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Shoot to Kill: A Critical Look at Stand Your Ground Laws

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I. INTRODUCTION

On November 14, 2007, 61-year-old retiree Joe Horn called 911 to report that two African-American men had broken into the house next door to him in Pasadena, Texas.[1] Two months earlier, on September 1, Texas' recently enacted Castle Law (modeled on Florida's *Stand Your*

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1. Adam B. Ellick, *Grand Jury Clears Texan in the Killing of 2 Burglars*, N.Y. TIMES, July 1, 2008, http://www.nytimes.com/2008/07/01/us/01texas.html?_r=0.

Ground law)[2] went into effect.[3] Horn specifically referred to the passage of this new law during his conversation with the 911 operator. Below is a partial transcript of the call:

Dispatcher: Mr. Horn
Horn: Yes
Dispatcher: I want you to listen to me carefully, OK.
Horn: Yes
Dispatcher: I got officers comin' out there. I don't want you to go outside that house. And I don't want you to have that gun in your hand when those officers are poking around over there.
Horn: I understand that, Ok, but I have a right to protect myself too, sir,
Dispatcher: Yes you do.
Horn: and you understand that
Dispatcher: Yes you do.
Horn: And there've also been changes in this country since September the first and you know it and I know it.[4]
Dispatcher: I understand.
Horn: I have a right to protect myself
Dispatcher: I'm, I'm right there with you.
Horn: And a shotgun is a legal weapon; it's not an illegal weapon.
Dispatcher: No it's not. I'm not sayin' that.
Horn: Alright.
Dispatcher: I'm not wanting you to, you know, make a mistake.
Horn: He's, oh, he's coming out the window right now, I gotta go, buddy. I'm sorry, but he's coming out the window.
Dispatcher: Don't, don't—don't go out the door. Mr. Horn? Mr. Horn?
Horn: Goddamn it. They just stole something. I'm going out the window. I'm sorry.
Dispatcher: Don't go outside.
Horn: I ain't letting them get away this shit; they stole something.
Dispatcher: Don't go outside the house.
Horn: They got a bag of something. I'm go . . .
Dispatcher: Mr. Horn, do not go outside the house.
Horn: I'm sorry.
Dispatcher: Mr. Horn, Do not go outside the house.
Horn: This ain't right, buddy.

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2. Matt, Gertz, *ALEC Has Pushed The NRA's "Stand Your Ground" Law Across The Nation*, MEDIA MATTERS FOR AMERICA (Mar. 21, 2012, 11:41 AM), http://mediamatters.org/blog/2012/03/21/alec-has-pushed-the-nras-stand-your-ground-law/186459; Susan Ferriss, *NRA pushed 'stand your ground' laws across the nation*, THE CTR. FOR PUB. INTEGRITY (Mar. 26, 2012, 6:00 AM), http://www.publicintegrity.org/2012/03/26/8508/nra-pushed-stand-your-ground-laws-across-nation.

3. S.B. 378, 80th Leg., Reg. Sess. (Tex. 2007).

4. Here Horn seems to be explicitly referencing Texas' recently enacted Castle Law.

Dispatcher: You're going to get yourself shot if you go outside that house with a gun. What do you think?
Horn: You want to make a bet? I'm going to kill them.
Dispatcher: OK? Stay in the house.
Horn: They're, wa . . . , they're getting away!
Dispatcher: That's all right. Property's not worth killing someone over, OK?
Horn: Goddamn it.
Dispatcher: Don't go out the house. Don't be shooting nobody. I know you're pissed and you're frustrated, but don't do it.
Horn: They got a bag of loot.
Dispatcher: OK. How big is the bag . . . (They're carrying a . . . They're walking out . . .)
Horn: It's a handbag.
Dispatcher: They're walking. Which way are they going?
Horn: I can't . . . I'm going outside. I'll find out.
Dispatcher: No. No. I don't want you going outside, Mr. Horn.
Horn: Well, here it goes, buddy. You hear the shotgun clicking and I'm going.
Dispatcher: Don't go outside.
[Clicking sound.]
Horn: [yelling] Move! You're dead! [Sound of three shots being fired][5]

The police had just arrived at the scene when Mr. Horn shot Hernando Riascos Torres and Diego Ortiz in the back.[6] They ran a short way before collapsing and dying.[7] Riascos and Ortiz had no gun or knife, just the tire iron that had been used to break into the neighbor's house.[8] Although both were illegal immigrants,[9] neither had a prior record for any crime of violence.[10][11]

Under traditional self-defense law, Joe Horn would be guilty of murder.[12] Not only did he leave a place of safety against the dispatcher's

5. Iyarah, *The Complete Joe Horn 9-11 Call*, YouTube, (Dec. 11, 2007), http://www.youtube.com/watch?v=LLtKCC7z0yc.

6. Ellick, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Texas Man Cleared of Shooting Suspected Burglars Next Door*, FOXNews.com, July 1, 2008, http://www.foxnews.com/story/0,2933,374223,00.html.

10. One of the men had a cocaine related conviction from 14 years prior, and the other had no known criminal record. Associated Press, *Joe Horn no billed by grand jury* (June 30, 2008), http://abclocal.go.com/ktrk/story?section=news/local&id=6235878.

11. One of them had a conviction for selling drugs. *See* Roland S. Martin, *Commentary: Was burglary worth killing 2 men?*, CNN (July 2, 2008, 11:14 AM), http://www.cnn.com/2008/CRIME/07/01/roland.martin/.

12. *See, e.g.*, Laney v. United States, 294 F. 412, 414 (D.C. Cir. 1923).

clear commands,[13] but he shot and killed two men because he did not want them to get away with stolen goods.[14] Traditional self-defense law holds that defense of property does not justify the use of deadly force.[15]

Horn might have tried to argue that he was entitled to use deadly force to apprehend a fleeing felon, but he would not have prevailed. It is true that under the common law a private citizen was justified in killing a felon if it was the only way to arrest him.[16] But states have found the common law rule too broad, and so have limited it in various ways, including by requiring that the felony be forcible.[17] Even Texas checked the right to use deadly force by requiring that the person reasonably believe that "'the property cannot be protected or recovered by any other means.'"[18] Since Mr. Horn knew that the police were on their way, it would have been unreasonable to believe that deadly force was the only way the two burglars would be apprehended.

Nor was it reasonable for Mr. Horn to believe that he, or anyone else, was in immediate danger of death or severe bodily injury. Traditional self-defense law allows the use of deadly force only if it is reason-

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13. *Id.* In *Laney*, the court explained:

> It is clearly apparent from the above testimony that, when defendant escaped from the mob into the back yard of the Ferguson place, he was in a place of comparative safety, from which, if he desired to go home, he could have gone by the back way, as he subsequently did. The mob had turned its attention to a house on the opposite side of the street. According to Laney's testimony, there was shooting going on in the street. His appearance on the street at that juncture could mean nothing but trouble for him. Hence, when he adjusted his gun and stepped out into the areaway, he had every reason to believe that his presence there would provoke trouble. We think his conduct in adjusting his revolver and going into the areaway was such as to deprive him of any right to invoke the plea of self-defense. . . . It is a well-settled rule that, before a person can avail himself of the plea of self-defense against the charge of homicide, he must do everything in his power, consistent with his safety, to avoid the danger and avoid the necessity of taking life. If one has reason to believe that he will be attacked, in a manner which threatens him with bodily injury, he must avoid the attack if it is possible to do so, and the right of self-defense does not arise until he has done everything in his power to prevent its necessity. In other words, no necessity for killing an assailant can exist, so long as there is a safe way open to escape the conflict. *Id.*

14. Ellick, *supra* note 1.

15. People v. Ceballos, 526 P.2d 241, 249 (Cal. 1974) ("[A]t common law in general deadly force could not be used solely for the protection of property. 'The preservation of human life and limb from grievous harm is of more importance to society than the protection of property.'" (citations omitted)).

16. According to Blackstone, "[a]ny private person . . . that is present when any felony is committed, is bound by the law to arrest the felon . . . . And they may justify breaking open doors upon following such felon: and if they kill him, provided he cannot be otherwise taken, it is justifiable . . . ." Sir William Blackstone, Commentaries on the Laws of England (1765–1769), Book 4, Chapter 21 Of Arrests, http://www.lonang.com/exlibris/blackstone/bla-421.htm.

17. People v. Couch, 461 N.W.2d 683, 686–87 (Mich. 1990).

18. Gonzales v. State, No. 07-04-0500-CR, 2006 Tex. App. LEXIS 9299 at *9, 2006 WL 3040002 (Tex. App. Amarillo Oct. 26, 2006) (quoting § 9.42 of the Texas Penal Code).

able to believe that a person is "in imminent peril of death or serious bodily harm,"[19] and use of such force is "necessary to save himself therefrom."[20] Even if the men did cross into Horn's yard, the fact that they were shot in the back shows that they did not pose an immediate threat. Furthermore, although it is usually difficult to prove mens rea, Horn clearly professed his intention to kill.[21] With the declaration "I'm going to kill them"[22] caught on tape, a prosecutor would have an easy time making the case for premeditated murder.

Yet not only was Joe Horn never convicted of murder, a Texas Grand Jury refused to indict him for *any* crime at all.[23] Many were outraged by what they saw as unjustified vigilantism, and they wondered whether a black man who shot two white men would be similarly exculpated.[24] Others believed that Horn should be commended for his actions, as reflected by the *Joe Horn Is My HERO* Facebook page.[25] Typical of some commending responses was a letter to the Houston Chronicle saying: "Joe Horn did what many of us would do in the absence of a neighbor from his home and possessions: He got involved. Thank God for men like Horn."[26] After news came out that Mr. Horn would not be indicted, his sixty-one-year-old neighbor, Velma Cabello, said, "'I just praise God that he was not indicted, that our country is still behind our good, honest people. . . . He is a hero in my book.'"[27]

This article takes a critical look at expanded self-defense laws, like the kind used to absolve Joe Horn, known as "Castle" or "Stand Your Ground" laws. It focuses on Florida because it passed the statute that has served as a model for other states, including Texas. First, this article discusses the history and mechanics of Florida's *Stand Your Ground*

19. United States v. Peterson, 483 F.2d 1222, 1230 (D.C. Cir. 1973).

20. *Id.*

21. *The Complete Joe Horn 9-11 Call*, *supra* note 5.

22. *Id.*

23. Ellick, *supra* note 1. To indict a defendant, the grand jury must find that there is probable cause to believe he committed the crime. 2-40 Texas Criminal Practice Guide § 40.08. This is a significantly lower standard of proof than required to convict someone of a crime, which is proof beyond a reasonable doubt. *In re* Winship, 397 U.S. 358 (1970). The fact that Horn was not even indicted is especially striking in light of the commonly held belief, as famously put by the Former Chief Judge of New York and its Court of Appeals back in 1985, that a grand jury would "indict a ham sandwich" if asked by the prosecution. Opinion, *Do We Need Grand Juries?*, N.Y. TIMES (Feb. 18, 1985), http://www.nytimes.com/1985/02/18/opinion/do-we-need-grand-juries.html.

24. *Id.* ("'There is not a snowflake's chance in hell that an African-American man could do what Joe Horn did and get away with it,' said Quanell X, a local black activist.").

25. *Joe Horn is my HERO*, FACEBOOK, http://www.facebook.com/pages/Joe-Horn-is-my-HERO/116615945024779 (last updated June 18, 2010).

26. James E. McCoy, *Letters*, HOUS. CHRON., July 2, 2008, at B8.

27. Brian Rogers & Dale Lezon, *Joe Horn Cleared by Grand Jury in Pasadena Shootings*, HOUS. CHRON., June 30, 2008, http://www.chron.com/neighborhood/pasadena-news/article/Joe-Horn-cleared-by-grand-jury-in-Pasadena-1587004.php.

law. Because special interest groups like the National Rifle Association ("NRA") were instrumental in passing the law, the next part contemplates whether *Stand Your Ground* would have been chosen by citizens operating behind the "veil of ignorance" in the hypothetical "original position" as formulated by John Rawls in A THEORY OF JUSTICE. Finally, the essay harnesses empirical data in considering whether states should continue to support *Stand Your Ground* laws.

II. OVERVIEW OF FLORIDA'S *STAND YOUR GROUND* LAW

On October April 26, 2005, Florida Governor Jeb Bush signed into law SB 436,[28] known then as the "Castle Doctrine" or "Stand Your Ground."[29] The law radically expanded Florida's self-defense law, even insulating shooters from criminal prosecution and civil suit.[30] This section compares self-defense law in Florida before and after SB 436 was passed. It then discusses the purported rationale for the law and the politics that led to its passage.

A. *Comparing Florida's Self-Defense Law Before and After* Stand Your Ground

Before *Stand Your Ground,* the right to use deadly force was strictly limited.[31] A person had to show that it was reasonable to believe that the use of such force was "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."[32] Unless a person was "attacked in his home by a person not having an equal right to be there,"[33] he had a duty to retreat if he could do so in absolute safety.[34] Florida was unequivocal in protecting human life: "'[A] person under attack [has] to "retreat to the wall or ditch" before taking a life.' 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 . . . .'"[35]

Stand Your Ground dramatically expanded the right to use deadly

28. Andy Kroll, *The Money Trail Behind Florida's Notorious Gun Law*, MOTHER JONES, (Mar. 29, 2012, 3:00 AM), http://www.motherjones.com/politics/2012/03/NRA-stand-your-ground-trayvon-martin.

29. *Former NRA President Exposes the Lies and Misinformation Aimed at Florida's "Castle Doctrine" Law,* CFIF.ORG (Nov. 3, 2005), http://www.cfif.org/htdocs/ freedomline/current/in_our_opinion/marion-hammer-nra-interview.htm.

30. FLA. STAT. § 776.032 (2005).

31. FLA. STAT. § 776.012 (2004).

32. *Id.*

33. Baker v. State, 506 So. 2d 1056, 1059 (Fla. Dist. Ct. App. 1987) (citation omitted).

34. *Id.* at 1058.

35. *Id.* (citations omitted).

force. It removed the duty to retreat outside the home.[36] As long as a person is not engaged in an unlawful activity and is in a place where he has the right to be, he is allowed to "stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony."[37]

The effect of *Stand Your Ground* can be clearly seen in how a person is now allowed to respond if attacked inside a vehicle. In *Baker v State*, a pre-*Stand Your Ground* case, the defendant was approached and then attacked by at least four men while standing next to the front passenger seat of his car for allegedly saying, "Hey, baby" to the 17-year-old girlfriend of one of the assailants.[38] Baker stabbed at the men in self-defense, killing one and injuring two. He was charged with murder and attempted murder. At trial, Baker argued that a person has no duty to retreat if he is attacked inside his car and that he should be acquitted as a matter of law.[39] The trial judge disagreed, and the jurors convicted Baker of manslaughter and attempted manslaughter. On appeal, the appellate court upheld the verdict, noting that there was witness testimony that could have led the jurors to reasonably conclude that even if Baker perceived the need to use deadly force to defend himself that he "had that perception in time to have retreated into his car and avoided the need."[40] Thus the appellate court refused to remove the duty to retreat when one is attacked inside a car, explaining: "The very mobility of an automobile has created the so-called automobile exception to the search warrant requirement. That mobility also may connote the inherent usefulness of an automobile under certain circumstances for a retreat from a self-defense confrontation. Thus, to carve out the exception defendant argues for could seem to virtually eliminate the retreat obligation."[41]

Now, however, Baker would, as a matter of law, be able to use deadly force to defend himself. *Stand Your Ground* specifically states that "A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm . . . if: (a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a[n] . . . occupied

36. FLA. STAT. § 776.013(3) (2005).

37. *Id.*

38. Baker v. State, 506 So. 2d 1056, 1057 (Fla. Dist. Ct. App. 1987).

39. *Id.* at 1059.

40. *Id.* at 1058.

41. *Id.* (citation omitted).

vehicle . . . ."[42] Thus, under *Stand Your Ground*, even if Baker could have driven safely away, he would have been entitled to kill his attackers.[43]

Not only did *Stand Your Ground* remove the duty to retreat, but it allows the use of deadly force even when the assailant is retreating and thus no longer posing a threat. In *Hair v State* (2009),[44] the First District Court of Appeal for the State of Florida held that Jimmy Hair was authorized to shoot and kill Charles Harper because he had unlawfully and forcibly entered the car in which Hair was a passenger. It didn't matter whether Harper was actually *exiting* the car at the time the shot was fired. The court ruled as a matter of law that Hair was immune from prosecution: "The statute makes no exception from the immunity when the victim is in retreat at the time the defensive force is employed."[45]

In addition to expanding the right to use deadly force, *Stand Your Ground* also makes it easier for a person claiming self-defense to prevail. Before the passage of *Stand Your Ground*, self-defense was an affirmative defense, and it could only be adjudicated at trial.[46] If a defendant made a prima facie case that he had acted in self-defense, the burden switched to the state to prove beyond a reasonable doubt that he had not.[47] Now, with limited exception, the law creates a *presumption* that a person possessed a reasonable fear of "imminent peril of death or great bodily harm" to himself or another when employing force that is either "intended or likely" to cause "death or great bodily harm" to another in the following situations: (1) if "[t]he person against whom . . .

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42. FLA. STAT. § 776.013(1)(a) (2013).

43. Indeed, this is what happened when Seth Browning shot and killed Brandon Baker on March 6, 2012 in Palm Harbor, Florida. Browning—an off-duty security guard—was concerned about Baker's driving and followed him to get his license plate number. Baker and his twin brother who were traveling in separate cars pulled over and confronted Browning who pulled over as well. Browning used pepper spray against them, but Baker leaned in the window and punched Browning in the face. Browning then reached for his gun and shot and killed Baker. Despite the fact that Baker had no weapon and Browning could have easily driven away, the local prosecutor decided not to file charges against Browning because he concluded that Browning had acted lawfully under *Stand Your Ground*. *See* Mike Brassfield, *Road rage blamed in fatal shooting on Palm Harbor street*, TAMPA BAY TIMES (Mar. 6, 2012, 5:37 AM), http://www.tampabay.com/news/publicsafety/crime/road-rage-blamed-in-fatal-shooting-on-palm-harbor-street/1218558; *See also* Sunde Farquhar, Stand Your Ground Shooter Seth Browning Releases Statement, PALM HARBOR PATCH (Sept. 25, 2012, 5:20 PM), http://palmharbor.patch.com/groups/police-and-fire/p/stand-your-ground-shooter-seth-browning-releases-statement.

44. 17 So. 3d 804 (2009).

45. *Id.* at 806.

46. "Involving as it does intricate finding of facts and numerous conclusions, the question of self-defense, with its inherent problems involving judgment and credibility decisions based on common sense and experience and the weighing of evidence, is peculiarly a function of the jury." McCauley v. State, 405 So. 2d 1350, 1352 Fla. Dist. Ct. App. 5th., (footnotes omitted).

47. Thompson v. State, 552 So. 2d 264, 266 (Fla. Dist. Ct. App. 1989) (citations omitted).

force was used was in the process of unlawfully and forcefully entering, [or had already entered], a 'dwelling, residence, or occupied vehicle;'" or (2) if the person against whom force was used "had removed or was attempting to remove [a person] against [his will] from [a] dwelling, residence, or occupied vehicle"[48] In either situation, the person who used defensive force must have known "or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred."[49] In addition, a person now has the right to a pre-trial hearing in front of a judge in which if he shows by a preponderance of the evidence that he acted lawfully pursuant to *Stand Your Ground*, he is immune from future prosecution or civil suit.[50]

B. *Rationale*

As explained above, *Stand Your Ground* significantly expanded a person's right to use deadly force in self-defense. Before *Stand Your Ground* the duty to retreat only applied if the person could do so in absolute safety, but State Representative Dennis Baxley, who co-sponsored the bill, argued that such a duty created "great risk" for the person threatened.[51] Baxley did not think that it was fair for a person who used deadly force to be subject to a "Monday morning quarterback situation" in which the state tried to figure out whether the person had acted lawfully.[52] Therefore, the law created a presumption that a person had the right to use deadly force in certain situations. Such a presumption was necessary, argued Marion Hammer of the NRA, because it prevents the shooter from being "badgered by a justice system that protects criminals."[53]

When Baxley and other legislators were trying to push through *Stand Your Ground*, they were asked to back up their rhetoric with a case in which a person had been treated unjustly by existing self-defense law.[54] The best that proponents could do was point to a seventy-seven year-old retiree James Workman who shot and killed a FEMA worker after he entered Workman's trailer late one night.[55] Workman was *never*

48. FLA. STAT. § 776.013(1)(a) (2012).

49. FLA. STAT. § 776.013(1)(b) (2012).

50. *See* Dennis v. State, 51 So. 3d 456, 460, 462–3 (Fla. 2010).

51. *Op-Ed: Why I Wrote 'Stand Your Ground' Law*, NPR (Mar. 26, 2012), http://www.npr.org/2012/03/26/149404276/op-ed-why-i-wrote-stand-your-ground-law.

52. *Id.*

53. *Former NRA President Exposes the Lies and Misinformation Aimed at Florida's "Castle Doctrine" Law*, *supra* note 29.

54. Ben Montgomery, *Florida's 'Stand Your Ground' Law Was Born of 2004 Case, But Story Has Been Distorted*, TAMPA BAY TIMES, Apr. 14, 2012, http://www.tampabay.com/news/publicsafety/floridas-stand-your-ground-law-was-born-of-2004-case-but-story-has-been/1225164.

55. *Id.*

arrested, and three months after the incident, the state prosecutor decided not to file charges on the ground that Workman's use of force had been justified.[56] To the Senator who introduced the bill, Durrell Peaden, three months was too long to resolve the killing of an unarmed federal worker: "'You're entitled to protect your castle . . . [w]hy should you have to hire a lawyer to say, 'This guy is innocent'?"[57]

C. *Passage of* Stand Your Ground

According to a wide variety of sources, the NRA was instrumental in getting *Stand Your Ground* passed.[58] Not only did the NRA conceive of the legislation, but it also used political donations, lobbying, and outreach to ensure its passage.

According to former NRA President Marion Hammer, the NRA began its efforts to expand gun rights in Florida in 1975, when it helped form the Unified Sportsmen of Florida.[59] As Hammer explained it, the NRA was concerned about attempts to pass gun control measures:

> Florida was seeing what I would call a burst of gun control measures being filed by northerners who had moved to South Florida and had brought the stuff that they had moved away from with them. So there was so much gun control being filed that it was very difficult for the NRA to deal with it from over 1,000 miles away. So they formed Unified Sportsmen of Florida so that they could have someone here in the state monitoring and working the legislation.[60]

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56. *Id.* The delay in deciding whether to file charges seems warranted based on the facts of the case. The decedent, Rodney Cox, was hired by FEMA to clean up after Hurricane Ivan. Somehow he ended up a mile and a half away from where he was staying and at the Workmans' trailer, which was parked outside of their damaged home. Kathryn Workman called 911 to say that there was a man outside of the trailer trying to get into the house. He asked for a glass of water. Workman fired a warning shot into the ground, and Cox ran into the trailer. Workman chased Cox into the trailer, and Cox bear hugged him. Workman shot Cox two times, killing him. Cox was wearing shorts at the time. He carried no weapon, and at no point did he strike Workman or his wife. *Id.*

57. *Id.* (internal quotation marks omitted).

58. *See A History of 'Stand Your Ground" Law in Florida*, NPR (Mar. 20, 2012), http://www.npr.org/2012/03/20/149014228/a-history-of-stand-your-ground-law-in-florida ("Well, this was an NRA bill, and this is a Republican-dominated legislature, so, you know, it passed pretty easily."); Abby Goodnough, *Florida Expands Right to Use Deadly Force in Self-Defense*, N. Y. TIMES, Apr. 27, 2005, http://www.nytimes.com/2005/04/27/national/27shoot.html ("The National Rifle Association lobbied hard for the bill's passage . . . ."); John-Thor Dahlburg, *Florida Law Lets Citizens 'Meet Force With Force'*, L.A. TIMES, October 2, 2005, http://articles.latimes.com/2005/oct/01/nation/na-shoot.1 ("Proponents of the law, which was championed by the National Rifle Association . . . ."); Kroll, *supra* note 28 ("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.").

59. *Former NRA President Exposes the Lies and Misinformation Aimed at Florida's "Castle Doctrine" Law*, *supra* note 29.

60. *Id.*

Three years later, Hammer was selected as Executive Director of United Sportsmen of Florida.[61] She also became a full-time lobbyist, representing Unified Sportsmen and handling all of the NRA's lobbying in Florida.[62] Hammer was president of the NRA from 1995-1998,[63] and she is currently a Member of the Board and a lobbyist for the organization.[64] In 1987, Hammer was successful in getting a right-to-carry law passed in Florida, which allows the state to issue a permit for persons to carry firearms.[65] Hammer was also "one of the chief architects" behind the 2005 Stand Your Ground Law,[66] and a "driving force behind a 2008 law that allows employees to bring guns to work — as long as they lock the weapons in the car."[67] Hammer also successfully pushed for the passage of a law that would make it illegal for doctors to ask young patients about guns in their homes but a judge struck down this law for violating the doctors' First Amendment rights.[68]

Although Hammer conceived *Stand Your Ground* (which she nicknamed the Castle Doctrine even though it was not limited to one's house),[69] she relied on two Florida lawmakers to co-author the bill and get it enacted into law: Republican State Legislator Dennis Baxley, who was the prime advocate of the bill in the Florida House of Representatives,[70] and Former Republican Senator Durrell Peaden, who sponsored the bill before the Florida Senate.[71] Both Baxley and Peaden were beneficiaries of the NRA's largesse. In 2000, Baxley received the maximum campaign contribution allowed per election cycle of $500 from the NRA,[72] and seven years later, the NRA spent $35,000 on radio advertising to support him in a primary fight, which he ultimately lost.[73] In addi-

61. *Id.*

62. *Id.*

63. Ann O'Neill, *NRA's Marion Hammer Stands Her Ground*, CNN, (Apr. 15, 2012, 11:02 AM), http://www.cnn.com/2012/04/15/us/marion-hammer-profile.

64. Educ. Fund to Stop Gun Violence, *Marion Hammer (Board Member)*, MEET THE NRA LEADERSHIP, http://www.meetthenra.org/nra-member/Marion-P-Hammer (last visited Mar. 21, 2013).

65. O'Neill, *supra* note 63.

66. *Id.*

67. *Id.* This law passed "despite opposition from the Walt Disney Co. and the Chamber of Commerce[.]" *Id.*

68. *Id.*

69. Manuel Roig-Franzia, *Fla. Gun Law to Expand Leeway for Self-Defense*, WASH. POST, Apr. 26, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/04/25/AR2005042501553_pf.html.

70. Dennis Baxley, Op-Ed., *Trayvon Martin's Alleged Attacker Not Covered Under Law I Wrote*, FOX NEWS (Mar. 21, 2012), http://www.foxnews.com/opinion/2012/03/21/trayvon-martins-alleged-attacker-not-covered-under-law-wrote/.

71. *Op-Ed: Why I Wrote 'Stand Your Ground' Law*, *supra* note 51.

72. Kroll, *supra* note 28.

73. *Id.*

tion, a year before Baxley proposed the bill, the NRA awarded him its Defender of Freedom award.[74] Similarly, the NRA gave Peaden $1,000 in direct donations during the 2000 election cycle and almost $1,500 in independent expenditures.[75]

In addition to direct support to Baxley and Peaden, the NRA made other significant financial contributions to ensure *Stand Your Ground*'s passage. It donated a total of $125,000 to the Florida Republican Party Committee between 2004 and 2010, which is more than it contributed to any other state party committee between 2003 and 2012.[76] The NRA also gave "$500 contributions—the state's legal limit—to 23 legislators at least once in the . . . five years" preceding the passage of *Stand Your Ground*.[77] Twenty-two of the twenty-three backed the bill.[78] The NRA also supported the 2002 re-election campaign of Governor Jeb Bush, who signed *Stand Your Ground* into law,[79] once again donating the $500 legal limit.[80]

In conjunction with its lobbying efforts, the NRA also extensively promoted *Stand Your Ground* on its website. On January 25, 2005, the NRA's Institute for Legislative Action posted the following: "Florida State Sen. Durrell Peaden wants to make sure people have a right to use deadly force to shoot home intruders without fear of prosecution."[81] A few days later, they issued an action alert to their Florida members that told the members the time and date that the Florida Senate Criminal Justice Committee would be holding a hearing on the law, and urging the NRA members to send emails to the committee members encouraging them to support the law.[82] The NRA wrote, "YOU MUST SEND EMAIL NOW IF YOU WANT YOUR PERSONAL PROTECTION RIGHTS RESTORED!!!!"[83]

Some Florida police chiefs publicly opposed the law and urged lawmakers not to pass it,[84] as did most of the state's major newspa-

74. Ferriss, *supra* note 2

75. Kroll, *supra* note 28.

76. Ferriss, *supra* note 2.

77. Josh Israel, *How the NRA Fueled Florida's 'Stand Your Ground' Law*, THINKPROGRESS (Mar. 22, 2012, 5:20 PM), http://thinkprogress.org/justice/2012/03/22/449961/how-nra-fueled-floridas-stand-your-ground-law/.

78. *Id.* (The twenty-third did not vote on the bill.).

79. *Id.*

80. Kroll, *supra* note 28.

81. Israel, *supra* note 77.

82. *Id.*

83. *Id.* (emphasis in original).

84. John F. Timoney, Op-Ed., *Florida's Disastrous Self-Defense Law*, N.Y. TIMES, Mar. 24, 2012, at A19.

pers.[85] Yet many members of law enforcement sided with the NRA.[86] At the time, former Federal Prosecutor and State Representative Dan Gelber of Miami Beach attributed the support of lawmakers to their fear of the NRA, especially because they would need to run for reelection.[87] Whatever the reason, *Stand Your Ground* was passed overwhelmingly by a vote of 94-20 in the House of Representatives and 39-0 in the Senate.[88] Former Governor Jeb Bush signed the bill into law with NRA lobbyist Marion Hammer at his side.[89]

Just as the NRA used its success in Florida to push for more right-to-carry laws across the country,[90] so too has it used Florida as a launching pad for nationwide *Stand Your Ground* legislation. According to the Florida Center for Investigative Reporting, as soon as *Stand Your Ground* was signed into law, the NRA's Executive Vice President Wayne LaPierre proclaimed that the NRA would use the victory in Florida to promote the law in other states across the country.[91] "We will start with red and move to blue," LaPierre trumpeted.[92] The NRA used the help of the American Legislative Exchange Council (ALEC) in their efforts to spread *Stand Your Ground* laws.[93] ALEC is a conservative organization that promotes laws favored by its patrons, of whom one is the NRA.[94] Soon after Florida's law was passed, ALEC adopted an almost identical proposed statute, and passed it to sympathetic lawmakers who then sponsored the bill in their state houses.[95] ALEC and the NRA have achieved considerable success, as there are currently twenty-four states that have followed Florida in passing a *Stand Your Ground* type law.[96]

85. Roig-Franzia, *supra* note 69.

86. *Id.*

87. *Id.*

88. Howard Goodman, *NRA's Behind-the-Scenes Campaign Encouraged 'Stand Your Ground' Adoption*, FLA. CTR. FOR INVESTIGATIVE REPORTING (Mar. 23, 2012), http://fcir.org/2012/03/23/nras-behind-the-scenes-campaign-encouraged-stand-your-ground-adoption-across-the-country/.

89. *Id.*

90. Roig-Franzia, *supra* note 69. During the 1980s, the NRA selected Florida as the state to begin a national push for "right-to-carry" laws. Before Florida passed its law, less than twelve states had "right-to-carry" laws; now, thirty-eight do. *Id.*

91. Goodman, *supra* note 88.

92. Goodnough, *supra* note 58.

93. *See* Goodman, *supra* note 88.

94. *Id.*

95. *Id.*

96. *Id.*

III. THE ORIGINAL POSITION

As the previous section showed,[97] the NRA played a pivotal role in getting *Stand Your Ground* legislation passed in Florida. More significantly, there were allegations that legislators who might have otherwise opposed the law were afraid to vote against it because of the NRA's power.[98] Of at least equal concern for the legitimacy of *Stand Your Ground* is Florida's past and present disenfranchisement of African Americans.[99] A 2012 Quinnipiac University Poll of Florida voters found that just 30 percent of African Americans supported *Stand Your Ground* as opposed to 61 percent of whites and 53 percent of Hispanics.[100] The implication is that *Stand Your Ground* might not have been enacted if the voices of more black Floridians had been heard. The political pressure from the NRA, in conjunction with the disenfranchisement of African Americans, calls into question whether *Stand Your Ground* was subject to the kind of vigorous debate that is the hallmark of a healthy democracy.

For that reason, this section seeks to look at *Stand Your Ground* from a completely different perspective. It will employ John Rawls' theories of the "original position" and the "veil of ignorance", discussed by him in *A Theory of Justice*, to consider whether citizens would choose *Stand Your Ground*. This section will begin by providing a basic introduction to John Rawls' theory and how it will be applied here. It will then address the following questions: Would citizens in the "original

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97. *See supra*, Part II.C.

98. *See* Roig-Franzia, *supra* note 69.

99. Disenfranchisement of African Americans in Florida has been accomplished through excluding convicted felons from voting, falsely rejecting ballots on Election Day, and shortening the window for early voting. *See* BRENNAN CTR. FOR JUSTICE, *History of Florida's Felony Disenfranchisement Provision* 1, 1 (2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_38222.pdf ("Felony disen-franchisement has long been used to diminish the voting power of Florida's African-American population, and the law continues to have that effect."); U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, http://www.usccr.gov/pubs/vote2000/report/ch9.htm ("This disenfranchisement of Florida voters fell most harshly on the shoulders of African Americans. Statewide, based on county-level statistical estimates, African American voters were nearly 10 times more likely than white voters to have their ballots rejected in the November 2000 election."); Barbara Liston, *In Florida, black churches scramble to get early voters to polls*, REUTERS (Oct. 27, 2012, 5:28 PM), http://www.reuters.com/article/2012/10/27/us-usa-campaign-florida/idUSBRE89Q0D720121027 ("In his ruling, federal judge Timothy Corrigan concluded that the changes in the early voting law disproportionately affect minority voters because of their tendency to vote early. However, Corrigan found no proof that the intent of the law was to suppress the minority vote.").

100. Release Detail, Quinnipiac University (May 24, 2012) ("Support [for *Stand Your Ground*] is 61 - 31 percent among white voters and 53 - 36 percent among Hispanic voters while black voters are opposed 56 - 30 percent"), http://www.quinnipiac.edu/institutes-and-centers/polling-institute/florida/release-detail?ReleaseID=1753.

position" choose to allow the use of deadly force in self-defense, and if so, would they model that law on *Stand Your Ground*?

A. *An Introduction to John Rawls*

In *A Theory of Justice*, John Rawls presents a conception of justice that is based on a highly abstract version of the social contract. Classical social contract theorists like Thomas Hobbes and John Locke posit the social contract to justify the legitimacy of the state. Each conceives that there is a state of nature not subject to law or government.[101] Even though, in a certain sense, individuals are free in that state of nature, they choose to leave and join society because they believe it is in their best interest to do so. For Hobbes, they are leaving a life that is "nasty, brutish and short,"[102] and for Locke, they join society in order to have more stability, and thus better enjoy their lives, liberty, and property.[103] For social contract theorists, consent of the governed is what gives a political authority its legitimacy, not force achieved through conquest or the command of God.[104]

Rawls has a much thicker idea of the social contract. He conceives of a hypothetical situation, called the "original position", to determine

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101. *See generally*, THOMAS HOBBES, LEVIATHAN (Oxford ed. 1947) (1651); *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

102. HOBBES, *supra* note 101, at 97.

103. LOCKE, *supra* note 101, at 65–66. Locke theorized:

> IF man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will be part with his freedom? why will he give up this empire, and subject himself to the dominion and controul of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*. *Id.*

104. *See, e.g.*, *id.* at 91. Locke explained,

> THOUGH governments can originally have no other rise than that before mentioned, nor *polities* be *founded on* any thing but *the consent of the people;* yet such have been the disorders ambition has filled the world with, that in the noise of war, which makes so great a part of the history of mankind, *this consent* is little taken notice of: and therefore many have mistaken the force of arms for the consent of the people, and reckon conquest as one of the originals of government. But *conquest* is as far from setting up any government, as demolishing an house is from building a new one in the place. Indeed, it often makes way for a new frame of a common-wealth, by destroying the former; but, without the consent of the people, can never erect a new one. *Id.*

what principles of justice free and rational persons would agree to if deciding the basic structure of society. Rawls writes the following:

> [T]he principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness.[105]

Since agreement on the principles of justice is key to their legitimacy, Rawls devises a mechanism, the "veil of ignorance", for ensuring that deliberation is fair and impartial.[106] Capacity to choose is a necessary condition, and so Rawls assumes that the citizens in the "original position": (1) are rational and mutually disinterested;[107] (2) that they have the capacity to create and pursue a conception of the good;[108] (3) that they will prefer principles that advance that conception;[109] (4) that, although they try to secure as many primary goods[110] as possible, they are not envious and "do not seek to confer benefits or to impose injuries on one another;"[111] and (5) that they have a capacity for justice.[112]

The major insight of the "veil of ignorance" is that it avoids the problem of citizens choosing principles that would benefit just themselves. Under the "veil of ignorance", citizens would choose the principles of justice without knowing important facts about themselves such as their intelligence, physical prowess, psychological profile, class position, and their social or economic status.[113] Further, they would not be aware of the general state of their society, such as its economic or political situation, or the level of culture and civilization.[114] The citizens would know that they have a rational plan for their life; however, they would not know the details of this plan.[115] The use of the "veil of ignorance" "ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of

105. JOHN RAWLS, A THEORY OF JUSTICE 11 (Harvard Univ. Press 1971).
106. *Id.* at 18-19.
107. *Id.* at 144.
108. *Id.* at 142.
109. *Id.*
110. Primary goods include: "rights and liberties, powers and opportunities, income and wealth." *Id.*
111. *Id.* at 144.
112. *Id.* at 145.
113. *Id.* at 137.
114. *Id.*
115. *Id.* at 142.

social circumstances."[116]

From this hypothetical situation, Rawls believes that citizens would choose two fundamental principles of justice. The first is: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."[117] The second is: "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged . . . and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."[118] Once the citizens have agreed upon these two fundamental principles, they would then use them to make decisions about the economic, legal, and political system.[119]

B. *Applying the Original Position to* Stand Your Ground

Rawls' *Theory of Justice* and the "original position" provide an insightful vantage point for evaluating *Stand Your Ground* laws. Citizens will deliberate from the "original position", behind the "veil of ignorance", to ensure that they choose a just law. Like Rawls, we will assume that they are both rational and self-interested. From these assumptions, it naturally follows that they will be motivated first and foremost to preserve their own lives,[120] as being alive is a necessary condition for the pursuit of other interests and goals, and for the enjoyment of love, liberty, and happiness.

Additionally, since the citizens are considering a self-defense law to be implemented within a particular space and time, they will be given information beyond what Rawls allowed. Because studies show that *Stand Your Ground* disproportionately affects minorities, particularly African American men,[121] the citizens deliberating will be aware of the

116. *Id.* at 12.

117. *Id.* at 302.

118. *Id.*

119. *Id.* at 195-391.

120. *See* H.L.A. HART, THE CONCEPT OF LAW 192 (3d ed. 2012). HLA Hart writes that survival is the minimum content of natural law: "[W]e may hold it to be a mere contingent fact which could be otherwise, that in general men do desire to live, and that we may mean nothing more by calling survival a human goal or end than that men do desire it. Yet even if we think of it in this common-sense way, survival has still a special status in relation to human conduct and in our thought about it, which parallels the prominence and the necessity ascribed to it in the orthodox formulations of Natural Law. For it is not merely that an overwhelming majority of men do wish to live, even at the cost of hideous misery, but that this is reflected in whole structures of our thought and language, in terms of which we describe the world and each other. We could not subtract the general wish to live and leave intact concepts like danger and safety, harm and benefit, need and function, disease and cure; for these are ways of simultaneously describing and appraising things by reference to the contribution they make to survival which is accepted as an aim." *Id.*

121. Susan Taylor Martin et al., *Race's Complex Role*, TAMPA BAY TIMES, June 4, 2012, at A1 (discussing an analysis by the *Tampa Bay Times* that found that out of nearly 200 cases, people

history of racism in the United States in general, and Florida in particular.[122] They will be also be aware of the literature on implicit bias, which shows that people of all races can be prejudiced against black people without realizing it. This leads them to see "blacks, especially young black men, as violent hostile, aggressive, and dangerous."[123] As a result they "might evaluate behaviors engaged in by individuals who appear black as suspicious even as identical behavior by those who appear white would go unnoticed."[124]

C. *Would Citizens Choose to Allow Self-Defense?*

The first question that citizens in the "original position" would have to answer is whether they would allow the use of deadly force for self-defense. Under social contract theory, the reason that people leave the state of nature is because they believe it is in their self-interest to do so.[125] Security is the most important part of that calculation. Hobbes famously described the state of nature as a "time of Warre, where every man is Enemy to every man,"[126] and a time of continuous fear and "danger of violent death."[127] In such a state of danger, there is no "Industry . . . Navigation . . . Knowledge . . . Arts [or] Society."[128]

Yet if security is one of the basic responsibilities of the state, how could the state ever legalize citizens killing one another? Certainly, the citizens deliberating in the "original position" from behind the "veil of ignorance" are not going to sanction a general right to kill other citizens. To do so would be to undermine security, one of the chief motives for joining the state. Further, because the "veil of ignorance" would prevent those deliberating from knowing whether they would be more likely to be the killer or the killed, they would not agree to such a law.

So then why might citizens choose to allow deadly force in some circumstances? The answer comes from the state's limitations in providing protection. It might be that citizens in the "original position" would prefer to have law enforcement protect them. The cost of such protection, however, might give citizens pause, especially since resources are limited and directing significant funds to law enforcement would mean

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who killed a black person went free seventy-three percent of the time, while those who killed a white person went free fifty-nine percent of the time).

122. See L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2039 (2011) (footnotes omitted).

123. *Id.*

124. *Id.*

125. LOCKE, *supra* note 101, at 65–66.

126. HOBBES, *supra* note 101, at 96.

127. *Id.* at 97.

128. *Id.* at 96–97.

fewer for other goods, such as protecting the environment, providing quality healthcare, and improving education.

In addition, citizens might be reluctant to bear the more intangible costs associated with living in omnipresent police presence. They might prefer to have more privacy, and feel that police ubiquity would interfere with their ability to pursue their version of the good. Complicating matters further is that most crimes of violence occur between intimate parties and people who know one another.[129] Preventing crime between intimate parties would require an even more invasive police presence. Because citizens are likely to value privacy (because it allows them to develop intimate relationships and carve out space and time for their own thoughts and pursuits), they might feel that having police officers in their home or business would be too high a price to pay for security.

But, if law enforcement does not provide this protection, then citizens must turn elsewhere. After all, if the primary reason that people join the state (and the primary reason for the state's legitimacy) is its ability to provide security, then without this, citizens may believe that they have given up too much in leaving the state of nature. If they face imminent danger and the state is not there to protect them, they may question why it is worth joining the state at all. The right to use deadly force in self-defense is necessary because it fills the gap between the security that we need and the protection that the state can provide.[130]

Thus, it makes sense that rational persons looking out for their own self-interest would choose to have the right to use deadly force when necessary to protect themselves or others. It also follows that they would want their action to be viewed as justified and not merely excused.[131] Since they are doing what the state would have done if it had been present, citizens who use deadly force in self-defense would want their action to be viewed as right. They would not think it was fair if they would suffer public disapproval for, in essence, assuming the state's responsibility.

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129. Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV., 343, 344–45 (2007) (footnotes omitted).

130. United States v. Peterson, 483 F.2d 1222, 1229 (1973). In *Peterson*, the court wrote of self-defense, "Hinged on the exigencies of self-preservation, the doctrine of homicidal self-defense emerges from the body of the criminal law as a limited though important exception to legal outlawry of the arena of self-help in the settlement of potentially fatal personal conflicts." *Id.*

131. *Id.* at 1228. This intuition jibes with how self-defense is viewed in the United States now and in England during Blackstone's time. As Judge Robinson explained in *Peterson*, "Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time . . . [b]ut '[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 . . . ." *Id.*at 1229 (citations omitted).

D. *Would They Choose* Stand Your Ground?

Because citizens in the "original position" operating behind a "veil of ignorance" would choose to have the right to use deadly force in self-defense, the issue becomes whether they would choose to have *Stand Your Ground* or a more traditional self-defense law. The citizens will focus on the two major differences laid out in Part I, *supra*: First, the expansion of the Castle Doctrine, and second the ease of those asserting self-defense to cut short judicial proceedings into the legitimacy of a *Stand Your Ground* claim.

1. Expansion of the Castle Doctrine

Stand Your Ground allows a person to use deadly force even when he could have retreated in absolute safety.[132] Because persons in the "original position" are trying to ensure their own liberty, health, and happiness, it seems clear that they would reject the unnecessary use of deadly force. As rational citizens interested in promoting their own self-interest, they would want to make sure that the laws they enact are those most likely to protect them. Creating a law that might allow people to kill without justification would not be in their self-interest, since behind the "veil of ignorance" they would not know whether they were the person with the gun who could have safely retreated but did not, or the person being shot.

Those deliberating would be particularly concerned about the expanded Castle Doctrine when they consider the society's history of racism and its effects. The implicit bias literature shows that people harbor prejudice that they may not be aware of, and that it causes them to interpret the exact same behavior as violent or non-violent based solely on whether the person is black or white.[133] Citizens deliberating behind the "veil of ignorance", unsure of their race, would be concerned about a law that might encourage people to use deadly force even if the person they are afraid of is not actually doing anything threatening.

Furthermore, since traditional self-defense law requires people to retreat only if they can do so in absolute safety, citizens in the "original position" would feel sufficiently protected. They would know that they could use deadly force if it was necessary. Additionally, because the "veil of ignorance" would prevent them from knowing whether they would be the suspected assailant or the victim, they would want to make sure that the law protected the assailant's life as well.

Finally, citizens in the "original position" would not be looking at

132. *See supra* Part I.

133. Richardson, *supra* note 122, at 2039.

the law from the vantage point of innocent persons or criminals. They would be looking at the law in the abstract, and so they would be able to see that as written, *Stand Your Ground* would place people at risk of being killed who were not actually posing a significant danger or even any danger at all. Because those in the "original position" believe that one of the state's chief responsibilities is security, they will not choose a law that creates the kind of "State of Warre" that they left the state of nature to avoid.

2. Making it Easier for a Person who Used Deadly Force to Prevail

Similarly, it seems clear that citizens in the "original position" operating behind the "veil of ignorance" would not want it to be easier for a person who uses deadly force to prevail without knowing their actions will be thoroughly scrutinized. Because the protection of life is one of the chief responsibilities of the state, they would want to make sure that a person really was justified in using deadly force. For that reason, and because they would look at the laws in the abstract, they would not presume that certain situations created the right to use deadly force—they would see that taking something by force or violence (robbery) may be dangerous in one situation but not in another. For instance, if a fourth grader grabs a smartphone from another boy's hand and takes off running, that clearly constitutes a robbery, but since there were no threats, use of a weapon, or physical injury the victim should not be authorized to use deadly force but should instead report the incident to the police, parents, or the school principal.

Additionally, the citizens generally would choose a jury to determine whether or not a person acted in self-defense; they would not want to leave such an important decision solely up to a judge. Not only would they prefer to have twelve persons instead of just one making such a critical decision, but also they would want their own voices to be heard. The only way to enable this to happen is if members of the community, and not judges, make the final judgment.

IV. Should States Keep *Stand Your Ground*?

Having outlined the differences between *Stand Your Ground* and traditional defense law, and then establishing that citizens in a hypothetical "original position" determining laws behind a "veil of ignorance" would not choose to expand the Castle Doctrine or make it easier to prevail on a claim of self-defense, it is time to consider whether these expanded Castle Doctrine laws, or *Stand Your Ground*, should remain in

force. In this part of the article, I will argue that *Stand Your Ground* laws create more harm than good and should therefore be overturned.

A. Stand Your Ground *Laws Create Incentive to Kill*

Crafting a just self-defense law requires striking the proper balance between a person's right to use deadly force for self-preservation and an assailant's right not to be unjustifiably injured or killed. To that end, states have added requirements such as that an assailant's force must be imminent to ensure that a person is only killing when it is absolutely necessary.[134] Likewise, the requirement that fear be subjective and reasonable[135] ensures both that the person invoking the right to use deadly force actually believes that he is in danger, and that his belief is not based on delusions or hypersensitivity. The reasonability requirement is critical because it helps to protect people who are viewed as suspicious for no other reason than the color of their skin.

Although it may be less obvious, a good self-defense law must also take into account the inherent advantage that individuals have in defending a self-defense case in which the alleged attacker was killed. The advantage arises because a dead attacker is always easier to handle at trial than a living one. Even if there were other witnesses, they often have an incomplete or inaccurate picture of what occurred. When one of the parties to the confrontation is dead, it often means that only one person can fully describe the entire confrontation and give his version of how threatening the attacker appeared and how terrified the shooter felt before pulling the trigger.

Although the prospect of a murder conviction and a life sentence might dissuade a person from killing unnecessarily, the ease with which a person can prevail on a self-defense claim is arguably even more important. After all, studies have shown that increasing the likelihood of being caught is more effective at deterring crime than increasing punishment severity.[136] Even the prospect of receiving the ultimate punishment

134. *See, e.g.*, FLA. STAT. § 776.012 (2012). Some states have relaxed the imminence requirement in cases where the defendant claims she was a battered woman. See Martin E. Veinsreideris, *The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women*, 149 U. PA. L. REV. 613 (2000) (providing an overview to the ways in which the imminence requirement has been relaxed and discussing the implications for doing so). For a discussion of why the imminence requirement should be relaxed in domestic violence cases, see Richard A. Rosen, *On Self-Defense, Imminence, and Women who Kill their Batterers*, 71 N.C. L. REV. 371 (1993). For a critical take on softening the imminence requirement, see Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342 (2007).

135. *Id.*

136. Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318, 321 (2003).

of death has not been shown to deter criminality.[137]

1. How *Stand Your Ground* Creates Incentive to Kill

In most states, even with a dead victim, winning a self-defense case is difficult. Many require the defendant to bear the burden of showing that he acted in self-defense.[138] Not only must he demonstrate that his fear of death or great bodily injury was actual and reasonable, he must also prove that the danger was imminent. In many states, unless a defendant is in his house or place of work, he has a duty to retreat if he can do so in absolute safety. State legislators impose these requirements to strike a careful balance between self-preservation and the value of human life. Even an assailant's life has value, and a person should avoid using deadly force unless it is absolutely necessary.

Florida is dramatically different. A *Stand Your Ground* claim prevents the police from arresting a suspect if they have probable cause to believe that he acted in self-defense.[139] Inability to arrest a defendant means that the police lose the opportunity to search a suspect incident to arrest[140] or when he is booked into custody,[141] thus costing the police the chance to gather critical evidence. Additionally, arresting a suspect gives the police the opportunity to interrogate him about what happened. Because roughly eighty percent of those given *Miranda* rights waive them,[142] losing this interrogation opportunity may significantly lessen the prosecution's ability to obtain a conviction.[143]

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137. *Id.*; John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 789, 794 (2005); Comm. on Deterrence and the Death Penalty & Comm. on Law and Justice, Nat'l Research Council, Deterrence and the Death Penalty 2 (Daniel S. Nagin & John V. Pepper eds., 2012).

138. This author does not believe that a defendant should have the burden of proving that she killed in self-defense, even if the burden is just by a preponderance of the evidence. The author agrees with Justice Powell in *Martin v Ohio* (1987) that placing the burden of proof on the defendant means that the jurors may convict even if they have a reasonable doubt as to whether the killing was justified. As Powell explained, "Because she [the defendant] had the burden of proof on this issue, the jury could have believed that it was just as likely as not that Martin's conduct was justified, and yet still have voted to convict. In other words, even though the jury may have had a substantial doubt whether Martin committed a crime, she was found guilty under Ohio law." 480 U.S. 228, 243. Yet the author remains critical of the other parts of *Stand Your Ground* as detailed in this section as she believes that they make it too easy for a defendant to prevail. The author is grateful to Scott Sundby for pointing out this distinction.

139. Fla. Stat. § 776.032(2) (2005).

140. *See* Chimel v. California, 395 U.S. 752, 762–63 (1969) (holding that the police have the right, in the name of officer safety and the prevention of the destruction of evidence, to conduct a search of a person and the area within his reach incident to arrest).

141. *See* Illinois v. Lafayette, 462 U.S. 640, 646 (1983) (holding that the police may search the personal effects of a person under arrest incident to booking and jailing him).

142. Richard A. Leo, *Criminal Law: Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 (1996).

143. This statement should not be interpreted as approval for police interrogation techniques.

In addition, *Stand Your Ground* states that as a matter of law, a suspect is entitled to a pre-trial evidentiary hearing where, if he convinces a judge by a preponderance of the evidence that he acted in self-defense, he is immune from criminal prosecution and civil liability.[144] Such a hearing prevents jurors from weighing the evidence and deciding the case. As a matter of law, a defendant is presumed to have acted lawfully in certain situations, such as to prevent the commission of a burglary,[145] and he need not retreat even if he can do so in complete safety.[146] The presumption of acting lawfully in conjunction with no duty to retreat constitutes a de facto license to hunt and kill suspected criminals, and it makes it easier for a person to murder someone and pass it off as self-defense.

B. Stand Your Ground *Laws Lower State's Legitimacy*

Stand Your Ground lowers a state's legitimacy because it fosters racism and encourages people to violate the law.

1. Fostering Racism

Florida has a particularly ugly history of extrajudicial killings of African Americans, and *Stand Your Ground* continues that legacy. Between 1882 and 1930, 212 black men, women, and children were lynched in Florida.[147] During this period, Florida had 22% more lynchings than Tennessee, 31% more than Arkansas, 48% more than South Carolina, 80% more than Kentucky, and 183% more than North Carolina.[148] Disturbingly, the rationale for lynchings strongly resembles that of *Stand Your Ground.* In their book *A Festival of Violence: An Analysis of Southern Lynchings, 1882-1930,* Stewart E. Tolnay and E.M. Beck wrote, "Faced with what many whites perceived as increasing black-on-white crime, some thought that the formal system of criminal justice was too weak, slow, and uncertain to mete out fitting punishment. In the absence of an effective system, the community had to assume extralegal responsibility to punish offenders."[149]

Indeed, a recent Tampa Bay Times investigation showed the racial implications of *Stand Your Ground.* The authors studied nearly 200 *Stand Your Ground* cases and found that 73% of individuals who killed

144. Dennis v. State, 51 So. 3d 456, 460, 462-63 (Fla. 2010); *see also* Fla. Stat. § 776.032(1) (2012).

145. Fla. Stat. § 776.013(1) (2012).

146. *Id.* § 776.013(3).

147. Stewart E. Tolnay & E.M. Beck, A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930 101 (1995).

148. *Id.*

149. *Id.* at 18 (citations omitted).

a black person faced no penalty, as compared with 59% of individuals who killed a white person.[150] The Fourteenth Amendment guarantees equal protection of the law,[151] and these numbers suggest that black persons are not being protected equally. It's no wonder that a recent poll taken in Florida found that 69% of black voters believe that *Stand Your Ground* should be repealed or modified, as contrasted with just 28% of white voters and 34% of Hispanic voters.[152]

Even the federal government has become concerned. On May 31, the U.S. Commission on Civil Rights voted 5-3 to investigate whether *Stand Your Ground* laws are racially biased.[153] Commissioner Michael Yaki indicated that it would take extensive investigation at the local level of both police and prosecutorial records to determine, "'whether or not, as some people suspect, that 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.'"[154]

The Trayvon Martin shooting demonstrates how charged *Stand Your Ground* laws are. On April 26, 2012, neighborhood watch volunteer George Zimmerman called 911 to report a "real suspicious guy . . . [who] looks like he's up to no good . . . ."[155] Zimmerman identified the male as black and later complained, "These assholes they always get away."[156] As it turned out, the "suspicious" looking male had the right to be there. He was 17-year-old Trayvon Martin, and he was visiting his father's girlfriend—a resident of the gated community.[157] Martin had just returned from a neighborhood convenience store where he had gone to buy snacks when Zimmerman noticed him.[158] The 911 operator told Zimmerman not to follow Martin, but Zimmerman didn't

150. Martin et al., *supra* note 121.

151. U.S. CONST. amend. XIV, § 1.

152. Toluse Olorunnipa, *Poll: Most Floridians Want No Changes to Stand Your Ground Law*, MIAMI HERALD, Jul. 16, 2012, http://www.miamiherald.com/2012/07/16/2897263/poll-most-floridians-want-no-changes.html.

153. 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.

154. *Id.*

155. *Transcript of George Zimmerman's Call to Police*, contributed by Sam Baldwin, MOTHER JONES (last visited July 17, 2013), http://www.documentcloud.org/documents/326700-full-transcript-zimmerman.html.

156. *Id.*

157. Trymaine Lee, *For Trayvon Martin's parents, a journey of grief and advocacy*, NBCNEWS.COM (June 4, 2013, 11:58 PM), http://tv.msnbc.com/2013/06/04/for-trayvon-martins-parents-a-journey-of-grief-and-advocacy-2/.

158. Trymaine Lee, *Trayvon Martin Case Spotlights Florida Town's History of 'Sloppy' Police Work*, HUNTINGTON POST (Apr. 9, 2012, 8:35 AM), http://www.huffingtonpost.com/2012/04/09/trayvon-martin-cops-botched-investigation_n_1409277.html.

listen.[159] What occurred next isn't clear—Zimmerman claimed that he was attacked by Martin and fired in self-defense, whereas the prosecutor asserted that Zimmerman murdered Martin.[160] Whatever happened, one thing is sure: George Zimmerman shot and killed an unarmed teenager holding nothing but a bag of skittles and a can of iced tea.[161]

The police took Zimmerman into "investigative detention,"[162] but he was released that same evening without being charged.[163] On March 13, Sanford Police Chief Billy Lee stated that there was no evidence to contradict Zimmerman's claim that he had shot Martin in self-defense.[164] Such a statement wasn't surprising since the police failed to protect the crime scene and did not extensively canvass and interview potential witnesses in a timely fashion.[165] The case quickly garnered national attention.[166] By March 18, 2012, 200,000 people had signed a petition calling for Zimmerman's arrest, and on March 22 rallies started taking place across the country demanding the same.[167] Although Zimmerman was eventually arrested and charged,[168] the community remained bitterly divided with many feeling that the six-week delay would not have happened if Zimmerman had been black and Martin had been white.[169]

Florida Governor Rick Scott responded to the initial furor by appointing a special task force to review *Stand Your Ground.*[170]

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159. *Transcript of George Zimmerman's Call to Police*, *supra* note 155.

160. Michael Pearson & Greg Botelho, With manslaughter an option, prosecutor uses Zimmerman's words, CNN JUSTICE (July 11, 2013), http://www.cnn.com/2013/07/11/justice/zimmerman-trial.

161. Greg Pearson & Michael Botelho, 5 things to know about the George Zimmerman-Trayvon Martin saga, CNN JUSTICE (Feb. 16, 2013), http://www.cnn.com/2013/02/25/justice/florida-zimmerman-5-things.

162. Serge F. Kovaleski, *Trayvon Martin Case Shadowed by Series of Police Missteps*, at 3 N.Y. TIMES, May 16, 2012 http://www.nytimes.com/2012/05/17/us/trayvon-martin-case-shadowed-by-police-

163. Matt Gutman & Seni Tienabeso, Timeline of the George Zimmerman Murder Trial, ABC News, June 24, 2013 http://abcnews.go.com/US/george-zimmerman-trayvon-martin-timeline/story?id=19300162

164. *Id.*

165. Serge F. Kovaleski, *Trayvon Martin Case Shadowed by Series of Police Missteps*, N.Y. TIMES, May 16, 2012 http://www.nytimes.com/2012/05/17/us/trayvon-martin-case-shadowed-by-police-missteps.html?pagewanted=1&_r=0&ref=trayvonmartin

166. Trayvon Martin Shooting Anniversary: A Look back at the Case after One Year, Huntington Post, 2/26/2013 http://www.huffingtonpost.com/2013/02/26/trayvon-martin-shooting-anniversary_n_2764818.html

167. Gutman & Tienabeso, *supra* note 163

168. *Id.*

169. George E. Curry, Would Zimmerman Have Been Arrested Sooner if Trayvon Had Been White, Greater Diversity News, 4/16/2012 http://www.greaterdiversity.com/index.php?option=com_content&view=article&id=807:would-zimmerman-have-been-arrested-sooner-if-trayvon-had-been-white&catid=52:weekly-headlines&Itemid=1

170. Bill Cotterell, *Florida Task Force Recommends Preserving Stand Your Ground Law*,

Although the task force held seven hearings, they ultimately advised against any major changes in the law.[171] To many, this did not come as a surprise given the composition of the task force and the strength of the pro-gun lobby.[172]

The case finally went to trial in June 2013, and a little over two weeks later, jurors returned a verdict of not guilty on all counts.[173] Although some supported the verdict (including legal analysts who did not believe the prosecution had met their burden of proof), many were appalled.[174] Rallies, marches and candlelight vigils have occurred in cities across the country, and the NAACP has called for the federal government to file a criminal civil rights case against Zimmerman.[175] Three days after the verdict, more than one million people had signed a petition[176] asking the justice department to "address the travesties of the tragic death of Trayvon Martin."

Although Zimmerman did not try and invoke *Stand Your Ground* immunity before his criminal trial,[177] the law still overshadowed the proceedings. Zimmerman claimed in a televised interview in July 2012 that he was not familiar with *Stand Your Ground* at the time of the shooting,[178] but his former professor testified at trial that Zimmerman *had* actually been taught about the law before the shooting took place.[179] We

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REUTERS, (Feb. 22, 2013), http://www.reuters.com/article/2013/02/22/us-usa-florida-guns-idUSBRE91L16I20130222.

171. *Id.*

172. *Id.*

173. Arian Campo-Flores & Lynn Waddell, *Jury Acquits Zimmerman of All Charges*, WALL STREET JOURNAL (July 14, 2013), http://online.wsj.com/article/SB10001424127887323487950457860356276206 4502.html.

174. Hasani Gittens & Elizabeth Chuck, *Obama: Honor Trayvon Martin by battling gun violence*, NBCNEWS.COM (July 14, 2013, 10:14 AM), http://usnews.nbcnews.com/_news/2013/07/14/19467556-obama-honor-trayvon-martin-by-battling-gun-violence. *See also* David G. Savage & Michael Muskal, *Zimmerman verdict: Legal experts say prosecutors overreached*, Los Angeles Times (July 14, 2013, 7:30 PM), http://www.latimes.com/news/nationworld/nation/la-na-zimmerman-legal-20130715,0,1600588.story.

175. Verena Dobnik (Associated Press), *Rallies, marches follow Zimmerman verdict*, USA TODAY (July 15, 2013, 8:49 AM), http://www.usatoday.com/story/news/nation/2013/07/15/rallies-marches-follow-zimmerman-verdict/2517251/; Emanuella Grinberg, *Anger, sadness, but 'little surprise' over Zimmerman verdict*, CNN JUSTICE (July 14, 2013), http://www.cnn.com/2013/07/13/justice/zimmerman-verdict-reax/index.html.

176. Nick Wing, *Petition Calling For Civil Rights Case Against George Zimmerman Reaches A Million Signatures*, HUFFINGTON POST (July 16, 2013), http://www.huffingtonpost.com/2013/07/16/george-zimmerman-civil-rights-case_n_3605315.html.

177. CNN Staff, *Zimmerman to argue self-defense, will not seek 'stand your ground' hearing*, CNN JUSTICE (May 1, 2013), http://www.cnn.com/2013/04/30/justice/florida-zimmerman-defense.

178. Trymaine Lee, *George Zimmerman: Stand Your Ground Laws Unknown To Him When He Shot Trayvon Martin*, HUFFINGTON POST (July 19, 2012, 11:43 AM), http://www.huffingtonpost.com/2012/07/19/george-zimmerman-stand-your-ground_n_1685948.html.

179. Christina Sterbenz, *Former Professor Says He Taught George Zimmerman The Law He*

don't know whether that knowledge affected Zimmerman's decision to use deadly force and/or shaped what he told the police after the shooting, but it is certainly troubling that he misrepresented what he knew.

In addition, the police did not vigorously investigate the shooting but instead deferred to Zimmerman's account. Without getting inside the officers' psyches, it's impossible to know what motivated this dereliction of duty. Were the police simply an understaffed department incompetent to handle such a serious investigation, or did they use *Stand Your Ground* as a cover for explicit or implicit racism? In other words, once they saw the decedent was a young black man in a hoodie, did they simply decide that he was a guilty thug and so failed to fully investigate knowing that *Stand Your Ground* would protect them from not having done more? Although it is impossible to know whether the trial would have turned out differently if the police had done a more effective job in the very beginning, it is certainly true that their mistakes made it more difficult for the prosecution to prevail.

Finally, the jurors were instructed on *Stand Your Ground*,[180] and one later said that it affected their deliberations.[181] She also said that the jury of six women (none of whom were black)[182] did not believe that race played a role in the shooting but instead felt that Zimmerman, "'just profiled him because he was the neighborhood watch.'"[183]

2. Eroding the Rule of Law

Equally concerning is how *Stand Your Ground* erodes the rule of law. Even though the legislature has set maximum punishments for most crimes,[184] *Stand Your Ground* allows individuals to circumvent those laws. The 911 call quoted at the beginning of this article epitomizes the

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Claimed He Knew Nothing About, Business Insider (July 3, 2013, 5:06 PM), http://www.businessinsider.com/alexis-carter-testifies-in-stand-your-ground-2013-7.

180. http://www.scribd.com/doc/153354467/George-Zimmerman-Trial-Final-Jury-Instructions

181. Nicole Flatow, *Zimmerman Juror Says Panel Considered Stand Your Ground in Deliberations: 'He Had a Right to Defend Himself'*, ThinkProgress (July 15, 2013, 10:46 PM), http://thinkprogress.org/justice/2013/07/15/2306631/zimmerman-juror-says-panel-considered-stand-your-ground-he-had-a-right-to-defend-himself/?mobile=nc.

182. JET, *All Women Jury Selected in George Zimmerman Trial* (June 24, 2013), http://jetmag.com/news/all-women-jury-george-zimmerman-case/

183. Eric Pfeiffer, *Juror says Zimmerman went 'above and beyond' but that race was not an issue*, Yahoo! News (July 15, 2013), http://news.yahoo.com/-juror-says-zimmerman-went—above-and-beyond—but-that-race-was-not-an-issue—010659567.html.

184. *See* Am. Jur. 2d *Criminal Law* § 870 (2013) ("It is generally the prerogative of the legislature, in the exercise of the police power, to prescribe the punishment for crimes. . . . Legislatures have extremely broad discretion in setting the range of permissible punishments for the offenses they define. The legislature possesses wide discretion to classify and prescribe penalties for criminal offenses, and to separate penalties by degree.").

way this works.[185] Despite the police dispatcher's clear instruction to Joseph Horn to stay inside, he chose not to listen.[186] It did not matter that the police had arrived on the scene, Horn did what he wanted—he shot and killed two suspected burglars as they were making their escape.[187] In the process, Horn effectively turned what would have been a Texas statutory two to twenty year prison term for burglary into a death sentence.[188] Allowing people to act as Horn did undermines the rule of law because it allows individual citizens to become judge, jury, and executioner, thereby sanctioning extrajudicial killings.

C. *Studies Show* Stand Your Ground *Does Not Deter*

Supporters of *Stand Your Ground* justified the law by predicting not only that it would protect citizens who use deadly force in self-defense from the threat of prosecution or civil suit, but it would also "curb violent crime and make citizens feel safer."[189] The theory was that an expanded right to use deadly force would deter would-be criminals: If a person knows that he may be shot and killed if he attempts to commit a forcible felony, he will decide that it is not worth the risk.

Almost eight years after the passage of *Stand Your Ground*, politicians point to the reduced violent crime rate as proof that the law works.[190] They contend that because the rate of violent crime has dropped since *Stand Your Ground* was passed, this definitively shows that the law deters violent criminals.[191] Although this conclusion may make intuitive sense, it is too simplistic. Determining whether or not a law has had an impact on the crime rate requires doing complicated statistical analyses that tease out other factors that could have caused the decline. Indeed, these politicians would have realized their folly if they had just looked at the crime rate statistics in states that did not pass *Stand Your Ground*—they dropped there as well![192]

Although there are studies that have looked, with varying results, at

185. *The Complete Joe Horn 9-11 Call*, *supra* note 5.

186. *Id.*

187. Ellick, *supra* note 1.

188. According to Texas Penal Code Section 30.02 (a)(1), (b)(2), Entering a habitation without the owner's consent and with the intent to commit a felony, theft, or assault is classified as a second degree felony in Texas. The minimum sentence for a second degree felony is two years, and the maximum is 20 years in prison. *See* Office of the Attorney General of Texas, Penal Code Offenses by Punishment Range at 1, https://www.oag.state.tx.us/AG_Publications/pdfs/penalcode.pdf.

189. Goodnough, *supra* note 58.

190. *See, e.g.*, Shankar Vedantam & David Schultz, *'Stand Your Ground' Linked to Increase in Homicides*, NPR, (Jan. 2, 2013, 4:50 PM), http://www.npr.org/2013/01/02/167984117/-stand-your-ground-linked-to-increase-in-homicide.

191. *Id.*

192. Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or*

the impact of guns on crime,[193] this author is aware of only two that have specifically studied *Stand Your Ground* legislation. In a forthcoming publication, Cheng Cheng and Mark Hoesktra used regression techniques to estimate the impact of *Stand Your Ground* and *Castle Doctrine* laws on the crime rate in states that passed those laws between 2000 and 2010.[194] For the sake of clarity, the authors simply referred to both as *Castle Doctrine* laws.[195] Cheng and Hoekstra found that contrary to the rhetoric behind the law, *Castle Doctrine* legislation did not deter burglary, robbery, or aggravated assault.[196] It did, however, lead to an eight percent *increase* in the number of reported murders and non-negligent manslaughters.[197] This translates into 600 additional homicides per year across the twenty-one states with *Castle Doctrine* laws.[198] Cheng and Hoesktra wrote, "In short, we find compelling evidence that by lowering the expected costs associated with using lethal force, castle doctrine laws induce more of it."[199]

Chandler B. McClellan and Erdal Tekin came to a similar conclusion in a 2012 paper.[200] They looked at the impact of *Stand Your Ground* legislation on the rate of homicides due to firearm assaults.[201] Instead of looking at all *Stand Your Ground* states, McCellelan and Tekin focused on the 18 states like Florida that enacted laws specifically stating that a person has no duty to retreat from any place he has the legal right to be—in other words, states that extend the traditional castle doctrine to public areas.[202] Using regression techniques, they found that having such a law is associated with a 6.8 percent *increase* in the rate of

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Escalate Violence? Evidence from Expansions to Castle Doctrine, J. HUM. RES. (forthcoming) (manuscript at 18), *available at* http://econweb.tamu.edu/mhoekstra/castle_doctrine.pdf.

193. *See* Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 JOURNAL OF PUBLIC ECONOMICS 379–391 (2006) (Finding that gun prevalence increases the number of people injured and killed due to crime related gunshot injuries). *But see* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS (Univ. of Chicago Press, 2001) (finding that gun ownership and less restrictive gun regulations reduce the rate of violent crime through deterrence.).

194. *See generally* Cheng & Hoekstra, *supra* note 192.

195. *Id.* (manuscript at 1).

196. *Id.* (manuscript at 4).

197. *Id.*

198. *Id.*

199. *Id.* (manuscript at 5). Earlier, the authors explained what they meant by "lowering the expected costs associated with using lethal force." "They lower the expected legal costs associated with defending oneself against criminal and civil prosecution, as well as the probability that one is ultimately found criminally or civilly liable for the death or injury inflicted." *Id.* (manuscript at 1).

200. Chandler B. McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides and Injuries*, NBER WORKING PAPER 18187 (forthcoming) (2012), *available at* http://www.nber.org/papers/w18187.

201. *Id.* (manuscript at 7).

202. *Id.* (manuscript at 10).

homicides.[203] They did further analysis to conclude that these were not killings of assailants, meaning that they were not justified killings.[204] Interestingly, McClellan and Tekin found that this increase affected only whites, and in particular white males.[205] Thus they estimated that these laws result in the killing of an additional 28-33 white males every month.[206] They also found that *Stand Your Ground* was associated with an increase in emergency room visits and hospitalizations related to firearm injuries, especially among black women who had a 60 percent increase.[207]

V. CONCLUSION

The Joe Horn case disturbed many. People couldn't understand how a person could avoid being arrested after gunning down two unarmed burglars, especially when he had been told not to do so by the 911 dispatcher. Yet the Texas prosecutor declined to charge Horn, instead sending the case to a grand jury, which failed to indict him. Five years later, in Sanford, Florida, the shooting and killing of unarmed teenager Trayvon Martin galvanized people to protest *Stand Your Ground* laws. Hundreds of thousands were outraged that it took six weeks for the state to even arrest and charge George Zimmerman with a crime.[208] Zimmerman's eventual acquittal on all counts has only intensified the national debate, with many claiming that the case would have turned out differently if Martin had been white.[209] Demonstrations have taken place across the country since the verdict,[210] and over a million have signed a petition calling for the Federal Government to charge Zimmerman with civil rights violations.[211]

Even the usually cautious President Obama has spoken out on the racial implications of the verdict. In an unscheduled press conference, Obama sought to address why there was "a lot of pain" among one segment of the American population:[212] "it's important to recognize that the

203. *Id.* (manuscript at 20).

204. *Id.* (manuscript at 27).

205. *Id.* (manuscript at 20–21).

206. *Id.* (manuscript at 31).

207. *Id.* (manuscript at 30).

208. Bill Chappell, *Zimmerman Arrested on Murder Charge in Martin Case; Will Plead Not Gilty*, NPR (Apr. 11, 2012, 6:06 PM), http://www.npr.org/blogs/thetwo-way/2012/04/11/150449405/zimmerman-arrested-on-murder-charge-in-martin-case.

209. Adam Nagourney, *Prayer, Anger and Protests Greet Verdict in Florida Case*, N.Y. TIMES (July 14, 2013), http://www.nytimes.com/2013/07/15/us/debate-on-race-and-justice-is-renewed.html?pagewanted=all.

210. *See* Dobnik, *supra* note 175; Nagourney, *supra* note 209.

211. *See* Wing, *supra* note 176.

212. CNN Political Unit, *Americans divided over Zimerman verdict, poll finds*, CNN (July

African-American community is looking at this issue through a set of experiences and a — and a history that — that doesn't go away."[213] He talked about how "most" black men, including him, had been followed in department stores or heard car doors lock as they crossed the street.[214] The President discussed how there were "racial disparities in the application of our criminal laws, everything from the death penalty to enforcement of our drug laws."[215] All of these experiences contribute, President Obama said, "to a sense that if a white male teen was involved in the same kind of scenario that, from top to bottom, both the outcome and the aftermath might have been different."[216]

Although Attorney General Eric Holder has indicated that the Justice Department is continuing its investigation into Zimmerman, many legal analysts believe that a federal civil rights prosecution is unlikely because the Government would have to prove racial animus to prevail.[217] Regardless of whether Holder files suit, he has made his criticism of *Stand your Ground* clear. Three days after the verdict, Holder gave a speech to the NAACP in which he challenged the legitimacy of *Stand Your Ground*:

> [I]t's time to question laws that senselessly expand the concept of self-defense and sow dangerous conflict in our neighborhoods. . . . By allowing and perhaps encouraging violent situations to escalate in public, such laws undermine public safety. The list of resulting tragedies is long and, unfortunately, has victimized too many who are innocent. It is our collective obligation; we must stand OUR ground to ensure that our laws reduce violence, and take a hard look at laws that contribute to more violence than they prevent.[218]

In America's federalist system, however, it is not for the President or the Attorney General to decide what will happen to *Stand Your*

22, 2013, 1:37 P.M.), http://politicalticker.blogs.cnn.com/2013/07/22/americans-divided-over-zimmerman-verdict-poll-finds/.

213. Two national opinion polls conducted soon after the verdict found that Americans were divided on racial lines. A Washington Post/ABC News survey found that 86% of African Americans disapproved of the not guilty verdict as compared with 51% of whites who approved. *Id.* A Pew survey found the same percentage of African Americans disapproving of the verdict; *Transcript: President Obama addresses race, profiling and Florida law*, CNN (July 19, 2013), http://www.cnn.com/2013/07/19/politics/obama-zimmerman-verdict/index.html.

214. *Id.*

215. *Id.*

216. *Id.*

217. Paul Lewis, *George Zimmerman: hate crime case would be tough to prove, experts say*, THE GUARDIAN (July 15, 2013), http://www.theguardian.com/world/2013/jul/15/george-zimmerman-hate-crime-case-experts.

218. Washington Post Staff, *Attorney General Eric Holder's remarks on Trayvon Martin at NAACP convention (full text)*, THE WASHINGTON POST (July 16, 2013), http://articles.washingtonpost.com/2013-07-16/politics/40608813_1_trayvon-martin-rights-leaders-justice-department (emphasis in original).

Ground.[219] Individual states have that power and responsibility, and thus far many politicians have indicated that they plan to keep them. In Florida, for instance, Governor Rick Scott has publicly stated that he will not repeal *Stand Your Ground* because he agrees with the findings of the 2012 special state task force.[220] While Democratic leaders of the Florida House and Senate have vowed to try and overturn the law,[221] they seem unlikely to succeed. In Alabama, Democratic lawmakers have also promised to try and strike down their state's *Stand Your Ground* law, but with minorities in both houses of the legislature,[222] they acknowledge that it will be an uphill battle.[223] Although the Attorney General of New Hampshire has urged his state legislature to repeal the law, the Republican State Senate Majority Leader has indicated that any efforts to do so would be rejected.[224] Arizona Governor Jan Brewer has come out in support of her state's law, as has Georgia Governor Nathan Deal.[225] In Iowa, Republican Representative Matt Windschitl has vowed to re-introduce *Stand Your Ground* when the session begins in 2014 after failing to get it passed the year before.[226]

These lawmakers are making a profound and deadly mistake. As this Article has shown, *Stand Your Ground* undermines the rule of law by licensing individual citizens to become judge, jury, and executioner. In addition, *Stand Your Ground* creates a perverse incentive to kill espe-

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219. *See* United States v Lopez, 514 U.S. 549 (1995) (striking down a federal statute that outlawed carrying a firearm within 1,000 feet of a school because it exceeded Congress' power under the Commerce Clause). There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." United States v. Morrison, 529 U.S. 598, 618 (2000) (footnote omitted) (citing *Lopez*, 514 U.S. at 566).

220. Elliott C. McLaughlin, *Protesters stand up to 'stand your ground,' but laws likely here to stay*, CNN.COM (July 19, 2013), http://www.cnn.com/2013/07/18/us/florida-stand-your-ground.

221. Tom Brown, *Florida lawmakers want overhaul of 'Stand Your Ground' law*, REUTERS (July 18, 2013), http://www.reuters.com/article/2013/07/18/us-usa-florida-shooting-lawmakers-id USBRE96H1HP20130718.

222. Justin Haas, *Republicans gain control of the Alabama state legislature for the first Time in 136 Years*, BALLOT NEWS (Nov. 8, 2010), http://ballotnews.org/2010/11/08/republicans-gain-control-of-the-alabama-state-legislature-for-the-first-time-in-136-years/.

223. Brian Lyman, *Democrats vow to repeal Alabama's 'Stand Your Ground' law*, MONTGOMERY ADVERTISER (July 23, 2013), http://www.montgomeryadvertiser.com/article/2013 0724/NEWS02/307230025/.

224. Kevin Landrigan, *NH Attorney General wants legislature to repeal Stand Your Ground law*, THE TELEGRAPH (JULY 18, 2013), http://www.nashuatelegraph.com/news/politics/1011045-476/nh-attorney-general-wants-legislature-to-repeal.html.

225. Curt Anderson, *Stand Your Ground Laws: Despite Outcry, Repeals Unlikely*, HUFFINGTON POST (July 21, 2013), http://www.huffingtonpost.com/2013/07/21/stand-your-ground-laws_n_ 3631625.html.

226. Adam B. Sullivan, *Iowa may examine 'stand your ground'*, PRESS-CITIZEN.COM (JULY 19, 2013), http://www.press-citizen.com/article/20130720/NEWS01/307200017/Iowa-may-examine-stand-your-ground-

cially for shooters like Joe Horn and George Zimmerman who are familiar with the law and know that they will have an easier time prevailing without the alleged attacker alive to testify against them. Indeed, two recent studies show that *Stand Your Ground* actually *increased* the number of reported murders and non-negligent homicides.[227] Layered on to these troubling facts is how *Stand Your Ground* makes African Americans feel that they are not equally protected under the law. The cowboy mentality that *Stand Your Ground* fosters is dangerous, not just to young black men like Trayvon Martin, but to the legitimacy of the state as a whole.

227. *See generally* Cheng & Hoekstra, *supra* note 192.