‘al-

Misinformed politics can produce bad law, and that may well happen here. A Florida task force appointed in 2012 by Governor Rick Scott recommended preserving the Sunshine State's Stand Your Ground statute with minor corrections.⁶ Reaction at the federal level was more dramatic. Shortly after George Zimmerman's acquittal, President Barack Obama suggested that it was time for states to reassess the Stand Your Ground approach. The President said:

[F]or those who resist the idea that we should think about something like these 'stand your ground' laws, I'd just ask people to consider, if Trayvon Martin was of age and armed, could he have stood his ground on that sidewalk? And do we actually think that he would have been justified in shooting Mr. Zimmerman, who had followed him in a car, because he felt threatened? And if the answer to that question is at least ambiguous, then it seems to me that we might want to examine those kinds of laws.⁷

U.S. Attorney General Eric Holder went further, affirmatively condemning Stand Your Ground laws and declaring, "These laws try to fix something that was never broken."⁸ The Attorney General opined: "[I]t's time to question laws that senselessly expand the concept of self-defense and sow dangerous conflict . . . [S]uch laws undermine public safety. . . . [W]e must . . . take a hard look at laws that contribute to more violence than they prevent."⁹

Such statements contain a number of factual assertions that call

lows a disproportionate response: if someone comes at you with a fist, you can reply with a gun."'). As Leider points out: "Many have asserted that in Florida anyone who believes he is in danger can use deadly force. . . . These perceptions of the law are wrong. . . . [A] person must also reasonably believe that the aggressor threatened him with death, great bodily injury, or intended to commit a forcible felony . . ." *Id.*; see also *infra* Part III.A (discussing various doctrinal confusions which have muddied the public discussion of Stand Your Ground).

6. Bill Cotterell, *Florida Task Force Recommends Preserving Stand Your Ground Law*, REUTERS, Feb. 22, 2013, available at <http://www.reuters.com/article/2013/02/22/us-usa-florida-guns-idUSBRE91L16120130222>.

7. *Transcript: Obama addresses race, profiling and FL law*, CNN (July 19, 2013, 2:49 PM), <http://www.cnn.com/2013/07/19/politics/obama-zimmerman-verdict/> [hereinafter *Obama's Address*]. The President also remarked, "I think it would be useful for us to examine some state and local laws to see if they are designed in such a way that they may encourage the kind of altercations and confrontations and tragedies that we saw in the Florida [Zimmerman] case, rather than [defuse] potential altercations." *Id.* Here the President seems to repeat a core misconception about Stand Your Ground laws—that such laws require only that the defendant have subjectively felt threatened in order successfully to claim that his or her use of deadly force was justified. This is most emphatically not the case, as I discuss *infra* Part III.B.

8. *Attorney General Eric Holder's Remarks on Trayvon Martin at NAACP Convention (full text)* [hereinafter *Holder's Remarks*], WASH. POST (July 16, 2013), http://www.washingtonpost.com/politics/attorney-general-eric-holders-remarks-on-trayvon-martin-at-naacp-convention-full-text/2013/07/16/dec82f88-ec5a-11e2-a1f9-ea873b7e0424_story.html.

9. *Id.*

loudly for verification. Do Stand Your Ground statutes allow a person to kill someone simply because the person feels threatened? Do they invidiously discriminate on the basis of race? Do they “senselessly expand the concept of self-defense”? Do they “sow dangerous conflict in our neighborhoods”? Do they necessarily “undermine public safety”? Do they “contribute to more violence than they prevent”?

The political conversation about these laws has been so dominated by bitter ideological disputes that the public has not been given a fair opportunity to study the Stand Your Ground approach or to assess its function and impact.

This Article examines the historical background of Stand Your Ground (No Retreat) rules in the United States and evaluates the various reasons that might explain their current embrace by more than half the country. Widespread adoption of a law does not necessarily make that law right. But it does suggest the law may be animated by strongly held moral intuitions that deserve exploration on their own merits. In identifying and examining the moral intuitions that have proliferated the law of Stand Your Ground, I hope not only to reach meaningful conclusions about the normative status of No Retreat rules in the law of self-defense, but also to raise a more general concern about the influence of political ideology on the content of the criminal law.

Part II traces the evolution of Retreat and Stand Your Ground rules in the United States, noting the roots of both approaches in English common-law doctrine dating back several centuries. Part III attempts to clear up some confusions about self-defense law which may have clouded the public debate over Stand Your Ground doctrine, and Part IV evaluates recent claims that Stand Your Ground is inherently racist, violence-enhancing, or both. I argue that none of these charges are justified. Like any other legal rule, Stand Your Ground laws can be badly or inexpertly invoked and interpreted. But so far, at least, no one has persuasively demonstrated that Stand Your Ground is inherently racist or that it increases the rate of gun violence generally or unjustified killing in particular. Part V concludes by proposing changes to both the Stand Your Ground and Retreat approaches, changes that would return them to their original and most rationally defensible mooring within the necessity element of self-defense. Properly housed in the universally accepted rule of necessity, Stand Your Ground laws (1) can shed the conceptual confusions that have produced so many over-heated charges against them and (2) can serve the public’s legitimate interest in protecting the individual’s right to use deadly force against an aggressor in situations where such force is necessary to save innocent human life.

II. Self-Defense and the Duty to Retreat

Both the Retreat and Stand Your Ground approaches proceed from the same core conception of self-defense and therefore have most foundational elements in common. Although phrased somewhat differently by

courts and legislatures in state jurisdictions, the justification of self-defense contains four basic elements. To advance a self-defense claim when a defendant has killed his or her attacker, the defendant must (1) be faced with a threat of death or serious bodily injury from the attack; (2) the threatened attack must be “imminent,” in the plain-language sense that it is about to happen right then; and the defendant at that moment must (3) honestly and (4) reasonably believe that the use of deadly force is necessary to prevent such injury or death.¹⁰ Again, self-defense doctrine shares these core elements in both Retreat and Stand Your Ground jurisdictions.

A. Core Elements of Self-Defense

These core elements of self-defense have generated a shared set of judicial and statutory corollaries.

First, among the minority of states that enforces a Duty to Retreat, that duty generally does not apply when a defendant is attacked in his or her own residence.¹¹ In the 1914 New York case *People v. Tomlins*,¹² Justice Benjamin Cardozo explained the basis of this Castle Doctrine¹³: “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.”¹⁴

Thus, even in Retreat rule states, the No Retreat principle applies in the important setting of the home. The difference between Retreat and Stand Your Ground concerns the law as it relates to deadly confrontations *outside* the home.

Second, in both Retreat and Stand Your Ground jurisdictions, self-defense claims are frequently permitted not only in cases where the defender honestly and reasonably believed that the assailant had the conscious purpose of killing, but also in cases where defenders used deadly force to retaliate against an aggressor who was attempting to commit a serious felo-

10. See *United States v. Peterson*, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973) (discussing what is required for a valid self-defense claim).

11. See, e.g., *DeVaughn v. State*, 194 A.2d 109, 112 (Md. 1963) (stating that, in Maryland, though there is a duty to retreat when defending one’s person, there is no such duty when defending one’s “home or ‘castle’”).

12. *People v. Tomlins*, 107 N.E. 496 (N.Y. 1914).

13. Some modern commentators refer to Stand Your Ground laws as “Castle” laws. See, e.g., Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 831 (2013) (“This article takes a critical look at expanded self-defense laws . . . known as ‘Castle’ or ‘Stand Your Ground’ laws.”). In this article, I use “Stand Your Ground” as synonymous with the “No Retreat” approach to self-defense, and the “Castle Doctrine” refers to the particular rule which applies in some Duty to Retreat states, creating an exception to that duty when an innocent person is assaulted with deadly force in his or her home. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER, CAROL S. STEIKER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 865, 866–68 (9th ed. 2012) (discussing the “castle exception”).

14. *Tomlins*, 107 N.E. at 497; see also *People v. Lewis*, 48 P. 1088, 1090 (Cal. 1897) (“When a person is attacked in his own house, he need retreat no further.” (quoting WHARTON ON CRIMINAL LAW § 502 (10th ed.))).

ny (such as burglary, kidnapping, robbery, or rape) upon the person or property of the defendant.¹⁵

Third, in all jurisdictions, a successful claim of self-defense may be advanced when the defender had reasonable grounds to believe that the attacker was about to kill or seriously injure—whether or not that belief turns out to be true. Thus, if the defender reasonably believed that the assailant was holding a gun, or was pulling a gun from his or her coat, and responded to that perceived threat by killing the person, a claim of self-defense would not be legally barred, although it turned out that the person killed did not, in fact, have a deadly weapon or intend to kill or injure the defender. In both Retreat and No Retreat jurisdictions, the defender’s belief in the need to use deadly force must be *honest* and *reasonable*, but it need not be *objectively true*.¹⁶

Fourth, in both Retreat and Stand Your Ground states, well-established rules limit the availability of the self-defense justification. Where the defendant is at fault in creating the situation which led to the necessity of using deadly force, or where the defendant was the “initial aggressor” in the attack and did not withdraw from the encounter prior to using deadly force against an attacker, the defendant has no right to stand his or her ground, and the defendant may not claim self-defense if the defendant fails to retreat before using deadly force even to save the his or her own life.¹⁷

15. See, e.g., FLA. STAT. § 776.012 (2014) (“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 . . . the imminent commission of a forcible felony.”); N.Y. PENAL LAW § 35.15(2) (McKinney 2014) (“A person may not use deadly force upon another . . . unless (a) The actor reasonably believes that such other person is using or about to use deadly force . . . (b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery”); *Ragland v. State*, 36 S.E. 682, 684 (Ga. 1900) (“A person in this State may kill another for other purposes than to save his own life, and be justified, if he do so to prevent any felony from being committed on his habitation, person, or property”); *Page v. State*, 40 N.E. 745, 746 (Ind. 1894) (“[I]f the [retreat rule] applied to all cases . . . it would require a man to flee before another who murderously assails him, or a traveler to flee before a highway robber, or a woman to flee before her would-be ravisher, before resorting to the extreme measure [L]aw puts upon a person no such necessity.”).

16. Thus, one night *A* is out for an evening stroll. Suddenly *B* jumps in front of him and demands his wallet. *A*, who forgot his wallet at home, fears for his life as he sees *B* reach into his (*B*’s) pocket and begin pulling out a gun. *A* responds by drawing his own weapon and shooting *B*, killing him. It turns out that *B*’s weapon was a (realistic-looking) water pistol and was harmless. Under traditional self-defense doctrine, *A* would successfully be able to claim self-defense on the ground that even though he was not actually in grave danger of death or serious bodily injury from *B*, he reasonably believed that he was in such danger.

17. What counts as “fault” is often far from clear. The Model Penal Code, for example, would deny a justification for using deadly force to a defendant who “with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter” MODEL PENAL CODE § 3.04(2)(b)(i) (Proposed Official Draft 1962). Other courts appear to define “fault” more broadly, denying the justification to defendants who were engaged in illegal activity at the time of the deadly encounter. See, e.g., *Mayes v. State*, 744 N.E.2d 390, 392–95 (Ind. 2001), cited in *KADISH ET AL.*, *supra* note 13, at 871 (upholding jury instruction to not find the defendant’s use of deadly force justified if he was “committing [or] escaping after the commission [of] a crime”); see also *Boykin v. People*, 45 P.

Finally, the justification of self-defense is, primarily, a function of *necessity*. The defense will be allowed only if the defender reasonably believed that the use of deadly force was an *unavoidable* means of saving the defender (or another) from death or serious bodily injury.¹⁸ Ideally, the element of necessity operates to balance the two important social policies expressed by the Retreat and No Retreat rules in self-defense law: the need, on the one hand, to prevent violent self-help (and the possible chaos it might produce); and, on the other hand, the perceived need to permit self-help in cases where innocent life is endangered by an immediate threat and law enforcement is not present to defeat that threat.

B. Brief History of Stand and Retreat

Political critics appear to assume that Stand Your Ground laws are new to the law of self-defense, the recent product of a fanatical nationwide lobbying campaign by the National Rifle Association (NRA).¹⁹ Not so. The Duty to Retreat and the No Retreat (Stand Your Ground) approaches have long co-existed in American legal doctrine,²⁰ and both are historically root-

419, 422 (Colo. 1896) (“[I]t is the duty of the party assaulted to retreat to the wall . . . where the parties engage in mutual combat, or where the defendant is the assailant, and has not, in good faith, declined further struggle before resorting to self-defense, or has provoked the assault with intent to commit a felony.”); *Page*, 40 N.E. at 746 (holding that the right to resist force with force depends on the person being without fault, in a place where he had the right to be, and one “who invites or voluntarily enters the conflict is not without fault. Retreat, in such case . . . becomes necessary”). As for what type of behavior makes the defendant the “initial aggressor,” the answer is also unclear. *See infra* text accompanying notes 98–104.

18. *See infra* text accompanying notes 27–28.

19. *See* Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 836 (2013) (citations omitted) (“According to a wide variety of sources, the NRA was instrumental in getting *Stand Your Ground* passed.”); E.J. Dionne, Jr., *Why the NRA Pushes ‘Stand Your Ground’*, WASH. POST (Apr. 15, 2012), www.washingtonpost.com/pb/opinions/why-the-nra-pushes-stand-your-ground/2012/05/15/g1QAL458JT_story.html (asserting that Stand Your Ground laws arose because state legislatures and Congress were intimidated by the lobbying power of the NRA); Carl Hiaasen, *Welcome to Florida, Where the NRA Rules and We Proudly Stand Our Ground*, MIAMI HERALD BLOG (Feb. 22, 2014, 7:00 PM), <http://www.miamiherald.com/opinion/opn-columns-blogs/carl-hiaasen/article1960643.html> (stating that the NRA “owns too many Republican lawmakers” for Florida’s Stand Your Ground law to be repealed); Andy Kroll, *The Money Trail Behind Florida’s Notorious Gun Law*, MOTHER JONES (Mar. 29, 2012, 6:00 AM), <http://motherjones.com/politics/2012/03/NRA-stand-your-ground-trayvon-martin> (“The money trail leading to the watershed law in Florida—the first of 24 across the nation—traces primarily to one source: the National Rifle Association.”); Samantha Lachman, *The NRA is Directly Behind a Bill Loosening Florida’s ‘Stand Your Ground’ Law*, HUFFINGTON POST (Jan. 25, 2014, 4:01 PM), www.huffingtonpost.com/2014/01/17/nra-guns-florida-_n_4619171.html (discussing a proposed bill, written by a former NRA president and promoted by a “top NRA lobbyist,” that would expand Florida’s Stand Your Ground law); Michael Ono, *NRA Pushed for ‘Stand Your Ground’ Laws*, ABC NEWS (Mar. 31, 2012, 4:33 PM), <http://abcnews.go.com/blogs/politics/2012/03/nra-pushed-for-stand-your-ground-laws/> (stating that the NRA lobbied for the original Stand Your Ground law in Florida in 2004 and also “lobbied to pass similar legislation in other states”).

20. *See* Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961, 969 (2014) (“American jurists have debated for well over a century the question of whether a person who reasonably fears imminent bodily injury and reasonably believes defensive force is necessary must first attempt to retreat before using force.”).

ed in English common-law doctrine dating at least from the seventeenth century.²¹

In England, the justification of self-defense evolved as an exception to the general rule, which prohibited persons from engaging in self-help that costs human life.²² It is often said that English common law enforced a strict duty of retreat, denying a self-defense claim unless the claimant could prove the claimant’s “back [was] to the wall” before responding to a deadly attack by killing the aggressor.²³ A quote from William Blackstone’s *Commentaries* captures the common view of early English law:

[T]he law requires that the person, who kills another in his own defence, should have retreated as far he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother’s blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honor: Because the king and his courts are the *vindices injuriarum* [avengers of injuries], and will give to the party wronged all the satisfaction he deserves.²⁴

But even early English commentators acknowledged exceptions to the rule requiring retreat. Alongside the Retreat rule, the principle of “No Retreat” (what we now call Stand Your Ground), though more limited in scope than its American descendant, was an identified feature of English law at least since the works of Sir Matthew Hale and Lord Edward Coke in the seventeenth century, and both doctrines were a continuing thread in the works of William Blackstone and Sir Michael Foster in the eighteenth century and Edward Hyde East in the early nineteenth century.²⁵ Their treatises

21. See, e.g., EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55–56 (1669) (noting that initial aggressors and mutual combatants had a duty to retreat before using lethal force, but that no such duty existed where a person was defending his life or property).

22. See *infra* text accompanying note 25.

23. KADISH ET AL., *supra* note 13, at 865 (“[T]he English common law imposed a strict duty to retreat; a person could use deadly force in self-defense only after exhausting every chance to flee, when he had his ‘back to the wall.’”). With respect to a non-deadly attack, the common law has always granted the attacked person a right to stand his or her ground and respond with proportional (that is, non-deadly) force. See *infra* note 25 and accompanying text.

24. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 184–85 (Oxford, Clarendon Press 1769).

25. See, e.g., BLACKSTONE, *supra* note 24, at 184–85 (finding no duty to retreat where attack “so fierce” that attempt to retreat would endanger the person’s life or put him in danger of “enormous bodily harm”); COKE, *supra* note 21, at 56 (finding no duty to retreat when confronted by person with intent to rob or murder); 1 EDWARD HYDE EAST ESQ., A TREATISE OF THE PLEAS OF THE CROWN 220–21 (London, A. Strahan 1803) (finding no duty to retreat from another who comes to commit a known felony with force against his person, habitation, or property); SIR MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS 273 (Oxford, Clarendon Press 1762) (“[An] injured party may repel force with force in defense of his person, habitation, or property, against one who manifestly intends and endeavors with

and commentaries all made clear that against the general backdrop of a Duty to Retreat, the law in some situations would admit a claim of self-defense when the defendant had *failed* to retreat, and instead stood his ground and killed an attacker.²⁶ The balance between Retreat and No Retreat was captured in the doctrine of “necessity,” a core element of self-defense from its inception through to the present day.²⁷ The necessity rule permitted a claim of self-defense to homicide only when killing the aggressor was unavoidable—that is, only when the defendant reasonably believed that the use of deadly force was the only means of saving life or limb.²⁸

To be sure, English common-law doctrine strictly limited the cases to which Stand Your Ground applied; not all situations in which a defendant was ultimately faced with a “him or me” choice were considered valid cases of self-defense.²⁹ Early English commentators distinguished between two fundamental scenarios: (1) cases in which the defendant’s use of deadly force was *justified*—for example, where a blameless and law-abiding defendant used deadly force to repel an attack from a thief or a burglar who intended to kill or gravely injure him, and (2) cases in which the use of deadly force was merely *excused*—for example where the defendant either bore some responsibility for the deadly encounter, or had reasonably *but incorrectly* believed that he or she was faced with imminent threat of death or serious injury and responded with deadly force.³⁰ In the former type of case, a defendant could claim self-defense although he or she had stood his or her ground and did not retreat; in the latter case, only defendants who could prove that they attempted to retreat before using deadly force could successfully claim self-defense. Even then, defendants of the second type did not merit a full acquittal but only an escape from execution, which was the usual penalty for intentional killings by private citizens.³¹ Thus, under the Eng-

violence or surprise to commit a known felony upon either. In these cases he is not obligated to retreat”); SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 481 (Sollom Emlyn ed., E. & R. Gosling 1736) (stating that a “true man” is not bound to retreat, but may kill his assailant, and it is not a felony).

26. BLACKSTONE, *supra* note 24, at 184–85; COKE, *supra* note 21, at 56; EAST, *supra* note 25, at 220–21; FOSTER, *supra* note 25, at 273; HALE, *supra* note 25, at 481.

27. See *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973) (“Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone’s time. . . . But “[t]he 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”) (quoting *Holmes v. United States*, 11 F.2d 569, 574 (1926)).

28. See 2 HENRY DE BRACON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 340–41 (George Woodbine ed., Belknap Press 1968) (defining homicide to include killings “[o]f necessity,” and noting that if the necessity was avoidable and “he could escape without slaying, he will then be guilty of homicide; if unavoidable, since he kills without premeditated hatred but with sorrow of heart, in order to save himself and his family, since he could not otherwise escape [danger], he is not liable to the penalty for homicide”).

29. FOSTER, *supra* note 25, at 273.

30. See EAST, *supra* note 25, at 220–22 (comparing excusable homicide by misadventure or “chance-medley” to justified homicide).

31. See FOSTER, *supra* note 25, at 273 (“Self-defence. . . . It is either that sort of homicide, *se et*

lish rule, as articulated by Edward Coke, a person was justified in using deadly force against another, even to the point of killing the other, if threatened with imminent death or grave injury for which the defendant bore no responsibility or blame.³² In other cases where the defendant and the deceased mutually came to blows and the embroglio reached the point where the defendant found it necessary to kill the other rather than die, the defendant could only claim self-defense if the defendant had first attempted to retreat; in other words, if the defendant’s “back [was] to the wall” before using deadly force against the other person.³³ Thus, in his 1628 treatise *Institutes of the Laws of England*, Lord Coke wrote:

Some be voluntary, yet being done upon inevitable cause, are no felony. As if A be assaulted by B, and they fight together, and before any mortal blow be given, A giveth back [retreat] until he cometh to a hedge, wall, or other strait, beyond which he can not pass; and then, in his own defense and for safeguard of his own life killeth the other; this is voluntary, and yet no felony³⁴ Some, without giving back [retreating] to a wall, etc., or other inevitable cause, as if a thief offer to rob or murder B either abroad or in his house, and thereupon assault him, and B defende himselfe without giving back, and in his defense killeth the thiefe, this is no felony; for a man shall never give way to a thiefe, ect., neither shall he forfeit anything.³⁵

Matthew Hale expressed a similar distinction in his famous *History of the Pleas of the Crown*.³⁶

The earliest American self-defense doctrine imposed a general Duty of Retreat, but also admitted exceptions of the kind just described.³⁷ In the mid-to-late nineteenth century, however, the American approach changed as homegrown legal commentators,³⁸ influential state supreme courts, and United States Supreme Court opinions developed a more robust Stand Your Ground doctrine, which became a widely adopted basis for self-defense in

sua defendendo, which is perfectly innocent and justifiable, or that which is in some measure blamable and barely excusable [T]here are cases in which the man may, without retreating, oppose force to force, even to the death.”)

32. COKE, *supra* note 21, at 55–56.

33. *See, e.g.,* *Erwin v. State*, 29 Ohio St. 186, 194–95 (Ohio 1876) (quoting COKE, *supra* note 21, at 55–56) (discussing the distinction between homicide *se defendendo* and justifiable homicide).

34. In such cases the defendant would not be executed, but the defendant would instead forfeit his property to the Crown. *Id.*

35. COKE, *supra* note 21, at 56.

36. *See* HALE, *supra* note 25, at 481 (contrasting general Duty to Retreat with circumstances where it may not be necessary, e.g., the “true man” confronted by the thief).

37. RICHARD MAXWELL BROWN, *NO DUTY TO RETREAT* 5–7 (Oxford Univ. Press 1991).

38. *See id.* at 7 (“The first truly original American work on the criminal law was published in 1856 by Joel Prentiss Bishop of Massachusetts. . . . As for the law of homicide and self-defense, Bishop followed Foster and East in the turn away from the duty to retreat.”).

this country.³⁹ Perhaps the leading case was *Erwin v. State* in 1876.⁴⁰ There the Ohio Supreme Court held that the criminal law “will not permit the taking of [human life] to repel a mere trespass, . . . but 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.”⁴¹ Some American courts may have read the phrase “true man” as synonymous with “macho man”—implying that the Retreat rule mandated cowardly behavior by requiring an attacked person to back away from a fight.⁴² However, the Ohio court in *Erwin* simply pulled the phrase “true man” from the seventeenth-century work of Matthew Hale.⁴³ The plain lan-

39. See, e.g., *Beard v. United States*, 158 U.S. 550, 563–64 (1895) (holding instruction endorsing duty to retreat erroneous; person in place he was entitled to be and who did not provoke the assault was entitled to stand his ground and use force he honestly and reasonably believed necessary to save his life or protect himself from great bodily harm); *Erwin v. State*, 29 Ohio St. 186, 194–99 (Ohio 1876) (tracing development of the “retreating to the wall” doctrine in England and noting American divergence). In *Erwin*, the court emphasized the American divergence by quoting the grand jury charge in leading case of *Commonwealth v. Selfridge*, 2 Am. St. Trials 544 (1806), which stated that:

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* . . . it must plainly appear by the circumstances of the case, as the manner of the assault, the weapon, etc., that his life was in imminent danger, otherwise the killing of the assailant will not be *justifiable homicide*. But if the party killing had reasonable grounds for believing that the person slain had a felonious design against him, although it should afterward appear that there was no such design, it will not be murder, but will be either manslaughter or *excusable homicide*, according to the degree of caution and the probable grounds for such belief.

40. 29 Ohio St. 186 (Ohio 1876). In *Erwin*, the Ohio Supreme Court described the evolution of self-defense law in the United States, making clear that “under our constitution, whether the killing in self-defense be justifiable or excusable, there must be an entire acquittal, for the reason that there is no forfeiture of goods in case of excusable homicide.” *Id.* at 199. Thus, in the United States, self-defense as a justification came to include not only cases in which the defendant used deadly force because the defendant *correctly* believed that the defendant was faced with the imminent threat of death or serious bodily injury, but it also includes cases in which the defendant honestly and reasonably, *but incorrectly*, believed that the defendant was faced with such a threat. See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1230 (D.C. Cir. 1973) (“The defender must have believed that he was in imminent peril of death or serious bodily harm, and that the response was necessary to save himself therefrom. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances.”).

41. *Erwin*, 29 Ohio St. at 199.

42. See, e.g., *State v. Abbott*, 174 A.2d 881, 884 (N.J. 1961) (“[A]dvocates of no-retreat say the manly thing is to hold one’s ground, and hence society should not demand what smacks of cowardice.”); BROWN, *supra* note 37, at 17 (“The language of the supreme court in Ohio [in *Erwin*] with its emphasis on the action of a ‘true man’ and of the Indiana Court [in *Runyan*, *infra*] with its repudiation of what it saw as legalized cowardice illustrates . . . concern for the values of masculine bravery in a frontier nation.”).

43. *Erwin*, 29 Ohio St. at 194; see also Garrett Epps, *The History of Florida’s ‘Stand Your Ground’ Law*, AMERICAN PROSPECT (Mar. 21, 2012), <http://prospect.org/article/history-floridas-stand-your-ground-law> (“[A] ‘true man’ in the legal sense—mean[s] not a manly man but, in the words of the Oxford English Dictionary, ‘an honest man (as distinguished from a thief or other criminal).’”); BROWN, *supra* note 37, at 9 (recounting the Ohio Supreme Court opinion in *Erwin* and reporting that the court in that case “found that *Erwin* himself had been without blame and therefore as a ‘true man’ was ‘not obliged to fly’ from his assailant”). Brown argues that the *Erwin* court “widened” Hale’s “true man”

guage of the *Erwin* court’s ruling suggests the phrase was meant not to applaud machismo, but to distinguish the blameworthy from the innocent.⁴⁴ Thus, in the self-defense context the phrase “true man” simply referred to an honest person, lawfully going about his business, who finds himself faced with a sudden, deadly, unlawful, and unprovoked attack from another who means to kill him or do him serious bodily harm.⁴⁵ Such persons, the *Erwin* court held, may claim self-defense if, to save their own lives, they kill the attacker without first attempting to retreat.⁴⁶

Importantly, in *Erwin* the Ohio Supreme Court explicitly couched the No Retreat doctrine within the framework of necessity—the principle that a self-defense claim is permitted only when the defendant reasonably believes that killing an aggressor was the only available means of preventing a deadly attack:

[A]ll authorities agree that the taking of life in defense of one’s person can not be either justified or excused, except on the ground of *necessity*; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question, then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? [No.] . . . [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.⁴⁷

doctrine, an argument apparently premised on the claim that Hale had meant the doctrine to cover *only* the situation in which an honest man was assaulted by a thief, whereas the *Erwin* court treated the thief situation as exemplary of a more general rule supporting a Stand Your Ground approach whenever an honest person is attacked, without lawful provocation, by “an assailant who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.” *Id.* Hale’s language appears susceptible to either interpretation, and either will suffice for purposes of this essay, the point here being only to show that the No Retreat principle has longstanding roots in both English and American legal doctrine.

44. *Erwin*, 29 Ohio St. at 199.

45. See Epps, *supra* note 43 (noting that the “true man” doctrine in English self-defense law was “not a *manly* man but, in the words of the *Oxford English Dictionary*, ‘an honest man (as distinguished from a thief or other criminal).’”).

46. *Id.* at 199–200. In her article *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J. L. & GENDER 237 (2008), Jeannie Suk discusses a number of historical interpretations of the phrase “true man,” including its interpretation to mean simply “an honest and good man.” See *id.* at 244 (“The most literal [interpretation of the phrase] was the idea of a man who was ‘true’ in the sense of honest, and who made decisions based on what he believed was true.”); see also *People v. News-Times Pub. Co.*, 84 P. 912, 957 (Colo. 1906) (Steele, J., dissenting) (“[S]hould I do what any true man ought to do, firmly believing that he spoke the truth, say, that he had spoken the truth and offer to establish the verity of the articles?”); *Springfield Republican, A Singular Case*, N.Y. DAILY TIMES, June 16, 1852, at 4 (“Dr. DeWolf deserves much credit, not for being honest, for a true man could hardly be otherwise, but . . . for delivering to justice, an offender against the laws.”).

47. *Erwin*, 29 Ohio St. at 199–200.

At the normative level, the *Erwin* court explained its rejection of the Duty to Retreat not on the basis of discouraging cowardice, but on the basis that the Stand Your Ground rule was “best calculated to protect and preserve human life.”⁴⁸

A year after *Erwin*, the Supreme Court of Indiana also embraced the No Retreat approach. In *Runyan v. State*,⁴⁹ the defendant had shot and killed the deceased.⁵⁰ Operating under instructions that strongly endorsed the Retreat rule, a jury convicted Runyan of manslaughter.⁵¹ In relevant part, those jury instructions stated:

The law gives to every man the right of self-defence. . . . He may repel force by force, and he may resort to such force as, under the circumstances surrounding him, may reasonably seem necessary to repel the attack upon him, and, in his defence, he may even go to the extent of taking the life of his assailant. The law, however, is tender of human life, and will not suffer the life even of an assailant and wrong-doer to be taken, unless the assault is of such a character as to make it appear reasonably necessary to the assailed to take life in defence of his own life, or to protect his person from great bodily harm. And if the person assailed can protect his life and his person by retreating, it is his duty to retreat, and thus avoid the necessity of taking human life.⁵²

Citing prominent authority to the effect that the Stand Your Ground approach “is founded on the law of nature; and is not, nor can be, superseded by any law of society,”⁵³ the Indiana Supreme Court rejected the lower court’s Retreat instruction, explaining that the American law of self-defense had embraced its opposite:

A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our

48. *Id.*

49. 57 Ind. 80 (Ind. 1877).

50. *Id.* at 81.

51. *Id.* at 82.

52. *Id.* The trial court instruction also made clear that retreat is not always necessary before the person attacked may take the life of the attacker: “If the assault is of such character that it reasonably appears to the party assaulted that retreat cannot be made so as to protect his life, or his person from great bodily harm, then retreat is not required.” *Id.* at 82–83 (internal quotation marks omitted).

53. *Id.* at 84.

courts, bearing on the general subject of the right of self-defence.⁵⁴

The *Runyan* court concluded: “[W]hen 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 reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable.”⁵⁵

Other state court cases in the late 1800s echoed support for the No Retreat approach, reaffirming that a person may use deadly force against another without first attempting to retreat if: (1) the person is in a place where the person has the lawful right to be; (2) the person is the victim of a deadly and unprovoked attack from which (3) the person honestly and reasonably fears death, grave bodily injury, or commission of a serious felony; and (4) the person reasonably believes that using deadly force to repel the attack is the only available means of forestalling such injurious consequences.⁵⁶

At the close of the nineteenth century, the United States Supreme Court joined the conversation. In the 1895 case *Beard v. United States*,⁵⁷ the Court embraced the No Retreat approach, holding that a defendant who was “where he had a right to be” when attacked, who “did not provoke the assault,” and who reasonably and in good faith believed “that the deceased intended to take his life or do him great bodily harm,” was not obligated to retreat, “nor to consider whether he could safely retreat, but was entitled to stand his ground”⁵⁸

54. *Id.* The court relied on several treatises including 2 WHARTON ON CRIMINAL LAW § 1019 (1846) as follows: “A man may repel force by force in the defense of his person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat”

55. *Runyan*, 57 Ind. at 84.

56. *See, e.g.*, *People v. Lewis*, 48 P. 1088, 1089–90 (Cal. 1897) (citing *Runyan v. State*, 57 Ind. 80 (Ind. 1877), *Beard v. United States*, 158 U.S. 550 (1895) and *Erwin v. State*, 29 Ohio St. 186 (Ohio 1876), for the proposition that the law affirms the right of an innocent person to stand his ground and use deadly force to defend himself against an assailant who intends to kill or gravely injure him); *Boykin v. People*, 45 P. 419, 422 (Colo. 1896) (“[A] defendant [is not obliged to retreat when he] is where he has a right to be . . . honestly and in good faith believes, and the circumstances being such as would induce a like belief in a reasonable man, that he is about to receive at the hands of his assailant great bodily harm, or to lose his life,”); *Page v. State*, 40 N.E. 745, 746 (Ind. 1894) (“[W]here an attack is made with murderous intent . . . the person attacked is under no duty to flee; he may stand his ground, and if need be kill his adversary.”); *State v. Hatch*, 46 P. 708, 708 (Kan. 1896) (“The doctrine that a party unlawfully attacked must ‘retreat to the wall’ before he can be justified in taking the life of his assailant in self-defense does not obtain in this State.”) (citation omitted). Courts have sometimes opined that the Retreat rule is implied by the doctrinal requirement, in self-defense law generally, that the killing of the deceased have been “necessary” to save the defender from death or serious physical injury. *E.g.*, *United States v. Peterson*, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973). But if common-law precedent is the marker, even this proposition appears to be in doubt. *See, e.g.*, *Ragland v. State*, 36 S.E. 682, 684 (Ga. 1900) (“[A] defense [claim] is complete when to a jury it appears that the circumstances were sufficient to excite the fears of a reasonable man that a felony was about to be committed, and that he killed to prevent its commission.”).

57. 158 U.S. 550.

58. *Id.* at 564.

Twenty-six years later, in *Brown v. United States*,⁵⁹ Justice Oliver Wendell Holmes added normative ballast to the *Beard* Court's embrace of Stand Your Ground. In *Brown*, Justice Holmes famously opined for the Court that the No Retreat rule was more just, because it was more consistent with human nature than its reverse:

The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense. That has been the decision of this Court [citing *Beard*]. *Detached reflection cannot be demanded in the presence of an uplifted knife.* Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.⁶⁰

For Justice Holmes, Stand Your Ground was the right approach not just because it had in fact become widely accepted by many states, but also because it more accurately reflected the behavior and the capacities of human beings under the stress of imminent attack and possible death.⁶¹

C. The Normative Roots of Stand Your Ground

In sum, the debate between Stand Your Ground and Retreat has longstanding historical roots in the common law of England. Both principles crossed the ocean centuries ago, and both continue to appear in the self-defense doctrine of the American states and in relevant interpretations of the United States Supreme Court.

Of course, the fact that a legal rule has existed for a long time does not make it right. Is the No Retreat approach morally defensible? We can begin to answer that question by examining the normative rationales, which drove the expansion of Stand Your Ground in the nineteenth-century United States.

First, courts embraced Stand Your Ground on the basis that it saves lives. Recall that the Ohio Supreme Court explicitly affirmed this rationale in *Erwin*, when it stated that the No Retreat rule is “the surest [way] to pre-

59. 256 U.S. 335 (1921).

60. *Id.* at 343 (emphasis added). Justice Holmes acknowledged that a defendant's 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 . . .” *Id.* This statement appears to assess a defendant's decision to retreat or not against an overall necessity standard. See *infra* Part V.D. (arguing that the necessity standard can effectively adjudicate the Retreat and No Retreat issue).

61. *Id.*

vent the occurrence of occasions for taking life; and this, by letting the would-be robber, murderer, ravisher, and such like, know that their lives are, in a measure, in the hands of their intended victims.”⁶² The court declared that Stand Your Ground saves lives by deterring would-be aggressors.⁶³ Such aggressors will be discouraged from attacking innocent victims by the knowledge that, if they do launch a deadly and unprovoked assault, their intended victim will be justified in responding with deadly force even to the point of killing them.⁶⁴ Thus, Stand Your Ground saves more innocent lives than does the Retreat rule.

A second rationale, the basis for Justice Holmes’s embrace of Stand Your Ground in *Brown*,⁶⁵ rejects the Retreat rule on the basis that it unjustly burdens innocent defenders by requiring them, while facing imminent death or serious injury, to consider and assess their chances of safely retreating before fighting force with force. Justice Holmes’s declaration in *Brown* that “[d]etached reflection cannot be demanded in the presence of an uplifted knife”⁶⁶ suggests that imposing a legal Duty to Retreat is unjust because it is based on unrealistic assumptions about the human capacity for rational deliberation under severe emotional stress.

This rationale may find contemporary support in the advances of neuroscience, suggesting that (1) the limbic system of the brain, which controls basic emotions including fear and anger, can overwhelm the rational faculties in times of great stress, and (2) such emotional flooding may drive an individual’s decisions in ways of which even the individual is unaware.⁶⁷ In a 1987 newspaper article assailing the law’s “reasonable man” standard in another self-defense context,⁶⁸ neuropsychiatrist Richard Restak seemed

62. *Erwin v. State*, 29 Ohio St. 186, 200 (Ohio 1876).

63. *Id.*

64. *Id.*

65. 256 U.S. 335 (1921).

66. 256 U.S. at 343.

67. Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 *NEW CRIM. L. REV.* 51, 77–79 (2008). Simons summarizes relevant work by Neuroscientist Joseph LeDoux of New York University, involving the brain’s response to emotional stimuli: “[F]rightening stimuli were processed by the emotional part of the brain before they were processed by the cortex, the seat of conscious thought. . . . As a result, we experience strong emotional reactions before knowing what, exactly, we are reacting to.” *Id.* Simons concludes, “[i]n the fast-moving context of a violent attack, it is often unrealistic to expect the person attacked to consciously and carefully evaluate the precise extent of a threat, the likely effect of [a defender’s] response on the aggressor, and the availability of alternatives.” *Id.* He writes that “[a person’s] emotional and intuitive reactions will often display a ‘wisdom’ of their own,” but also that spontaneous reactions to sudden threats “are sometimes crude, resulting in inaccurate or excessive responses to threats.” *Id.*; see also AARON T. BECK, *PRISONERS OF HATE: THE COGNITIVE BASIS OF ANGER, HOSTILITY, AND VIOLENCE* 73 (2000) (noting that “primal thinking processes” are adaptive in emergencies but may also “crowd[] out our more reflective thinking”); see generally Joseph E. LeDoux, *The Emotional Brain, Fear, and the Amygdala*, 23 *CELLULAR & MOLECULAR NEUROBIOLOGY* 727 (2003) (explaining the role of the amygdala in the expression of fear, in the conscious awareness of it, and in its cognitive processing).

68. The case involved Bernhard Goetz, the 1984 New York City “subway vigilante.” KADISH ET AL., *supra* note 13, at 828–29.

to place the imprimatur of neuroscience on Justice Holmes's intuition:

On the basis of what I know about the human brain I'm convinced that there are no reasonable people under conditions in which death or severe bodily harm are believed imminent Although lawyers and judges love to explore [the issue of whether or not a threatened person acted "reasonably" in a particular situation, such ex post legal analysis places] an overemphasis on empty intellectualization to the exclusion of those deep and powerful emotional currents of fear, self-preservation or territoriality that can surface in any one of us and overpower the cogitations of reason To expect reasonable behavior in the face of perceived threat, terror and rage is itself a most unreasonable expectation.⁶⁹

Dr. Restak was speaking of the "reasonable person" standard in self-defense generally, not specifically of the Duty to Retreat, but the passage invites a close analogy: To the extent that the Duty to Retreat requires the innocent defender to deliberate—about the defender's response options generally, about the probable behavior of the attacker, or the statistical chances of making a safe retreat—in a situation in which humans are generally unable to think clearly, the rule may be unjust to those innocent defenders who use deadly force without first trying to escape. The Retreat rule may be unjust in the same sense that requiring a defender to sprout wings and fly away from the attacker would be unjust.

Third, some modern courts have embraced the No Retreat approach on grounds of clarity and fairness. For example, in the Nevada case of *Culverson v. State*,⁷⁰ the defendant, Culverson, appealed his first-degree murder conviction on the grounds that the trial court had improperly instructed the jury that he had a duty to retreat before using deadly force against the deceased.⁷¹ Reversing the defendant's conviction, the Supreme Court of Nevada unequivocally affirmed a 90-year-old precedent, *State v. Grimmitt*,⁷² which had embraced Stand Your Ground.⁷³ The *Culverson* court explained:

[Defendant] Culverson contends that *Grimmett* stands for the proposition that Nevada does not require a person to retreat when

69. Richard Restak, *The Law: The Fiction of the "Reasonable Man"*, WASH. POST, May 17, 1987, at C3; see also Simons, *supra* note 67, at 64 ("Indeed, it will often be a self-defeating strategy for an actor who is suddenly attacked to pause and carefully examine his options; the very effort to form accurate, or indeed any, beliefs might increase his risk of injury or decrease the efficacy of his planned response."). Simons also cites BECK, *supra* note 67, which states: "When we are confronted with a threat, we have to be able to label the circumstances quickly so that an appropriate strategy (fight or flight) can be put into effect. The thought processes activated by threats compress complex information into a simplified, unambiguous category as rapidly as possible." *Id.* at 78 n.48.

70. *Culverson v. State*, 797 P.2d 238 (Nev. 1990).

71. *Id.* at 239.

72. *State v. Grimmitt*, 112 P. 273 (Nev. 1910).

73. *Culverson*, 797 P.2d at 240 (citing *Grimmett*, 112 P. at 273).

he reasonably believes that he is about to be attacked with deadly force. We agree. First, we note that a rule requiring a non-aggressor to retreat confers a benefit on the aggressor and a detriment on the non-aggressor. Second, it is often quite difficult for a jury to determine whether a person should reasonably believe that he may retreat from a violent attack in complete safety. Thus, a rule which requires a non-aggressor to retreat may confuse the jury and lead to inconsistent verdicts. We believe that a simpler rule will lead to more just verdicts.⁷⁴

Under the *Culverson* court’s rationale, a Stand Your Ground rule increases *clarity* because it obviates the need for the jury to inquire into the often-unanswerable question of whether a defender actually knew of a retreat option and knew that it was completely safe. Under *Culverson*, the Stand Your Ground approach is also fairer to innocent defenders than the Retreat rule. A duty of retreat forces an innocent defender, in the moment of being attacked, to assess his options for escape and to act on those options if possible, before responding with deadly force. Such a duty, the court suggests, favors the life of an unlawful aggressor over that of an innocent defender. The court’s statement in *Culverson*, that “a rule requiring a non-aggressor to retreat confers a benefit on the aggressor and a detriment on the non-aggressor”⁷⁵ implies that if forced to choose between the life of an innocent person and the life of an unlawful aggressor, the law should side with the former and not the latter.

It is possible to dispute or disagree with the above arguments in favor of Stand Your Ground. What seems clear is that those arguments are neither obviously irrational nor morally repulsive. On the contrary, all four lines of reasoning proceed from basic moral intuitions that we recognize, even today, to be generally pro-social and central to the law’s mission in particular—intuitions supporting the law’s obligation to protect innocent human life, to refrain from imposing superhuman duties on law-abiding citizens, and to structure legal doctrine so that factfinders have the best possible chance at accurately deciding difficult fact issues, such as what a defendant knew or consciously intended at the time of a potentially criminal act.

III. What’s Wrong With Stand Your Ground?

Why then, is Stand Your Ground so controversial at the moment? The controversy seems to stem from two sources: (1) confusion about the elements of self-defense law generally, and about the role and function of Retreat and Stand Your Ground rules in particular; and (2) politically salient claims that Stand Your Ground laws are socially unjust, or that they

74. *Id.*

75. *Id.*

promote and increase gun violence, or both. This Part examines the doctrinal confusions, and Part IV assesses the affirmative charges of racism and violence.

A. Confusion about the Elements of Self-Defense

Although Retreat and Stand Your Ground rules have long common-law histories in the United States, the twenty-first century has introduced an era of statutory reforms that embrace Stand Your Ground legislatively. Since 2005, when the Florida legislature replaced the state's Retreat rule with a Stand Your Ground statute, about half the states have followed suit.⁷⁶ In important respects, Stand Your Ground statutes typically mirror common-law No Retreat rules, providing that: (1) a person has no duty to retreat if the person is not the initial aggressor and is assailed in any public place (not merely at home) where the person has a right to be;⁷⁷ and (2) a person is presumed to have a reasonable fear of imminent death or serious bodily harm in cases where the person confronts an intruder who has entered or is attempting to enter the person's home.⁷⁸ The second point clari-

76. 'STAND YOUR GROUND' SUMMARY, *supra* note 1. Approximately 26 states have adopted statutory Stand Your Ground laws since 2005. *Id.* The original version of the Florida Stand Your Ground statute became the national model. FLA. STAT. § 776.013(3) (2006):

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

In Florida, the Stand Your Ground statute replaced the state's Retreat rule, which imposed a duty to retreat if it was possible to do so safely. FLA. STAT. § 776.012 (2004). In *Baker v. State*, the Florida Court of Appeals interpreted the old Retreat rule to mean that the "one interposing the defense must have used all reasonable means in his power, consistent with his own safety, to avoid the danger and to avert the necessity of taking human life." *Baker v. State*, 506 So. 2d 1056, 1058 (Fla. Dist. Ct. App. 1987), *superseded by statute*, FLA. STAT. § 776.013 (2006).

77. *E.g.*, FLA. STAT. § 776.012(2) (2014). Similarly, the statutory Stand Your Ground rules in Michigan provide:

(1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

(b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

MICH. COMP. LAWS ANN. § 780.972(2) (West 2014).

78. *E.g.*, FLA. STAT. § 776.013(1) (2014) ("[A] person is presumed to have held a reasonable fear . . . if [t]he person against who the defensive force was used . . . unlawfully and forcefully entered, a dwelling, residence, or occupied vehicle . . . [and the defendant] knew or had reason to believe . . . [the event] had occurred.").

fies the Castle Doctrine.⁷⁹ Most of the controversy over Stand Your Ground rules, therefore, concerns the first principle, which establishes a person’s right to stand and fight, even if retreat is possible, when faced with imminent and deadly force from an aggressor outside the defendant’s home.

This issue exploded onto the national scene in February and March 2012, after George Zimmerman shot and killed 17-year-old Trayvon Martin in Sanford, Florida. From the start, Zimmerman claimed that he had acted in self-defense, and the Sanford police initially accepted that account.⁸⁰ Calls by Martin’s family for further investigation prompted a media firestorm around the case, which ultimately resulted in second-degree murder and manslaughter charges against Zimmerman.⁸¹ The case went to trial in the summer of 2013, and in July of that year, the trial jury acquitted Zimmerman of all charges.⁸²

As noted above,⁸³ it is not clear that any legal issue in the Zimmerman case turned on the presence of Florida’s Stand Your Ground statute. Zimmerman chose not to ask for a pre-trial Stand Your Ground hearing, and at trial he advanced a straightforward self-defense claim.⁸⁴ A number of media stories pointed both to the presence of Stand Your Ground language in the jury instructions⁸⁵ and to the post-trial comments of one juror alleging that the jury discussed Stand Your Ground during deliberations.⁸⁶ But the particular juror’s remarks about Stand Your Ground failed to establish either the juror’s understanding of the state’s No Retreat rule or how that rule differs from other, arguably more relevant, elements of self-defense. Thus, the effect on the Zimmerman jury of the Stand Your Ground language in

79. See generally Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 655–57 (2003) (noting that the Castle Doctrine exists in some Retreat jurisdictions as an exception to the general rule).

80. Eliot C. McLaughlin, *Ex-Sanford Police Chief: Zimmerman Probe ‘Taken Away from Us’*, CNN (July 11, 2013, 12:03 PM), www.cnn.com/2013/07/10/justice/sanford-bill-lee-exclusive/.

81. Sari Horwitz, *George Zimmerman Charged with Second-Degree Murder in Trayvon Martin Shooting*, WASH. POST (Apr. 11, 2012), www.washingtonpost.com/politics/george-zimmerman-to-be-charged-in-trayvon-martin-shooting-law-enforcement-official-says/2012/04/11/gIQAHI5oAT_story.html.

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

83. *Supra* text accompanying notes 3–5.

84. Yamiche Alcindor, *Zimmerman waives pre-trial immunity hearing*, USA TODAY (Apr. 10, 2013, 4:11 PM), <http://www.usatoday.com/story/news/nation/2013/04/30/trayvon-martin-zimmerman-self-defense-hearing/2122991/>.

85. E.g., Mark Memmott, *Read: Instructions for the Jury in the Trial of George Zimmerman*, NPR (July 12, 2013, 7:10 AM), <http://www.npr.org/blogs/thetwo-way/2013/07/12/201410108/read-instructions-for-the-jury-in-trial-of-george-zimmerman> (“If George Zimmerman was not engaged in an unlawful activity . . . he had the right to stand his ground and meet force with force . . . if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself.”).

86. E.g., Mark Caputo, *Juror: We Talked Stand Your Ground Before Not-Guilty Zimmerman Verdict*, MIAMI HERALD (July 16, 2013), <http://www.miamiherald.com/2013/07/16/3502481/juror-we-talked-stand-your-ground.html> (“Jurors discussed Florida’s controversial Stand Your Ground self-defense law before rendering their not-guilty verdict in George Zimmerman’s trial, one of the jurors told CNN’s Anderson Cooper.”).

the instructions remains unclear.⁸⁷

Further, judging by the facts presented at trial, the encounter between Zimmerman and Martin did not even raise a genuine issue of Stand Your Ground. George Zimmerman argued (and the jury apparently believed) that Zimmerman shot Trayvon Martin out of fear for his life when Martin was on top of him, beating on him and slamming his head into a concrete sidewalk.⁸⁸ If these facts are true, then regardless of what the law or the jury instructions said, Zimmerman had no opportunity to retreat—no choice but to stay where he was and defend himself. Even in Retreat jurisdictions, a defender has the duty to retreat only when retreat is reasonably possible.⁸⁹ If a safe retreat is not possible, and the other elements of self-defense are present, a defendant may stand his or her ground and respond with force, including deadly force, if the defendant reasonably fears for his or her life.⁹⁰

Critics of the Zimmerman verdict may contest the defendant's version of the facts, but if that is their problem with the case, their complaint is really about the weakness of the prosecution's proof and performance in front of the jury, not about Florida's Stand Your Ground rule.⁹¹ Proving its version of the facts beyond a reasonable doubt is, of course, the job of the prosecution seeking a conviction in *every* criminal case—not just those involving self-defense.

As this example from the Zimmerman case suggests, one important problem with the political opposition to Stand Your Ground is that it sometimes gets the law wrong. The next section considers a few other relevant confusions about Stand Your Ground rules in the context of the law of self-defense.

B. What Does the Law of Self-Defense Actually Say?

Some misinformed arguments about Stand Your Ground laws are premised on confusion about how and when such rules allow a person to act when threatened with deadly force. Consider, for example, the related issues of *trigger* and *timing*: What triggers a defender's right to use deadly force against a deadly attack, and at what point in a deadly encounter does

87. *Id.* (“The law became very confusing. It became very confusing,” [the juror] told Cooper Monday night. “We had stuff thrown at us. We had the second-degree murder charge, the manslaughter, charge, then we had self defense, Stand Your Ground.”); see also GRUBER, *supra* note 20, at 977 (“[I]t appears that the [Zimmerman] jurors neither distinguished stand your ground from class self-defense nor actually thought Zimmerman could have retreated.”).

88. Lizette Alvarez, *In Zimmerman Case, Self-Defense Was Hard to Topple*, NY TIMES (July 14, 2013), <http://www.nytimes.com/2013/07/15/us/in-zimmerman-casc-self-defense-was-hard-to-topple.html>.

89. *E.g.*, *State v. Golwacki*, 630 N.W.2d 392, 399 (Minn. 2001) (“[G]enerally, the law mandates a duty to retreat if reasonably possible when acting in self-defense.”).

90. *Beard v. United States*, 158 U.S. 550, 564 (1895).

91. A complaint many shared. *E.g.*, ALVAREZ, *supra* note 82 (“Legal experts pointed to what they said were errors by the prosecution.”). The article goes on to describe a number of problems with the prosecution's case and its performance at trial.

that right “kick in”? In the wake of the Zimmerman verdict, some protests against Stand Your Ground were apparently motivated by the belief that No Retreat statutes, such as Florida’s, allow a person to kill anyone who makes him or her feel threatened, and at any point after the person subjectively experiences that feeling.⁹²

But that is just not so. The plain language of Florida’s Stand Your Ground provision (which, again, became the model for similar provisions across the country) explains why. The statute provides that a person who is not engaged in an unlawful activity and is attacked in any place where the person has a right to be, has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if the person reasonably believes it is necessary to prevent death or great bodily harm or to prevent the commission of a forcible felony.⁹³

The statute’s language makes two things abundantly clear: (1) What triggers a defender’s right to use deadly force is the prior, uninvited and unlawful *threat of deadly force* by another; and (2) the defender’s right to use deadly force arises *as of that moment*—the moment when the defender faces a deadly threat from the other person. That is what the statute clearly says and that is what courts have consistently held at common-law and in decisions interpreting self-defense statutes.⁹⁴ A person’s right to self-defense begins at the moment the person reasonably believes that he or she is facing deadly force and reasonably believes it necessary to respond in kind.

Thus, George Zimmerman could not have successfully argued self-defense had he shot Martin at any point before Martin posed a deadly threat to him. *Only* at the moment when Zimmerman subjectively *and reasonably* believed that Martin was going to kill or seriously injure him, was he justified in using deadly force. Whether Zimmerman did in fact believe that Martin threatened him in this way was a question of fact to be adjudicated at trial. Zimmerman’s acquittal suggests he persuaded the jury that he met

92. See Leider, *supra* note 5 (“Many have asserted that in Florida anyone who believes he is in danger can use deadly force, no matter how unreasonable his belief. These perceptions of the law are wrong.”); see also *Obama’s Address*, *supra* note 7 and accompanying text (quoting from President Obama’s remarks, in July 2013, about the Stand Your Ground controversy). “Trayvon’s Law,” a statute some Stand Your Ground opponents have proposed to reform Florida’s law of self-defense, seems to reflect a similar concern. *Trayvon’s Law: Bill Summary*, NAACP, <http://www.naacp.org/pages/trayvons-law-summary> (last visited Mar. 4, 2015) (“An aggressor who pursues an individual(s) without justifiable cause must not automatically be protected under the law, if they shoot or harm their target(s). They must prove they were acting in self-defense and had a rational and reasonable purpose in using force or deadly force.”). Except in the sense that all defendants are innocent until proven guilty, self-defense law has never “automatically” protected initial aggressors who shoot or harm their adversaries.

93. FLA. STAT. § 776.012(2) (2014).

94. *E.g.*, *State v. Norman*, 378 S.E.2d 8, 13 (N.C. 1989) (citation omitted) (“Only [where a defendant] killed due to a reasonable belief that death or great bodily harm was imminent can the justification for homicide remain clearly and firmly rooted in necessity. . . . The term ‘imminent,’ as used to describe such perceived threats . . . has been defined as ‘immediate danger’”); *supra* text accompanying note 27–28 (discussing the centrality of necessity to self-defense).

these requirements.

If this is correct, it exposes another doctrinal confusion about self-defense law and Stand Your Ground. Expanding our view to look at the entire encounter between Zimmerman and Martin, from the moment when Zimmerman first saw Martin, it appears true that Zimmerman “made the first move” in the sense that when Zimmerman first spotted Martin walking through the Twin Lakes neighborhood, he chose to follow the teenager. Further, Zimmerman’s choice to follow Martin was surely a “but for” cause of Martin’s death: But for Zimmerman’s pursuit of Martin, the shooting of Martin would not have occurred. Do these facts make Zimmerman’s choice to follow Martin a criminally culpable cause of Martin’s death?

The short (and long) answer to that question is no; however, that answer has nothing to do with Stand Your Ground. Had Florida never replaced its Retreat rule with a No Retreat rule, that answer would be the same.

1. Criminal Causation

First, some background information about the criminal conception of cause, specifically the level and types of causation necessary to support a criminal charge or conviction. Standard doctrine holds that to be convicted of a crime the defendant’s action must have been a “but for” or “actual” cause of the harm prohibited by the criminal statute⁹⁵—in the Zimmerman case, the killing of another person. However, “but for” cause is rarely precise or accurate enough to draw a morally defensible line between criminal culpability and its absence. Most events, including criminally prohibited events, result from numberless “but for” causes. That Trayvon Martin was born; that his parents got divorced; that his father had a new fiancée; that the fiancée had purchased a town house in the Twin Lakes neighborhood; that Trayvon left his house on the night he died; that he chose a particular 7-Eleven at which to purchase Skittles, all could be labeled “but for” causes of his death. If any one of them had not occurred, Martin would not have encountered George Zimmerman that night and therefore would not have died as and when he did. Does it follow that Martin’s death should be deemed a suicide because it was “caused” by his own choices (to leave the house; to go to a 7-Eleven; etc.), or that his parents or the father’s new fiancée should be charged with homicide (for conceiving him; divorcing; purchasing a home in Twin Lakes)? Of course not.

Similarly, “but for” the fact that George Zimmerman and his family made a thousand different choices, including the choice to move into the Twin Lakes neighborhood, Zimmerman would never have met Martin and would not have shot him. But should the law treat those decisions, or Zimmerman’s decision to get out of bed that morning, or to go to the store at the

95. *People v. Acosta*, 284 Cal. Rptr. 117, 121–22 (Cal. Ct. App. 1991).

time he did—or, for that matter, his parent’s decision to give birth to him—all probably “but for” causes of Martin’s death—as culpable choices in that death? Again, of course not. “But for” cause may be necessary, but is not sufficient, to meet the criminal causation standard.

Thus, standard criminal doctrine adds a second causation requirement, which courts frequently refer to as “proximate cause.” In addition to being a “but for” cause of criminal harm, the defendant’s act must also be a *proximate* cause of the harm—meaning that the harm must be a reasonably foreseeable result of the defendant’s action at the time.⁹⁶ Was it reasonably foreseeable by Zimmerman that following Martin through the neighborhood, itself a lawful act, would lead to a violent encounter and cause Martin’s death? From the reasonable person’s perspective before the event, that seems like a very long stretch. Only proximate causes, causes that could reasonably produce the harmful result prohibited by the criminal law, can be valid bases for a criminal charge or conviction.⁹⁷

2. The “Initial Aggressor” Rule in Self-Defense

A second and related misunderstanding about the law may be even more to the point. Under the standard rules of self-defense, a defender who first provokes the fight that ultimately leads to his or her use of deadly force is usually deemed the “initial aggressor” in the altercation and must retreat before using deadly force against the other, even if that defendant did not originally anticipate a deadly confrontation and ultimately killed only to save the defendant’s own life.⁹⁸

But what qualifies as “initial aggression” which deprives a defender

96. “An individual is criminally liable if his conduct was a sufficiently direct cause of the death, and the ultimate harm is something which should have been foreseen as being reasonably related to his acts.” *People v. Arzon*, 401 N.Y.S.2d 156, 159 (N.Y. Sup Ct. 1978).

97. “To say one event proximately caused another . . . means first that the former event caused the latter. This is known as actual cause or cause in fact. . . . [T]o say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result.” *Paroline v. United States*, 134 S. Ct. 1710, 1713 (2014).

98. Thus, in Florida for example, the justification of self-defense is not available to a person who:

- (1) Is attempting to commit, committing, or escaping after the commission of, a forcible felony; or
- (2) Initially provokes the use or threatened use of force against himself or herself, unless:
 - (a) Such force or threat of force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use or threatened use of force which is likely to cause death or great bodily harm to the assailant; or
 - (b) In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use or threatened use of force, but the assailant continues or resumes the use or threatened use of force.

FLA. STAT. § 776.041 (2014).

of the right to self-defense? For example, was George Zimmerman the “initial aggressor” against Trayvon Martin because Zimmerman chose to follow Martin, and at one point left his car to ask Martin what he was doing in the neighborhood? The law in this area is not crystal clear; indeed, one academic commentator has named the “initial aggressor” rule as “one of the most maddeningly indeterminate questions of criminal law.”⁹⁹ But general guidelines do exist, and as it happens they strongly suggest an answer in the Zimmerman case. Consider this summary of the law, taken from a prominent criminal law treatise,¹⁰⁰ which suggests various situations in which a defendant ought, or ought not, to be deemed the “initial aggressor” in a violent confrontation.

When is D the “Initial Aggressor”?	
<u>D “provokes” the encounter if D:</u>	<u>D does NOT “provoke” the encounter if D:</u>
<ul style="list-style-type: none"> • Assaults the deceased • Fires the first shot in a standoff • Leaves a fight, only to return with a weapon • Is caught sleeping with the deceased’s wife 	<ul style="list-style-type: none"> • Demands an explanation of offensive words or conduct • Discusses a sensitive subject • Hurls inappropriate language and insulting epithets • Engages in an inconsiderate act • Travels near a neighbor who has previously threatened him • Arms himself to repel an anticipated attack, while going about normal business • Provides an opportunity for conflict, but does not cause it

Thus, if A is the first to assault B, then B escalates the confrontation by introducing deadly force, and A ultimately kills B in order to save A’s own life, standard doctrine would deny A a self-defense claim unless A had first tried to retreat or had exhausted every other possible means of avoiding the use of deadly force.¹⁰¹

Critics have argued that George Zimmerman’s act of following and verbally questioning Trayvon Martin, “provoked” the confrontation that led to Martin’s death and that Zimmerman should therefore be adjudged a

99. Michael J. Z. Mannheimer, *Trayvon Martin and the Initial Aggressor Issue*, PRAWFSBLOG (Mar. 26, 2012, 10:46 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/03/trayvon-martin-and-the-initial-aggressor-issue.html>.

100. 2 WHARTON’S CRIMINAL LAW § 128 (15th ed. 1993).

101. See *United States v. Peterson*, 483 F.2d 1222, 1231 (D.C. Cir. 1973) (“[O]ne who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation. Only in the event that he communicates to his adversary his intent to withdraw and in good faith attempts to do so is he restored to his right of self-defense.”).

murderer.¹⁰² But the authorities strongly suggest that this conclusion is wrong—for reasons, once again, which have nothing to do with Stand Your Ground. First, even if Zimmerman *were* deemed the initial aggressor in his encounter with Martin, this fact would only require that he attempt to retreat if he could safely do so, before using deadly force against his attacker. If no safe retreat were possible—and again, under Zimmerman’s account of the facts, which were apparently accepted by the jury, he could not have retreated at the moment he reasonably believed his life was in danger—then he would still have the right to respond to the threat with deadly force.

Second, under the “initial aggressor” doctrine described above, a defender is *not* deemed a provocateur for purposes of asserting self-defense unless the defender “makes the first move” to assault, or attempt to assault, the other person.¹⁰³ Thus, following someone on property where both people have the lawful right to be or asking the person to explain the person’s presence in the place, would not qualify as “provocative” behavior for purposes of self-defense law, would not prompt a court to rule that the defender was the “initial aggressor” in the ultimately fatal encounter, and thus would not bar the survivor from asserting self-defense. Whether one believes that George Zimmerman used good or bad judgment in following Trayvon Martin on the night that Martin died, Zimmerman’s proven behavior almost certainly does *not* qualify him as the “initial aggressor” under the law of self-defense.¹⁰⁴

3. Self-Defense Requires Reasonableness But Not Accuracy

Finally, opponents of Stand Your Ground sometimes misinterpret yet another element of self-defense—the element of reasonable belief. Under longstanding doctrine, a defender may justifiably use deadly force against an attacker only if the defender honestly and reasonably believes that such force is necessary to save him or her from death or serious injury.¹⁰⁵ Thus, a defendant’s belief in the threat and the need for a deadly response must be both sincerely and reasonably held—but *it does not have to be accurate*. A defendant who actually and reasonably, but incorrectly, believed in the necessity of using deadly force, and killed the attacker in doing

102. M. Alex Johnson, *Prosecutors contend George Zimmerman provoked confrontation with Trayvon Martin*, NBC NEWS (Apr. 12, 2012), http://usnews.nbcnews.com/_news/2012/04/12/11164328-prosecutors-contend-george-zimmerman-provoked-confrontation-with-trayvon-martin.

103. 2 WHARTON’S CRIMINAL LAW § 128 (15th ed. 1993).

104. Again, even if it did, the rule in many states imposes only a Duty of Retreat in such situations, requiring that an initial aggressor attempt to escape or use every other available means to avoid using deadly force. If no such means exist at the moment of deadly confrontation and the initial aggressor honestly and reasonably believed that deadly force was the only way to save the initial aggressor’s own life, state law would allow the initial aggressor to use such force and, presumably, to later claim self-defense against a homicide charge. *E.g.*, FLA. STAT. § 776.041 (2014) (citing the “initial aggressor” rules in that state).

105. *Peterson*, 483 F.2d at 1229.

so, may still claim self-defense, and this has long been the law in all American jurisdictions.¹⁰⁶ Suppose that C threatens to kill D, then moves his hand toward his pocket as though to reach for a gun. D, believing that he is about to be killed, pulls his own weapon and shoots C dead. It turns out that C was not carrying a weapon and had been reaching only for his handkerchief. Under longstanding self-defense doctrine, D would have an affirmative defense.¹⁰⁷ Although C *in fact* posed no danger of injury to D, D actually and reasonably believed that C was about to kill him.

The reasonable belief standard has produced some hard cases in recent years, and concerns about it may well be valid.¹⁰⁸ But objections to the reasonable belief element should not be confused with Stand Your Ground.¹⁰⁹ The element of reasonable belief is a core feature of self-defense law generally. Whether a jurisdiction operates under a Stand Your Ground or a Retreat rule, a defendant who uses deadly force because the defendant honestly and reasonably, though incorrectly, believed the defendant was in danger of death or serious bodily injury, can successfully claim self-defense.

Although the reasonable belief standard does not require the defendant's belief to have been accurate, it nonetheless sets a fairly high bar to claims of self-defense. Suppose, for example, that George Zimmerman, feeling threatened by Trayvon Martin's mere presence in his neighborhood,

106. See, e.g., ZIMMERMAN FINAL JURY INSTRUCTIONS, *supra* note 85 ("The danger facing George Zimmerman need not have been actual; however . . . the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force . . ."); see also *supra* notes 10–17, 27 and accompanying text (discussing the American tradition of self-defense law).

107. *Shorter v. People*, 2 N.Y. 193, 201 (N.Y. 1849).

108. A number of recent cases raising the "reasonable belief" issue have involved fatal actions by police. See, e.g., *Death of Tamir Rice, 12-year-old shot by Cleveland police, ruled a homicide*, WASH. POST (Dec. 12, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/12/12/death-of-tamir-rice-12-year-old-shot-by-cleveland-police-ruled-a-homicide/> ("The African American boy was fatally shot by a white Cleveland police officer on Nov. 22. Officers had responded to a 911 call reporting a person pointing a gun—which turned out to be a toy pistol missing its orange safety cap."); *Amadou Diallo News*, N.Y. TIMES (last visited May 15, 2015), http://topics.nytimes.com/top/reference/timestopics/people/d/amadou_diallo/index.html (describing the facts in the 1999 Diallo case). Mr. Diallo was killed by four New York City police officers who thought Diallo had pulled a gun when in fact he had pulled out his wallet. *Id.* After his death it was discovered that Mr. Diallo was unarmed at the time of his encounter with the police. *Id.* Similarly, although the recent controversy over police officer Darren Wilson's fatal shooting of Michael Brown in Ferguson, Missouri, invokes a number of legal issues involving police conduct more generally, confusion about the "reasonable belief" standard may be a factor. Wilson's critics have argued that the unarmed Brown did not in fact pose a deadly threat to Officer Wilson, but the self-defense standard requires only that Wilson reasonably believe Brown posed such a threat. See Katie Sanders, *Megyn Kelly: Al Sharpton declared Michael Brown 'didn't use any deadly force' against officer*, TAMPA BAY TIMES (Aug. 28, 2014, 5:29 PM), <http://www.politifact.com/punditfact/statements/2014/aug/28/megyn-kelly/megyn-kelly-al-sharpton-declared-michael-brown-did/> (describing the facts in Darren Wilson case). For present purposes, the most important points are to understand what the elements of a legal self-defense claim actually require.

109. Mark O'Mara, *It's Not About 'Stand Your Ground,' It's About Race*, CNN (Feb. 19, 2014, 4:36 PM), <http://www.cnn.com/2014/02/19/opinion/omara-stand-your-ground-and-race/>.

had simply pulled out his gun and shot Martin. In that case the reasonable belief element would not be satisfied—even if Zimmerman could show that he actually believed he was in danger of life and limb, that belief would almost certainly be deemed unreasonable—and Zimmerman would be guilty of criminal homicide. Similarly, had an armed Trayvon Martin felt threatened by Zimmerman’s presence behind him and turned around and shot Zimmerman simply for following him down the road, Martin would not have been able to claim self-defense. The no-defense result would apply in both cases, and it would apply whether these imaginary events happened in a Retreat or a Stand Your Ground jurisdiction. A person’s mere presence in your neighborhood, even if you subjectively feel threatened by that presence, does not establish reasonable grounds for killing the person. And following someone, without more, does not establish reasonable grounds to kill the follower.

C. Resolving Doctrinal Confusion

As described above, the four main sources of doctrinal confusion about Stand Your Ground concern: (1) Timing, (2) Causation, (3) Initial Aggressor, and (4) Reasonable Belief. None of these signals structural or inherent conceptual flaws in No Retreat rules. Whether in Stand Your Ground or Retreat jurisdictions, longstanding self-defense doctrine provides that a defender’s right to self-defense begins only at the moment when the defender reasonably believes that he or she is faced with deadly force and reasonably believes that deadly force is necessary. “But for” causation is not enough to prove a criminal case, whether the case occurs in a Stand Your Ground or a Retreat jurisdiction (or whether the crime charged is homicide or some lesser violation). The initial aggressor rule, in both Retreat and No Retreat states, denies self-defense to a defendant who has made the first move to assault, or attempt to assault, the defendant’s antagonist, and extends the defense to persons who were lawfully in the place where they were attacked and were not otherwise at fault in the encounter. Finally, defenders in both Retreat and Stand Your Ground jurisdictions may not claim self-defense any time they feel threatened. They may only claim the defense if, and when, they honestly and reasonably believed themselves to be threatened with death or serious bodily injury and that using deadly force against their attacker was strictly necessary.

IV. The Politics of Stand Your Ground

Recall that early courts and commentators, against the backdrop of a generally applicable Duty to Retreat, nonetheless identified a number of situations in which an innocent defender could stand his or her ground even

if that meant using deadly force that killed the attacker.¹¹⁰ In the late nineteenth and early twentieth centuries, American courts expanded the No Retreat rule. Leading state cases, such as *Erwin* and *Runyan*, and United States Supreme Court cases, such as *Beard* and *Brown*, justified the adoption of the Stand Your Ground approach in terms of core values viewed as central to the law's mission in this area, principally the values of fairness, accurate fact-finding, justice toward criminal defendants, and the preservation of human life.¹¹¹

Thus, a number of important, and legally relevant, values supported the rise and expansion of Stand Your Ground laws. But contemporary political critics attack Stand Your Ground on the basis of its supposed harmful effects—in particular, that No Retreat rules (1) are invoked and enforced in a racially discriminatory manner and that they (2) produce unacceptably high levels of gun violence or unjustified homicides or both. This Part examines the evidence for those claims.

A. The Charge That Stand Your Ground is Racist

Few argue that Stand Your Ground rules are motivated by the conscious desire to disadvantage vulnerable minority groups. Instead, the argument is that Stand Your Ground laws have the effect of hurting such groups, either by disadvantaging minority defendants (for example, denying self-defense claims when similar claims by white defendants would be successful), or by disadvantaging minority homicide victims (for example, acquitting defendants who claim self-defense after killing an African-American person when similar claims would not be successful had the homicide victim been white).¹¹² Michael Yaki of the United States Commission on Civil Rights voiced this concern when he announced the Commission's intent to investigate "whether or not . . . there is bias in the assertion or the denial of Stand Your Ground, depending on the race of the victim or the race of the person asserting the defense . . ."¹¹³ Trayvon Martin, of course, was African-American while his killer, Zimmerman, was Hispanic and white. In the minds of some, the Zimmerman-Martin case became a stand-in for the claim that Stand Your Ground is racist in one or both of the ways

110. *Supra* text accompanying notes 24–39 (discussing the views expressed in early English and American treatises).

111. *Brown v. United States*, 256 U.S. 335, 344 (1921); *Beard v. United States*, 158 U.S. 550, 561 (1895); *Runyan v. State*, 57 Ind. 80, 84 (Ind. 1877); *Erwin v. State*, 29 Ohio St. 186, 199 (Ohio 1876); *supra* text accompanying notes 39–58.

112. Faith Karimi, 'Raise Your Voice, Not Your Hands' Cops Urge as Zimmerman Verdict Looms, CNN (July 10, 2013, 10:24 AM), <http://www.cnn.com/2013/07/10/justice/florida-zimmerman-backlash/>.

113. Amanda Terkel, "Stand Your Ground" Laws to be Scrutinized for Racial Bias by Civil Rights Commission, HUFFINGTON POST (May 21, 2013, 2:03 PM), http://www.huffingtonpost.com/2013/05/31/stand-your-ground-racial-bias_n_3365893.html; see also Yamiche Alcindor, *Officials Plan to Take Closer Look at Stand-Your-Ground Laws*, USA TODAY (June 9, 2012, 12:20 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-06-09/trayvon-martin-stand-your-ground/55480352/1> (discussing the review of Stand Your Ground laws).

just described.

The question raised is this: In self-defense cases invoking Stand Your Ground, are minority defendants and minority victims treated more harshly than their white counterparts because of race?

1. Two-Tiered Inquiry

As a threshold matter, consider that “empirical” questions of public policy often have two broad dimensions that should be, but frequently are not, distinguished. One dimension is purely descriptive, the other value-driven. The purely descriptive question focuses on what the factual evidence says about the question raised. For example, what does the available data tell us about whether minority defendants and minority homicide victims are disadvantaged by Stand Your Ground laws and about whether Stand Your Ground laws produce higher levels of gun violence or of unjustified homicides?

The second question is primarily normative and only derivatively empirical. It asks what type, quantity, weight, and degree of descriptive evidence should mandate a change in policy; answering it requires the deployment of value judgments which respond to those questions. Thus, to take an example that is outside the present topic, suppose that only two methods of inflicting the death penalty exist—Method A and Method B. And suppose further that a set of unimpeachable data were to demonstrate that using *Method A*, on average, inflicts a relatively small but identifiably greater amount of physical pain on the condemned person, during the execution process, than does *Method B*. Does this empirical fact alone mandate that jurisdictions which allow capital punishment should no longer use *Method A*?¹¹⁴ Different people would answer this question differently, depending on their various methods of weighing all the costs and benefits that go into choosing a method of capital punishment, and their individual sense of the “rightness” or “wrongness” of inflicting pain on a condemned person during the execution procedure. Deciding whether the new data about pain suggests that states should no longer use *Method A* requires that the data be filtered through a normative lens of some kind, and because normative lenses are quite numerous and different from each other, when people filter facts in this way, they will ultimately come out on different sides of almost any policy question. Empirical data is useful—indeed, often essential—but they play only a partial and ultimately derivative role in structuring law and public policy.

Returning to the policy issues that are raised by Stand Your Ground, it seems clear that looking to the “facts” requires at least two stages and types of analysis. First, there are purely empirical questions: for ex-

114. Leaving aside, for present purposes, any constitutional or other doctrinal issues that might be raised at this point.

ample, whether available or acquirable data can tell us if Stand Your Ground laws in fact disadvantage minority criminal defendants or homicide victims because of their race, and whether the data convincingly show that Stand Your Ground produces higher levels of gun violence in general or of unjustified killing in particular. Assuming we can convincingly answer the descriptive questions, the second-tier questions then arise—whether or not the data justify changes in the law. The second question can only be answered by reference to our values and beliefs about justice, equality, and fairness of the criminal law.

2. The Empirical Evidence

With respect to the racial impact of Stand Your Ground, it probably goes without saying that the descriptive and normative questions are nearly coterminous. The value of racial equality is now so deeply engrained in our culture that if the available facts were to clearly demonstrate that Stand Your Ground claims by minority defendants are more likely to be denied because of race, or killers of minority victims are more likely to be granted such claims than those who kill white victims, most people would view that as a very serious problem requiring a fix. What, then, do the facts say about this question?

Start with a general, and perhaps under-reported, fact: Acquittals on grounds of self-defense (of which Stand Your Ground based acquittals are a subset) are extremely rare. According to data compiled by the Federal Bureau of Investigation, in 2010 only 2.57% of homicides were deemed justified.¹¹⁵ Relatedly, over the five years between 2006 and 2010, the total number of justifiable homicides using a firearm was 1,031—an average of about 200 per year.¹¹⁶ This is not to suggest that Stand Your Ground laws are not important, only that their impact on the daily lives of most Americans may be less dramatic than recent headlines have suggested.

Now consider the issue of Stand Your Ground in particular. First, the purely descriptive question: Does the empirical evidence demonstrate that Stand Your Ground laws discriminate against racial minorities, either as defendants or as homicide victims? At least at this point, the answer has to be no.

Surveying the available data makes this clear. In 2012, for example, the *Tampa Bay Times* assembled a list of 192 Florida homicide cases that

115. JOHN K. ROMAN, URBAN INSTITUTE, RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA 3 (2013); see also VIOLENCE POLICY CENTER, FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE: AN ANALYSIS OF FEDERAL BUREAU OF INVESTIGATION AND NATIONAL CRIME VICTIMIZATION SURVEY DATA 1 (2013) (“Guns are rarely used to kill criminals or stop crimes. In 2010, across the nation there were only 230 justifiable homicides involving a private citizen using a firearm reported to the Federal Bureau of Investigation’s Uniform Crime Reporting (UCR) Program as detailed in its Supplementary Homicide Report (SHR).”).

116. VIOLENCE POLICY CENTER, *supra* note 115, at 2.

involved a Stand Your Ground claim since 2005 (the year the Florida legislature passed its Stand Your Ground statute).¹¹⁷ One key finding caught fire in the political arena: With respect to the treatment of homicide victims by race, the *Times* study found a significant difference between the treatment of defendants who killed a black victim versus defendants who killed a white victim. “[P]eople who killed a black person walked free 73 percent of the time, while those who killed a white person went free 59 percent of the time.”¹¹⁸

What was not as widely reported were the important caveats which attended this finding. Discussing the above result, the *Times* itself concluded that its “analysis does not prove that race caused the disparity between cases with black and white victims. Other factors may be at play. The analysis, for example, found that black victims were more likely to be carrying a weapon . . . [and] were more likely than whites to be committing a crime”¹¹⁹

The *Times*’s review found “many cases where people went free after killing a black victim under questionable circumstances. . . . But the *Times* found similarly questionable cases in which the victim was white or Hispanic.¹²⁰ It also found that mixed-race cases—like that of [Trayvon] Martin—are relatively rare.”¹²¹

On the question of how Stand Your Ground claims by black defendants are treated vis-a-vis such claims by white defendants, the *Times* found no clear bias in the treatment of black defendants. Indeed, in at least one respect it appeared that Florida’s black defendants who argued Stand Your Ground received *more* lenient legal treatment than white defendants who made a Stand Your Ground claim. As the *Times* summarized its find-

117. Susan Taylor Martin et al., *Race Plays Complex Role in Florida’s ‘Stand Your Ground’ Law*, TAMPA BAY TIMES (June 2, 2012, 1:00 PM), <http://www.tampabay.com/news/courts/criminal/race-plays-complex-role-in-floridas-stand-your-ground-law/1233152>. The newspaper published key details about the Stand Your Ground claims it canvassed: “The *Times* included 118 cases in which a ‘stand your ground’ immunity hearing before a judge was requested. In the majority of the remaining cases, a law enforcement official, prosecutor or defense attorney invoked the law. The *Times* also included twenty-nine cases where circumstances appeared to reflect the Legislature’s intent [of the law]” *Id.*

118. *Id.*

119. *Id.*; see also John Lott, *Perspective: In Defense of Stand Your Ground Laws*, CHICAGO TRIB., (Oct. 28, 2013), http://articles.chicagotribune.com/2013-10-28/opinion/ct-oped-1029-guns-20131029_1_ground-laws-blacks-ground-defense (“The [*Times*’s] data shows blacks killed in these confrontations were 13 percentage points more likely to be armed than whites. This suggests that those claiming that they were defending themselves often reasonably believed that they had little choice but to kill their attacker.”). Lott also noted that the *Times* collected a lot of other information regarding the Stand Your Ground Cases including whether the victim initiated the confrontation, whether the defendant was on his own property when the shooting occurred, whether a witness was present, whether there was physical evidence, whether the defendant pursued the victim, and the type of case. *Id.* Lott then ran regressions with this data to see if the factors might explain the different conviction rates for whites and blacks. *Id.* He found that “[s]uch analysis finds no evidence of discrimination. While the results are not statistically significant, the regressions suggest that any racial bias would go the other way—that killing a black rather than a white increases the defendant’s odds of being convicted.” *Id.*

120. Martin et al., *supra* note 117.

121. *Id.*

ings:

- Whites who invoked the [stand your ground] law were charged at the same rate as blacks.
- Whites who went to trial were convicted at the same rate as blacks.
- In mixed-race cases involving fatalities, the outcomes were similar. Four of the five blacks who killed a white went free; five of the six whites who killed a black went free.
- Overall, black defendants went free 66 percent of the time in fatal cases compared to 61 percent for white defendants—a difference explained, in part, by the fact blacks were more likely to kill another black.¹²²

Although the newspaper acknowledged that its racially disparate results as to victims reflect “numerous studies showing disparities in the way whites and blacks are treated by the criminal justice system [in contexts other than Stand Your Ground or self-defense],” even here the *Times* cautioned: “Experts note that most cases have unique combinations of facts and circumstances that determine whether a person goes free or goes to prison. They caution against drawing conclusions on statistics alone.”¹²³ This caution is especially merited when those statistics are drawn from such a small number of cases and the statistical difference—five percent—is also quite small.

Next, in 2012, Chandler B. McClellan and Erdal Tekin published a paper reporting on their analysis of United States Vital Statistics data from the National Center for Health Statistics (NCHS).¹²⁴ McClellan and Tekin assembled information about firearm related homicides between the years 2000 and 2010 and correlated that information with data concerning which states had adopted Stand Your Ground statutes, when those laws became effective, and how (if at all) the number of firearm-related homicides changed after Stand Your Ground laws were passed in the various states.¹²⁵

On the question of Stand Your Ground’s racial impact, McClellan and Tekin reported: “[O]ur gender and race specific analyses indicate that the rise in homicides [associated with recently adopted Stand Your Ground statutes] is primarily driven by the deaths among whites, especially white males, while we generally find no effect on blacks.”¹²⁶ Thus, “[w]e find no

122. *Id.*; see also VIOLENCE POLICY CENTER, *supra* note 115, at 5 (“For the five-year period 2006 through 2010, 7.6 percent (32) of the persons killed by black shooters were white, 92.2 percent (388) were black, none were Asian, 0.2 percent (one) were American Indian, and none were of unknown race.”).

123. Martin et al., *supra* note 117.

124. Chandler B. McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries* 12 (Nat’l Bureau of Econ. Research, Worker Paper, Working Paper No. 18187, 2012).

125. *Id.*

126. *Id.* at 31.

evidence to suggest that these laws increase homicides among blacks.”¹²⁷ Again, the numbers are very small here. But if the numbers matter, then *all* the numbers should matter—both those that support the hypothesis of racial discrimination, and those that do not.

Finally, in July 2013, social scientist John K. Roman of the Urban Institute published an analysis, based on FBI data from 2005 to 2010, of the nationwide racial impact of Stand Your Ground laws on justifiable homicides.¹²⁸ Dr. Roman reported that a total of 2.57% of homicides during this period (1,365 out of 53,019) were deemed justified,¹²⁹ that “[w]hite-on-black homicides were most likely to be ruled justified (11.4%),¹³⁰ and [that] black-on-white homicides were least likely to be ruled justified (1.2%).”¹³¹ When Roman sifted the data for elements similar to the facts in the Trayvon Martin case, (single shooter, single victim, both shooter and victim are male, shooter and victim strangers to each other, and the victim was killed with a firearm), he found that the rate of justifiable homicides was almost six times higher in cases with attributes that matched the Martin case.¹³² He also found that “[r]acial disparities are much larger, as white-on-black homicides have justifiable findings 33 percentage points more often than black-on-white homicides. Stand Your Ground laws appear to exacerbate those differences, as cases overall are significantly more likely to be ruled justified in SYG [Stand Your Ground] states than in non-SYG states”¹³³

Dr. Roman concluded: “Overall, states with SYG laws have statistically significantly higher rates of justifiable homicides than non-SYG states.” He also found that “The presence of a SYG law is associated with a statistically significant increase in the likelihood a homicide is ruled to be justified for white-on-black, black-on-black, and white-on-white homicide The change in likelihood for black-on-white homicides being found justified is not significant”¹³⁴

Dr. Roman also acknowledged significant gaps in the data on which he based his conclusions. Although he identified “racial disparities” in the rates that homicides were found to be justified, he conceded that in his

127. *Id.* at 2; *see also* GRUBER, *supra* note 20, at 1008 (“[The McClellan & Tekin study] indicates that the law’s primary racial effect is increasing the probability of white male deaths by shooting, with no general effect on African American populations.”).

128. ROMAN, *supra* note 115, at 4. “Cases were coded as having occurred in an SYG state if the law was statutory and not a judicial precedent.” *Id.* This is a puzzling omission, which by definition excludes states with common law Stand Your Ground regimes. States with longstanding common-law No Retreat rules could presumably provide longer-term data about the effects of Stand Your Ground than states that have just recently adopted Stand Your Ground by statute.

129. *Id.* at 6.

130. *Id.*

131. *Id.*

132. *Id.* at 9.

133. *Id.* at 7.

134. *Id.* at 1; *see also* GRUBER, *supra* note 20, at 1010–11 (noting that one data set in Roman’s study involved “Martin attributes”). The data were not consistent with the hypothesis that stand your ground has had racially disparate impact. *Id.*

analysis “the phrase ‘racial disparity’ is value free: the presence of a racial disparity is a necessary but insufficient condition to identify racial animus in criminal case processing. Racial animus can only be causally identified if all other competing explanations for the existence of a racial disparity can be rejected.”¹³⁵ Such variables could not be discounted in the data with which Dr. Roman was working because: (1) his data dealt only with information about cases in which perpetrators were apprehended, leaving out an estimated 40% of cases in which perpetrators had not yet been identified,¹³⁶ and (2) the data did not include information about where the homicide occurred, which is “relevant to determining the presence of racial animus. If, for instance, white-on-black homicides were mainly defensive shootings in a residence or business, and black-on-white shootings mainly occurred during the commission of a street crime, then the disparity would be warranted. This last issue is particularly important.”¹³⁷ Thus, Roman acknowledged that it was possible his racial disparity findings were not associated with “any conscious or unconscious racial animus in the justice system.”¹³⁸ He stated that if the facts surrounding white-on-black homicides and black-on-white homicides were different, “such that one routinely occurs as part of self-defense and the other as part of a street crime,” then it was possible that there was no animus.¹³⁹ “The data here cannot completely address this problem because the setting of the incident cannot be observed. Thus, the analysis is at risk due to omitted variable bias, where the lack of a data element leads to a spurious conclusion.”¹⁴⁰

In a separate article discussing the data in his report, Dr. Roman wrote:

What’s lacking in these data is the context of the killing. We know that homicides with a black perpetrator and a white victim are more likely to be robberies or burglaries that go sideways and end up in death—we just don’t know how often this happens. Are robberies gone bad 10 times more likely with a black assailant? We don’t know. But we need to find out to understand this disparity.

The flip side is that we also do not know much about white-on-black killings. We know that between 2005 and 2009, there were about 80,000 homicides in the United States. Since we don’t know who the killer was in about 40% of murders, we only know

135. *Id.*

136. John K. Roman, *It’s Time to Separate Race and Firearms Policy*, HUFFINGTON POST (Feb. 20, 2014, 3:29 PM), http://www.huffingtonpost.com/john-roman-phd/its-time-to-separate-race-and-us-firearms-policy_b_4810824.html.

137. ROMAN, *supra* note 115, at 2.

138. *Id.* at 11.

139. *Id.*

140. *Id.*

all the facts of the case in a little fewer than 50,000 homicides.¹⁴¹

But, out of just under 50,000 homicides, an older white man killed a younger black man with a gun when they were strangers and neither was law enforcement only 23 times. [Michael] Dunn and [George] Zimmerman thus participated in extremely rare events. Neither was convicted,¹⁴² which was the outcome of nine of the 23 cases with that fact pattern (39 percent). By contrast, when a black American kills a white American, it is ruled to be justified about 1 percent of the time.¹⁴³

Dr. Roman calls for further research to explore the possible reasons for this disparity.¹⁴⁴

Further empirical data on the topic of Stand Your Ground is undoubtedly in the works, and unbiased analysis of such data will be very welcome. As the evidence stands now, empirical data do not demonstrate that Stand Your Ground laws are racist or that they systematically disadvantage persons of color because of their race.

3. Stand Your Ground Laws Cause More Gun Violence, More Unjustified Killings, or Both

A second set of empirical claims about Stand Your Ground laws concerns their effect on gun violence in general and firearm-related homicides in particular. The arguments here range from claims that No Retreat rules deter violence and save innocent lives, to claims that these laws generate more violence and more homicides than would exist under a Duty to Retreat regime.

Two 2012 National Bureau of Economic Research papers have attracted a fair amount of media attention. In their paper *Stand Your Ground Laws, Homicides, and Injuries*, Chandler McClellan and Erdal Tekin report that their “results indicate that Stand Your Ground laws are associated with a significant increase in the number of homicides among whites, especially white males.”¹⁴⁵ According to our estimates, between 28 and 33 additional

141. *Id.*

142. Dr. Roman’s article was published in 2013, the year that George Zimmerman was acquitted in the killing of Trayvon Martin. In 2014, Michael Dunn was convicted of first-degree murder in the shooting death of African American teenager Jordan Davis. Dunn was sentenced to life without the possibility of parole. *Michael Dunn Sentenced to Life Without Parole for Loud Music Killing*, ABC NEWS (June 9, 2014), <http://www.nbcnews.com/news/us-news/michael-dunn-sentenced-life-without-parole-loud-music-killing-n228191>; *Michael Dunn to be Retried for Murder in Sept. in Loud Music Shooting*, BAY NEWS (June 9, 2014, 11:47 AM), http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/articles/cfn/2014/6/9/michael_dunn_retrial.html.

143. Roman, *supra* note 136.

144. *Id.*

145. MCCLELLAN & TEKIN, *supra* note 124, at 2.

white males are killed each month as a result of these laws.”¹⁴⁶ The authors conclude: “[O]ur 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.”¹⁴⁷

Professor Andrew Gelman, a statistician and director of the Applied Statistics Center at Columbia University, has highlighted potential problems with McClellan and Tekin’s data and conclusions. In a June 2012 blogpost, Professor Gelman challenges the authors’ regressions.¹⁴⁸ Professor Gelman then comments: “[E]ven if Stand Your Ground laws really did increase homicides, I could imagine people still supporting the laws on the ground that some of these homicides were justifiable. I suppose that would be the next stage of research but it would take a lot more effort”¹⁴⁹ In short, what appears to be both essential, and missing, from McClellan and Tekin’s empirical data is complete and reliably accurate information about (1) the alleged increase in homicides resulting from Stand Your Ground laws generally, and, to the extent that the increase is real, (2) information about what proportion of such homicides is justified.

Another analysis of the relationship between Stand Your Ground laws and violence is equally problematic. In their 2012 paper, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from the Castle Doctrine*, Cheng Cheng and Mark Hoekstra used data from the FBI Uniform Crime Reports to analyze the question of whether Stand Your Ground laws deter or encourage the use of lethal force.¹⁵⁰ Like McClellan and Tekin, Cheng and Hoekstra suggest their findings support the conclusion that No Retreat laws increase the number of homicides:

Estimates indicate that the [Stand Your Ground] laws increase homicides by a statistically significant 8 percent, which translates into an additional 600 homicides per year across states that expanded Castle Doctrine. . . . We further show that this divergence in homicide rates at the time of Castle Doctrine law enactment is larger than any divergence between the same groups of states at any time in the last 40 years, and that magnitudes of this size arise rarely by chance when randomly assigning placebo laws in similarly structured data sets covering the years prior to Castle Doctrine expansion. In short, we find compelling evidence that

146. *Id.*

147. *Id.* at 32.

148. Andrew Gelman, *Stand Your Ground Laws and Homicides*, STATISTICAL MODELING, CAUSAL INFERENCE, AND SOCIAL SCIENCE (June 27, 2012, 11:12 PM), <http://andrewgelman.com/2012/06/27/stand-your-ground-laws-and-homicides/>.

149. *Id.*

150. 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, 823 (2013) (note that the authors use Castle Doctrine synonymously with Stand Your Ground and No Retreat).

by lowering the expected costs associated with using lethal force, Castle Doctrine laws induce more of it.¹⁵¹

But Cheng and Hoekstra acknowledge a critical hole in the data—their information does not reveal how many of the additional homicides in Stand Your Ground states are justified.¹⁵² If many or most were deemed justified, then advocates of Stand Your Ground could argue that the new No Retreat laws are doing the job they were meant to do—ensuring that innocent and law-abiding citizens have the right to defend themselves against unlawful and deadly attacks. Cheng and Hoekstra hazard “back-of-the-envelope” calculations, which in their view suggest that at least some of the additional homicides were not legally justified. They emphasized, however, that conclusions on this issue depend on assumptions regarding the degree and nature of the underreporting of justifiable homicide by police to the FBI.¹⁵³ In short, the authors acknowledge that police underreporting may be a significant problem with both their data and their conclusions about the justifiability of the homicides reported in the data.¹⁵⁴

As with the empirical data about race and Stand Your Ground, we await further information on the factual question of whether No Retreat laws cause more homicides or not. But even if such data were confirmed—if the data showed indisputably that Stand Your Ground laws do result in an increased number of homicides—those results would not answer the core policy question: Whether Stand Your Ground laws should be repealed or not. Answering the policy question requires engaging the normative issues that ultimately decide questions of public policy. Even if a significant percentage were found justified, we cannot know what to make of that on a policy level until we decide what costs we are willing to pay to keep Stand Your Ground laws on the books. In short, we must make a value judgment that tells us at what point an increased number of homicides crosses our

151. *Id.* at 823–24.

152. *See id.* at 849 (“A critical question is whether all the additional homicides that were reported as murders or non-negligent manslaughters could have been legally justified.”)

153. *Id.* at 848; *see also id.* at 828 (“The major disadvantage of [the FBI’s Supplemental Homicide Report data on justifiable homicides] data is that they are widely believed to be underreported; Kleck (1988) estimates that around one-fifth of legally justified homicides are reported that way to the FBI. However, note that we use this data only to look for evidence of *relative* changes in legally justified homicide.”). While the best back-of-the-envelope estimate is that roughly half of the additional homicides caused by Castle Doctrine are legally justified, stronger assumptions about the degree of underreporting (e.g., one-tenth compared to one-fifth) can lead one to conclude that all of the additional homicides caused by Castle Doctrine are legally justified. *Id.* The authors emphasize that any conclusion “depends on assumptions about the nature and degree of underreporting of legally justified homicides.” *Id.* at 848.

154. *Id.* John R. Lott, Jr. has also criticized Cheng and Hoekstra’s methodology, questioning their exclusion of pre-2005 Stand Your Ground laws from the analysis. JOHN R. LOTT, JR., TESTIMONY BEFORE THE U.S. SENATE JUDICIARY COMMITTEE’S ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS: HEARING ON “‘STAND YOUR GROUND’ LAWS: CIVIL RIGHTS AND PUBLIC SAFETY IMPLICATIONS OF THE EXPANDED USE OF DEADLY FORCE” HEARTLAND INSTITUTE (2013), https://www.heartland.org/sites/default/files/lott_syg_senate_testimony_rev_oct_29.pdf.

moral threshold and makes Stand Your Ground the wrong policy choice.

V. Stand Your Ground, Politics, and Law

Like most other policy choices, the choice between Retreat and No Retreat rules carries risk of harm on both ends. What determines society's choice of legal policy is not only the existing degree of risk but also the moral intuitions we bring to the choice.

A. Reciprocal Risks

Remember that under the Retreat rule, a defendant who responds to a deadly attack with deadly force cannot claim self-defense unless (1) the defendant could not have safely retreated without killing the attacker; or in some jurisdictions, (2) as an objective matter the defendant might have been able to retreat safely but the defendant was not subjectively aware of this.¹⁵⁵ One risk is that Retreat rules may give the guilty party, the aggressor, an advantage over the innocent party in a deadly confrontation. In *Culverson*, the Nevada Supreme Court expressed this view when it explained its rejection of the Retreat approach by declaring, “a rule requiring a non-aggressor to retreat confers a benefit on the aggressor and a detriment on the non-aggressor.”¹⁵⁶ Retreat rules require that before using deadly force, the innocent person facing attack must calculate the options for retreat, evaluate his or her chances of escape, and assess the assailant's possible responses. In the view of the *Culverson* court, that amounts to advantaging the aggressor over the non-aggressor—protecting the guilty over the innocent.¹⁵⁷ Thus, some believe that the Retreat approach systematically privileges aggressors over non-aggressors and unjustly deprives the latter of a very basic legal protection, protection from unprovoked aggression.¹⁵⁸ If life is to be lost in a deadly confrontation, the law should preserve the life of the innocent law-abiding citizen over that of the unlawful aggressor.

A second risk of the Retreat rule involves a more general evidentiary difficulty in the criminal law: the difficulty of proving or disproving a defendant's knowledge or conscious purpose. Retreat rules pose the risk that some defendants will be convicted when they were actually justified in killing the victim. The jury may incorrectly decide that the defendant could

155. *E.g.*, CONN. GEN. STAT. § 53a-19(b) (2009) (“[A] person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety (1) by retreating . . .”).

156. *Culverson v. State*, 797 P.2d 238, 240 (Nev. 1990).

157. *Id.* at 240; *see also supra* text accompanying notes 73–75 (discussing the decision in *Culverson*).

158. *See* Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULSA L. REV. 875, 882 (2004) (“[A]s a rule, if there is any duty of retreat associated with self-defense, it is quite limited. Any other approach would grant an unlawful aggressor an advantage over his victim, and could encourage violence.”).

have retreated, and knew he or she could have retreated, when in fact that was not so—and may unjustly deny the defendant’s self-defense claim on that basis. Juries may convict on grounds that the defendant *should* have known, despite statutory language requiring that the state prove the defendant actually *did* know, about the availability of a completely safe retreat.¹⁵⁹ The *Culverson* court expressed this concern, noting that a jury often finds it quite difficult to determine whether “a person should reasonably believe that he may retreat from a violent attack in complete safety. Thus, a rule that requires a non-aggressor to retreat may confuse the jury and lead to inconsistent verdicts. We believe that a simpler [No Retreat] rule will lead to more just verdicts.”¹⁶⁰ The risk is that some defendants will be convicted when they were actually justified in killing the victim.

Risks also exist under a Stand Your Ground regime. By definition, No Retreat rules allow a defendant to successfully claim self-defense although the defendant did not retreat—even, presumably, when the defendant could have safely done so. The concern here is that Stand Your Ground might actually *violate* the law’s perceived duty to preserve life because it encourages the killing of a wrongdoer under circumstances where that death was avoidable and therefore unnecessary.¹⁶¹

Dropping the Retreat requirement could also make it easier for defendants to credibly argue self-defense when, in fact, they did not act justifiably. With only the defendant left alive to tell the tale, Stand Your Ground laws can deprive the state of an inquiry—whether or not the defendant tried to retreat before killing the other party—which could help juries decide if the defendant truly acted in self-defense. Stand Your Ground laws, in other words, may make it difficult to prove whether or not the defendant really did fear imminent death or bodily harm. Even if the defendant’s fear was reasonable given the best *ex post* understanding of the facts and the situation, did the defendant actually experience extreme fear at the time? That is a difficult jury question and the lack of a Retreat rule may tilt the balance in favor of a lying defendant who, having killed the other party in the confrontation, now has a solo opportunity to convince the jury that the defendant was actually and reasonably afraid of death or serious injury at the time he or she used deadly force against the other party. The concern here is that such defendants will literally “get away with murder”—that the jury will accept a defendant’s false account of the facts because it is not contestable

159. Similar concerns abound in other criminal law contexts; where judges and other commentators have worried that juries would convict a defendant on a lower standard of culpability than that required by the applicable criminal statute. *E.g.*, *United States v. Jewell*, 532 F.2d 697, 707 (9th Cir. 1976) (Kennedy, J., dissenting) (“The [jury instruction’s] failure to emphasize . . . that subjective belief is the determinative factor, [for possession] may allow a jury to convict on an objective theory of knowledge . . .”).

160. *Culverson*, 797 P.2d at 240.

161. See Joseph H. Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 577, 580–82 (1903) (criticizing the “brutal doctrine” of Stand Your Ground for elevating honor over the sanctity of human life).

by the deceased victim.

Thus, both the Retreat and Stand Your Ground approaches carry potential risks of harm. The empirical evidence cannot tell us which set of risks we should take. Indeed, to the extent—and it seems to be a very great extent—that empirical studies of Stand Your Ground have been motivated by “hot” political issues such as racism and gun violence, they may actually obscure the core problems that should really drive discussions about structuring, or restructuring, the law of self-defense. When ideology drives the search for facts, then facts tend to become the pawns of political strategy. So it seems here. Some who induced from the facts of the Zimmerman case that Stand Your Ground has racist effects cite the existing statistical studies for partial and misleading numbers, which support that position.¹⁶² At the same time, some who favor Stand Your Ground are too quick to dismiss the possibility that No Retreat rules may require society to absorb increased costs in certain types of cases.¹⁶³ Looking away from politics and toward the reciprocal risks posed by Retreat and No Retreat rules suggests firmer legal ground on which to conduct the inquiry.

From the discussion thus far, we can hypothesize that Stand Your Ground poses the risk of acquitting guilty defendants, while Duty to Retreat poses the risk of convicting innocent defendants. If the criminal law must choose between these two sets of risk, then the presumption of innocence might decide the question.¹⁶⁴ On this view, if one legal rule risks convicting innocent defendants and the other risks acquitting guilty ones, we should choose the latter rule on the ground that it is better to let guilty defendants go free than to unjustly punish the innocent.¹⁶⁵

But this cannot be a complete answer. Most would agree not only that *some* risk of convicting the innocent inheres in every criminal process, but also that such risk certainly exists in our own criminal process, which

162. See, e.g., *The Problems with “Stand Your Ground”*, DREAM DEFENDERS, <http://dreamdefenders.org/wp-content/uploads/2013/07/Dream-Defenders-Stand-Your-Ground.pdf> (last visited Mar. 4, 2015) (citing *Tampa Bay Times* findings that Stand Your Ground defenses tended to be more successful in cases involving a black victim, and that there was a fourteen point difference between acquittal rates of those claiming self-defense under Florida’s Stand Your Ground law who killed white people compared to those who killed black people).

163. See, e.g., Patrik Jonsson, *Racial bias and ‘stand your ground’ laws: what the data show*, CHRISTIAN SCI. MONITOR (Aug. 6, 2013), <http://www.csmonitor.com/USA/Justice/2013/0806/Racial-bias-and-stand-your-ground-laws-what-the-data-show> (quoting a gun rights historian’s claims that Stand Your Ground opposition “is just politics”).

164. Legally the “presumption of innocence” is often specifically linked with the high standard of proof, beyond a reasonable doubt, in criminal prosecutions. See *Coffin v. United States*, 156 U.S. 432, 453 (1895) (linking the presumption of innocence to the burden to prove guilt beyond a reasonable doubt). However, the principle has freestanding resonance as well. See *id.* (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”). Logically, it does not seem to be too far a stretch to apply the presumption to the structure of legal rules as well as to their implementation and proof in the courtroom.

165. *Id.* at 455–56 (compiling sources to this effect).

has resulted in numerous convictions of innocent people despite its longstanding embrace of the presumption of innocence. At some level we acknowledge that convicting and punishing the guilty requires that we accept the risk of unjust convictions. Given the inherent imperfections of human institutions, the only way for the criminal law to eliminate such risk entirely would be not to convict anybody at all, and we are not willing to go this far. The law acknowledges, and strikes a balance between, the risks on both sides of that equation. With respect to any particular legal rule, perhaps the right question is not which set of risks to choose, but *how much* risk of convicting the innocent is acceptable against the risk that the legal rules and structures we adopt will result in too many guilty defendants going free. In terms of the legal debate over Stand Your Ground laws, that would suggest looking for a way of incorporating *both* sets of concerns—those supporting Retreat *and* No Retreat rules—into a functional legal standard. In sum: how might we structure the law of Retreat and Stand Your Ground so that it acknowledges, and minimizes, the dual risks of convicting the innocent and of acquitting the guilty? The presumption of innocence establishes the importance of acknowledging and attempting to avoid the risk of convicting innocent people. But is there also there a substantial risk that adopting Stand Your Ground rules will result in the acquittal of defendants who are, in fact, guilty of unlawful homicide?

Although the nationwide evidence is not yet conclusive on this point, some interesting case law in Florida suggests that there *is* such a risk. The Florida cases collected by the *Tampa Bay Times* in 2012 illustrate the problem.¹⁶⁶ Recall that the *Times* looked into almost two hundred Florida homicide cases in which Stand Your Ground claims had been made since the state passed its No Retreat rule in 2005.¹⁶⁷ Based on these cases, the newspaper reported a number of disturbing issues with the invocation and enforcement of Florida’s Stand Your Ground statute. The main problems identified were:

- (1) Stand Your Ground has led to similar cases being treated differently by courts and prosecutors.¹⁶⁸
- (2) Stand Your Ground has been successfully invoked in a number of cases—for example, where the defendant killed another person during a dispute in the midst of an illegal drug deal—in which such acquittal is morally repugnant and seems outside the contemplation of the statute.¹⁶⁹

166. Kris Hundley et al., *Florida 'stand your ground' law yields some shocking outcomes depending on how law is applied*, TAMPA BAY TIMES (Jun. 1, 2012 11:25 AM), <http://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133>.

167. *Id.*

168. *Id.*

169. *Id.*

- (3) Vagaries in the statutory standard have produced different rulings that have in turn impacted case law in contradictory ways.¹⁷⁰
- (4) Although Florida's statutory law clearly bars initial aggressors from successfully claiming self-defense,¹⁷¹ defendants who provoked the confrontation that resulted in the victim's death have successfully walked free under Stand Your Ground.
- (5) In Florida, at least, the Stand Your Ground law is being over-used, in both homicide and non-homicide cases, thanks to the increased incentive it creates for defendants to argue self-defense.¹⁷²

At the very least, it appears that many legal actors charged with arguing and interpreting the Florida law are confused about its purpose, reach, and conceptual limits. Looking more closely at the facts of the *Times* cases makes this impression even stronger.¹⁷³ The *Times*, for example, reported that nearly 70% of defendants making Stand Your Ground claims went free.¹⁷⁴ And this result occurred despite the fact that of the 75 *Times* cases in which the defendant was acquitted following a determination that his or her use of deadly force was justified, the great majority did *not* match the Stand Your Ground paradigm of an innocent defender, threatened with imminent and deadly force from an unprovoked attack, standing his ground and meeting force with force to save his own life.¹⁷⁵ Some cases did match the paradigm, either partially or completely, suggesting that the Stand Your Ground statute may sometimes accomplish the job for which it was designed.¹⁷⁶ But in most cases the facts were much more ambiguous: cases of arguments turned violent where it was often unclear "who started it" or even who first brought a deadly weapon to the fight; domestic disputes turned violent gang shootouts; killings between drug dealers during a deal gone bad, or killings during the commission of a felony in which both shooter and homicide victim were both participating; or killings which (though a Stand Your Ground claim was apparently made during the adjudication process) would probably have afforded the defendant a self-defense claim even in a Retreat jurisdiction (for example, where at the moment the defendant was faced with deadly force, there was no possibility of safe retreat or where a reasonable person could have perceived that to be true).¹⁷⁷

170. *Id.*

171. *Id.*

172. *Id.*

173. Many thanks to my research assistant, Eric Speer, for invaluable assistance in compiling the numbers for this section.

174. See Darla Cameron & William M. Higgins, *Florida's Stand Your Ground Law*, TAMPA BAY TIMES (Oct. 1, 2014), <http://www.tampabay.com/stand-your-ground-law/fatal-cases> (compiling statistics for Stand Your Ground cases).

175. *Id.*

176. *Id.*

177. *Id.*

At least in Florida, it seems, the cases indicate that many defendants are being acquitted under Stand Your Ground statutes even though their cases bear little resemblance to the paradigm Stand Your Ground situation.¹⁷⁸ As a group, the Florida cases reveal the lack of a limiting principle that clearly tells defendants, lawyers, and judges which cases will likely fall within the protection of the Stand Your Ground rule and which will not. In some instances, it appears that the law is working as anticipated, but in many more it seems that the legal actors charged with implementing the law have no clear conception of what a Stand Your Ground case should look like or how it fits into the underlying justification of self-defense. If this is true, then the highly charged political debate over Stand Your Ground laws may have little or no relevance to the real problems with these statutes or with the correct remedies for solving those problems. On the contrary, the cases suggest not the presence of racial animus, or gun-craziness, but the need to introduce a doctrinal boundary that clearly articulates the reach and the boundaries of Stand Your Ground and Retreat. In the next section, I argue that the principle of necessity, already the conceptual backdrop to the justification of self-defense, should serve as that boundary.

B. Necessity, Retreat, and Stand Your Ground

For centuries courts and scholars have recognized that the right of self-defense grows from, and is limited by, the overarching rule of necessity. The use of deadly force against another person is justifiable *only* when “no other course of action is possible.”¹⁷⁹ In *United States v. Peterson*,¹⁸⁰ the District of Columbia Circuit Court of Appeals succinctly captured the history: “Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone’s time But [t]he 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”¹⁸¹ That necessity offers the primary ground for a valid claim of self-defense is a principle as old as the defense.¹⁸²

178. A development that has not escaped commentators. See, e.g., GRUBER, *supra* note 20, at 964, 993 (discussing cases such as those listed by Cameron & Higgins, *supra* note 175174). Professor Gruber argues that the media focus on Stand Your Ground as a flawed (but not racist) policy has “de-linked” the Zimmerman-Martin case from important issues of race, and racist invocation and implementation of the law (by agents of the state such as the police), that ought to be the focus of public conversation about the case. *Id.* After surveying the empirical evidence Gruber concludes that Stand Your Ground itself is not inherently racist; she urges political progressives to consider that the “punitive impulse” which may fuel their opposition to Stand Your Ground reinforces the “neoliberal” vision of individual responsibility for crime and could ultimately “bolster the existing racist, classist, and masculinist American penal state.” *Id.*

179. See *infra* text accompanying Part V Subsection C (discussing strict necessity in the criminal law).

180. *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973).

181. *Id.* at 1229 (quoting *Holmes v. United States*, 11 F.2d 569, 574 (1926)).

182. See *id.* at 1231 (stating that self-defense and necessity “runs deep” in the law).

The original Retreat and No Retreat rules developed from this doctrine.¹⁸³ Over time, we have come to view them as separate, from each other and from the principle of necessity that gave birth to them both. But viewed in the context of their historical roots, it becomes clear that the two approaches are really just different aspects of the same thing—that is, they are mutually compatible sets of rules governing when a person may, or may not, resort to the use of deadly force when facing a deadly attack from which there may be a possibility of retreat.

It is unfortunate that the modern statutes seem to treat necessity as a separate matter from the question of Stand or Retreat. Consider the language of Florida's Stand Your Ground law (which, again, has become the model for similar statutes across the country):

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 or another[,] or to prevent the imminent commission of a forcible felony. 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 is not engaged in a criminal activity and is in a place where he or she has a right to be.¹⁸⁴

Notice that this Stand Your Ground law contains two main sections: (1) a section establishing the rule of necessity as the basis for a claim of self-defense, and (2) a section establishing a No Retreat rule under the conditions therein. But assuming that (1) applies, what explains the presence of (2)? The core principle of necessity provides that a claim of self-defense will not be allowed unless the defendant who makes the claim reasonably believed, at the time the defendant used deadly force against an attacker, that the defendant had no other way of retreating.¹⁸⁵ As a logical matter, if safe Retreat was possible and the defendant knew that, then the use of deadly force was not necessary. If safe Retreat was not possible, or the defendant did not know about the possibility of a retreat, then the defender's use of force may have been necessary.

This suggests that as separate, freestanding provisions of a statute or of a common-law defense, both Stand Your Ground and Retreat rules are either redundant or internally incoherent. In a Stand Your Ground jurisdiction, if the defendant's action satisfied the rule of necessity—that is, the defendant stood his or her ground and killed the attacker only because he or

183. See *supra* text accompanying Part II Subsection B.

184. FLA. STAT. § 776.012(2) (2014) (emphasis added).

185. See *supra* text accompanying notes 27–28 (discussing the centrality of necessity to a self-defense claim).

she reasonably believed there was no other way of preserving his or her own life—then the No Retreat rule in the statute is redundant. If the defendant *could* have safely retreated from the deadly confrontation and knew at the time that the defendant could do so—then the defendant’s actions do not satisfy the requirement of necessity and should not be deemed legally justified. In that case the presence of a Stand Your Ground rule seems to flatly contradict the necessity requirement—to say that, although it was *not* strictly necessary to use deadly force, the defendant did so anyway because the defendant chose to stand and shoot rather than to retreat in complete safety.

A parallel conclusion follows from the presence of Retreat rules in statutes or common-law decisions. In Maryland, for example, state court precedents have made clear that (1) a person has a general duty to retreat before using deadly force outside the home, and (2) such duty does not apply if “the peril of the defendant was imminent.”¹⁸⁶ Again, the rule of necessity implies both—if a person can safely retreat and knows it, he or she should do so before using deadly force, but if there is no time to retreat safely because the attacker is just about to strike, then the only reasonable means of saving his or her own life or avoiding serious injury may be to strike first.¹⁸⁷ A separate rule of Retreat is at best redundant and at worst confusing—perhaps suggesting to a jury that the duty to retreat applies whether or not the facts show that the defendant actually thought about the possibility of retreat or was aware, at the time of the deadly confrontation, that a completely safe retreat was possible. Recall that such concerns about the Retreat rule animated the court’s decision in the *Culverson* case.¹⁸⁸ As a separate and freestanding element of the doctrine, the Retreat rule, in practice, may be more confusing than enlightening.

Of course it could be that Stand Your Ground rules are intended as *exceptions* to the necessity element—that although the elements of self-defense usually require a defendant to establish that his or her use of deadly force was strictly necessary, in cases involving possible retreat the necessity requirement should give way to the defendant’s right to use deadly force, despite the known availability of a safe means of escape. Such an interpretation might rescue some of the statutory standards from the charge that they are redundant or incoherent on their face. But this reading creates its own—major—problem, a problem revealed by the preceding discussion of Florida’s Stand Your Ground cases¹⁸⁹: Severed from its rightful home within the principle of necessity, Stand Your Ground rules appear to have few, if any, conceptual boundaries. Whatever the legislative intent, Stand or Retreat rules require clear boundaries that can give them more predictive value and guide their interpretation and implementation in case law.

186. See cases cited *supra* note 2 (defining retreat rule in Maryland).

187. Remember that imminence, for purposes of self-defense, means, “just about to happen.” See cases and materials cited *supra* Part III.B (defining imminence under standard doctrine).

188. *Culverson v. State*, 797 P.2d 238, 240 (Nev. 1990).

189. *Supra* text accompanying Part V Subsection B.

C. A Doctrinal Fix

At some point, the issue of Stand Your Ground or Retreat became detached from its proper home within the necessity principle, establishing itself as a separate element in the law of self-defense. It may be that the roots of this phenomenon lie in the English law's early determination to assert the King's privilege against the use of self-help in homicide cases,¹⁹⁰ and that enforcing a Duty to Retreat before using deadly force made good sense against a legal backdrop in which the relative lack of police and official law enforcement meant that self-help was both common and justifiable in a variety of contexts. Over time, perhaps an unintended consequence was that the Duty to Retreat became an independent source of concern that led to the widespread common-law endorsement in the United States of the Stand Your Ground approach, beginning in the nineteenth century. Structurally, the result has been a kind of doctrinal seesaw that tilts from Retreat to No Retreat while largely ignoring the fact that both the Stand Your Ground and Retreat concepts are properly housed within the principle of strict necessity that provides the overarching justification of self-defense in the first place.

Regardless of the particular historical reason, current realities argue for the return of both the Retreat and Stand Your Ground rules to their natural source, as aspects of the core necessity element in self-defense. Contained within that principle, both rules have essential roles to play in a doctrinal setting in which the fundamental necessity principle sets appropriate limits to their operation.

One can imagine various ways of restructuring the law to incorporate this idea. Here I will suggest only one. Consider Florida's current self-defense statute, which says, "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 or to prevent the imminent commission of a forcible felony."¹⁹¹ This language succinctly enacts the traditional elements of self-defense, including the foundational principle of necessity. A second sentence, which would clarify the standard for juries and other legal actors, might read: "In deciding whether the use of deadly force was necessary in a particular case, the following factors shall be considered: (1) whether, as an *objective* matter, and considering all the circumstances, the defendant could have avoided the use of deadly force by retreating from the confrontation in complete safety; and (2) whether, as a *subjective* matter, the defendant actually knew that he or she could have safely retreated. If the facts demonstrate that no safe retreat was available; that the defendant honestly and reason-

190. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 184-85 (Oxford, Clarendon Press 1769) ("[T]he king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves.").

191. FLA. STAT. § 776.012(2) (2014).

bly believed there was no time to retreat before responding with deadly force; or that the defendant was not actually aware of the possibility of retreat or that such retreat would be completely safe, then the court or jury shall find that the defendant had no duty to retreat and had the right to stand his or her ground and respond to the threat with deadly force. It shall be the burden of the prosecution to prove, beyond a reasonable doubt, that the defendant was in fact aware of the possibility of retreat and was aware that such retreat would be completely safe.”

Such language would simultaneously affirm the principle of necessity as the overarching rule governing self-defense; clarify the conditions under which both the Stand Your Ground and Retreat doctrines are relevant to deciding whether a defendant’s use of deadly force was justified or not; and help judges, juries, and attorneys determine both when to invoke a defendant’s right to stand the defendant’s ground and when to conclude that the right was properly exercised.

This language does not perfectly answer the concerns posed by courts that have adopted Stand Your Ground rules. For example, if the *Culverson* court is right that Retreat rules, by their very existence, give a structural advantage to unlawful attackers over innocent defenders,¹⁹² then the explicit attempt to validate both the principles of Retreat and Stand Your Ground within the overarching boundary of necessity might not eliminate this problem. Other solutions are certainly possible. The important point here is that finding, and vetting, such solutions requires careful, focused, and deliberative attention to the function of self-defense law as well as its history and its core doctrinal elements.

D. Beyond Politics: Toward an Independent Role for the Law

Necessity has always been the basis of self-defense, and other courts and commentators have noted its connection to the Retreat rule and Stand Your Ground.¹⁹³ However, over time the doctrinal seesaw between Stand Your Ground and Retreat, reflected both in older common-law decisions on the issue and in recently enacted statutes rejecting the Duty to Retreat in favor of Stand Your Ground, has pushed the role of necessity into the background. The political controversy over Stand Your Ground, focused on ideologically loaded issues such as racism and the right to own guns, has only exacerbated this problem. The real problem is that as freestanding elements of self-defense, separate from the overarching principle of necessity, No Retreat rules may generate results in particular cases that are very far afield from the limited justification that self-defense was meant to give.¹⁹⁴

192. See *Culverson*, 797 P.2d at 240 (“[A] rule requiring a non-aggressor to retreat confers a benefit on the aggressor and a detriment on the non-aggressor.”).

193. See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973) (making clear the importance of necessity to self-defense).

194. As mentioned above in note 162, some evidence indicates that this may already have oc-

Similarly, Duties to Retreat, unbound from the necessity principle, pose the risk of confusing juries or other legal actors as to the conditions under which a defendant may justifiably stand her ground and use deadly force against an imminent deadly attack.¹⁹⁵ Returned to their natural home within the rubric of necessity, both rules can play important roles in helping the law decide when, and when not, to justify the fatal use of deadly force by a private citizen.

The above suggests one doctrinal answer to the debate between Retreat and Stand Your Ground. But the issue also offers a chance to engage a much larger conversation, focusing not on the structure of the law but on how we talk about it.

If the argument here is persuasive, it demonstrates a complete separation between the politics of Stand Your Ground and the real problems it creates for the law. That should bother us. Our political debate about this issue has shoved the legal issues into the midst of bitter and longstanding disputes about racism and private gun ownership. By contrast, identifying and solving the legal problems posed by Stand Your Ground and Retreat requires calmer and more lawyer-like skills. It requires close attention to the history and structure of both rules, to the moral intuitions that have supported their existence for centuries, and to any demonstrable issues that recent case law may suggest they present for our justice system today. In the latter endeavor, the content of our political debate on this topic has not been merely useless; it has been harmful. Sometimes political controversy can usefully inform the law. But politics can also generate discussions about law reform which (1) distract our collective attention from facts that might really point the way to a better legal standard; (2) intimidate those in the legal and political communities who would otherwise be open to considering and acting on those facts; and (3) lend strength to the view that the law has no independent role to play in thinking about issues of justice, but is simply a weapon of the socially powerful or the loudest political action group of the moment. This is what has happened in the debate over Stand Your Ground, and it should alert us to the need for a deeper conversation about how we decide which legal issues to act upon, and which reasons should count in favor of such action.

The law, in short, must stand its own ground against ideology-driven pressures for reform. Law is *not* reducible to politics; conversations about legal change should not become ideologically driven food fights; and we are unlikely to find the right legal answers unless we think carefully about the law's core mission, its fundamental structure, and the complex set of intuitions about justice that drive its evolution.

curred in Florida since the passage of its Stand Your Ground statute in 2005.

195. See Leider, *supra* note 5 ("Prosecutors have an easier time proving that a combatant could have safely withdrawn than they do convincing juries, beyond any reasonable doubt, that the person did not reasonably believe that he was in danger.").