FLORIDA'S STAND YOUR GROUND LAW: THE NATIONAL RIFLE ASSOCIATION AND IMPLICIT RACIAL BIAS

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I. INTRODUCTION

Browsing Facebook, I came across a picture posted by a Florida friend. The picture was of a young black male with long braided hair that stood up at odd angles. The caption read: "For my buddies that hunt: I shot this 18 pointer off my front porch this morning. I used KFC scent and subwoofers to draw him in." The post was obviously intended to be humorous; however, the fact that some people joke about shooting young black men for sport illustrates the troubling direction America is headed in terms of race and gun laws.

This unfortunate path has been influenced by the National Rifle Association ("NRA") via its advancement of an agenda that exploits the history of American racism.[1] The NRA successfully promoted the passage of the first Stand Your Ground ("SYG") self-defense law in Florida by taking advantage of existing racial tensions and southern attitudes toward violence by fostering a culture of fear

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[1] *Cf.* Editorial, *The Shoot-First State*, WASHINGTON Post, May 1, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/04/30/AR2005043000735.html [hereinafter *Shoot-First*] ("The NRA believes it has a favorable climate, especially in the South . . . in which to market its macho bill"); Amanda Marcotte, *The History of the NRA is Really Interesting*, THE RAW STORY, (July 24, 2012, 9:53 E.D.T.), http://www.rawstory.com/rs/2012/07/24/the-history-of-the-nra-is-really-interesting ("gun hysteria and the belief that gun control is a direct attack on the right of white Americans to protect themselves from nebulous 'crime' emerged in response to the civil rights movement"); *See also* Adam Winkler, *The Secret History of Guns*, THE ATLANTIC, Sept. 2011, http://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/?single_page=true ("The gun control laws of the late 1960s, designed to restrict the use of guns by urban black leftist radicals, fueled the rise of the present-day gun-rights movement-one that, in an ironic reversal, is predominantly white, rural, and politically conservative."). U.S. Rep. Hank Johnson discussed the motives and tactics of the NRA in advancing its agenda.

> I think they have invoked racist sensitivities. They . . . are certainly not free of those kinds of tactics to win their battle. They will gladly confuse people. They will gladly divide people. And so whatever it takes for them to accomplish their objective, which is no limits on firearm use and possession whatsoever. . . . Really the ideas of cowboys and everybody has a weapon and there are no limits, there's no court system, there's no justice, everything is just simply handled right there on the spot between the people who disagree with each other — we're much more civilized than that. And so our society has gotten to the point where we must look at the types of weaponry that is available to the citizenry and whether we want citizens to have those weapons, whether or not there should be any restraints on what" types of weapons are available, any regulations at all. That's what we are dealing with now.

Daniel Malloy, *Hank Johnson: NRA Has "Invoked Racist Sensitivities,"* Political Insider with Jim Galloway, ATLANTA JOURNAL CONSTITUTION, Jan. 31, 2013, http://blogs.ajc.com/political-insider-jim-galloway (hereinafter Malloy). S*ee generally* Lawson, *infra* note 34, for a discussion of race, Trayvon Martin, and self-defense law. *See generally* Schulze, *infra* note 181(discussing the origins of SYG laws); *see infra* note 2; *see infra* Parts V and VI.

and racial animosity.[2] The successful NRA SYG campaign that originated in Florida has spread across the country to include over half of the United States.[3] While SYG enables people to protect themselves and their property,[4] it embodies an implicit racial bias that undermines the American ideals of equality and the value of human life.[5] Florida and states that have adopted similar SYG laws should reevaluate their impact and consider their repeal. The killing of Trayvon Martin, discussed below, provides a tragic example of what SYG laws can produce.

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[2] *See infra* Parts V & VI; Paul Solotaroff, *A Most American Way to Die*, ROLLING STONE, April 25, 2013, at 58, 61 ("[Marion Hammer's] Stand Your Ground bill, which passed with ease despite being built on a convenient tale – Hammer claimed to have been stalked in a parking garage by six men, one of whom wielded a 'long-necked beer bottle' before she pulled out her .38 and aimed – gave anyone who deemed himself under attack the right to fire first and explain later."). *Cf. Who is the NRA Leadership?* http://www.meetthenra.org/issues?field_issue_value_many_to_one=Race (quoting NRA leaders making racially inflammatory statements).

> One only has to look to the NRA's Board of Directors to discover that the organization is operated by a group of individuals who promote racism, misogyny, homophobia, anti-immigrant animus, religious bigotry, anti-environmentalism, and insurrectionism. Some active board members have even had close relationships with brutal dictators in outside nations. Put simply, members of the NRA leadership no longer make for polite company.

Meteor Blades, *Fighting the NRA Leadership Means Knowing Who it is*, DAILY KOS (Dec. 21, 2012), http://www.dailykos.com/story/2012/12/21/1172692/-Fighting-the-NRA-leadership-means-knowing-who-is-in-it (quoting the Educational Fund to Stop Gun Violence); *See generally* Barney Warf, *The Deep Historical Roots of White Southern Cultures of Justice*, 47(1) SOUTHEASTERN GEOGRAPHER 92, 93-94 (2007) (discussing the historic roots of southern attitudes toward race and violence); *Id.* at 94 ("long standing racism . . . permeated southern culture, even after the civil rights movement of the 1950s and 1960s"); Richard Maxwell Brown, *Southern Violence-Regional Problems or National Nemesis?: Legal Attitudes Toward Southern Homicide in Historical Perspective*, 32 VAND. L. REV. 225, 228 (1979) [hereinafter *Southern Violence*] (discussing J. REED, THE ENDURING SOUTH 45-56 (1972) ("southerners retain a value system and behavior patterns that make them more tolerant of violence and 'the use of force' than other Americans"); Daniel Michael, *Florida's Protection of Persons Bill*, 43 HARV. J. LEG. 199, 203 (2006) (discussing Marion Hammer, *At Last, Balance Shifts Away from Criminals*, ATLANTA JOURNAL-CONSTITUTION, May 2, 2005 at 11A) ("the bill was not introduced in response to a specific case or incident but rather was an attempt to counterbalance the protection courts give to the rights of criminals vis-à-vis the rights of their victims."). *Cf.* Tom Dias, *Bloody Reel-How the NRA and the Gun Industry Exploit Violent Movies to Sell Guns . . . and More Guns*, FAIRLY CIVIL (Jan. 2, 2013 at 11:23 AM), http://tomdiazgunsandgangs.com/2013/01/02/bloody-reel-how-the-nra-and-the-gun-industry-exploit-violent-movies-to-sell-guns-and-more-guns ("For over a decade the NRA has glamorized the use of guns in violent movies."); Schulze, *infra* note 181at 39-40 (explaining how SYG laws promote fear); *see infra* Parts V.-VII; *see generally* Eitches, *infra* note 336 (discussing the NRA's use of racism and a culture of fear); *see generally* NAT'L RIFLE ASS'N, FREEDOM IN PERIL: GUARDING THE 2ND AMENDMENT IN THE 21ST CENTURY (2006), http://boingboing.net/images/NR-F8_PERILFINAL.pdf (last visited Feb. 10, 2014) (hereinafter FREEDOM IN PERIL) (providing an example of the NRA's culture of fear and racial animosity).

[3] *See infra* note 318.

[4] FLA. STAT. ANN. §§776.012-.013; 776.031-.032; *see infra* Part III.C.5.

[5] *See generally* P. Leuvonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground*, 35.1 S. U. L. REV. 1 (2007) (explaining how abrogation of the duty to retreat negatively affects the value of life); *Id.* at 1 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 176, 186-87 (1976) ("For the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law... the law will not hold the survivor intirely guiltless."). *See infra* Part VII.

II. TRAYVON MARTIN

The killing of Trayvon Martin illustrates a disturbing result of SYG law. Neighborhood Watch volunteer, George Zimmerman, fatally shot a black teenager, Trayvon Martin, on February 26, 2012.[6] That night, Martin walked to the store to buy Skittles and iced tea.[7] Zimmerman spotted Martin while Martin was walking back to the house belonging to his father's girlfriend, located in a gated community near Orlando.[8] Zimmerman found Martin's appearance suspicious, so he called the police and explained to a dispatcher, "these a--holes always get away."[9] Zimmerman claimed that Martin looked questionable because he was meandering in the rain, looking at houses,[10] and wearing a sweatshirt with the hood pulled up.[11] The dispatcher instructed Zimmerman to wait for police and stay in his car.[12] Zimmerman, however, disregarded the instructions and left his vehicle to follow Martin.[13] The two allegedly got into a fight, and Zimmerman shot and killed Martin.[14] Witnesses stated that they heard someone yell for assistance, but they could not identify whether it was Martin or Zimmerman.[15]

Zimmerman maintained that he shot Martin in self-defense. The police did not initially arrest him,[16] claiming that they lacked evidence to disprove Zimmerman's assertion.[17] Chris Serino, the police investigator who interviewed Zimmerman, doubted Zimmerman's self-defense claims, but Serino's superiors dismissed Serino's suspicions about Zimmerman's guilt.[18] On March 12, 2012, the chief of police in Sanford stated that no charges were brought against Zimmerman because there were "no grounds to disprove his account of the events."[19]

On March 8, 2012, Martin's family and attorneys for the family held a news conference to create awareness of the homicide and the inaction of local authorities.[20] Observers speculated that the killing was racially motivated and

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[6] Matt Gutman & Seni Tienabeso, *Orlando Watch Shooting Probe Reveals Questionable Police Conduct*, ABC NEWS (Mar. 13, 2012), http://abcnews.go.com/US/neighborhood-watch-shooting-trayvon-martin-probe-reveals-questionable/story?id=15907136.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Transcript of George Zimmerman's Call to Police*, https://www.documentcloud.org/documents/326700-full-transcript-zimmerman.html (last visited Jan. 24, 2012) [hereinafter *Transcript*].
[11] Gutman & Tienabeso, *supra* note 6.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Peter Grier, *Trayvon Martin Case: Why Hasn't Zimmerman Been Arrested?*, CHRISTIAN SCIENCE MONITOR, Mar. 28, 2012, http://www.csmonitor.com/USA/Justice/2012/0328/Trayvon-Martin-case-Why-hasn-t-George-Zimmerman-been-arrested-video.
[18] *Id.*
[19] *Timeline of Events in Trayvon Martin Case*, CNN (June 20, 2012), http://www.cnn.com/2012/06/12/justice/florida-zimmerman-timeline/index.html [hereinafter *Timeline*]. This charging decision was probably the result of the chief of police's understanding of the statutory immunity provided by SYG. FLA. STAT. ANN. § 776.032.
[20] *See Timeline*, *supra* note 19.

reflected widespread racism.[21] Due to the local police department's inaction, the Justice Department began an investigation into the killing.[22] Because of the appearance that local authorities were not properly investigating the homicide, Florida Governor Scott appointed a special prosecutor on March 22, 2012.[23] Meanwhile, public outrage was growing at the failure of police to make an arrest.[24] Protests were organized across the country to bring attention to the Martin killing.[25] On April 11, 2012, after the appointment of the special prosecutor and enormous public pressure on authorities to make an arrest, Zimmerman was charged with second-degree murder for killing Trayvon Martin. Zimmerman pled not guilty.[26] .[27] Sanford's chief of police was eventually fired for his mishandling of Zimmerman's case.[28]

Zimmerman's trial was set for June 10, 2013,[29] and observers speculated that the trial and stand your ground hearing would be combined.[30] A stand your ground hearing allows a defendant in a criminal trial to plead self-defense under

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[21] Cherry Davis, *Trayvon Martin Case Signals Trend of New Racism in America*, POLICY MIC, http://www.policymic.com/articles/7271/trayvon-martin-case-signals-trend-of-new-racism-in-america (last visited Mar. 17, 2013).

[22] *See Timeline*, *supra* note 19.

[23] *Id.* Scott appointed 4th Judicial Circuit State's Attorney Angela Corey. *Id.*

[24] A "petition for Zimmerman's arrest reaches 1 million signatures." *Id.*

[25] *Trayvon Martin Protest in LA: 'Million Hoodie March' Calls for Justice* (April 4, 2012), http://www.huffingtonpost.com/2012/04/10/trayvon-martin-protest-la_n_1415208.html (describing protests in Los Angeles where marchers wore hoodies to show solidarity with Martin); *Trayvon Martin Protests: Demonstrations Nationwide Call for Justice*, NY DAILY NEWS , Mar. 17, 2013, http://www.nydailynews.com/news/national/trayvon-martin-protests-million-hoodie-march-demonstrations-call-justice-gallery-1.1049189#pmSlide=1 (showing pictures of demonstrations across Florida, Michigan, and New York); Noah Trister, *Miami Heat Protest Trayvon Martin Case*, HUFFINGTON POST (Mar. 23, 2012), http://www.huffingtonpost.com/2012/03/24/miami-heat-protest-trayvon_n_1376922.htmlhttp://www.cnn.com/2012/06/12/justice/florida-zimmerman-timeline/index.html (describing the Miami Heat players' protest of Martin's killing by posing for a photo wearing hooded sweatshirts and standing with their hands in their pockets).

[26] *See Timeline*, *supra* note 19.

[27] Meredith Rutland, *Sanford Police Chief Bill Lee Fired In Wake Of Trayvon Martin Case*, THE MIAMI HERALD, June 20, 2012, http://www.miamiherald.com/2012/06/20/2860209/sanford-police-chief-bill-lee.html.

> Activists, students and ardent supporters across Florida and the country held rallies and marches to push for Zimmerman's arrest. They included more than 1,000 Miami-Dade high school students. In protest, they wore hoodies and carried Skittles candy, as Trayvon had in his final moments. The Rev. Al Sharpton held a rally with thousands of supporters in Sanford. *Id.*

Gene Demby, *LeBron James Tweets Picture Of Miami Heat Wearing Hoodies In Solidarity With Family Of Trayvon Martin*, THE HUFFINGTON POST (Mar. 3, 2012, 2:12 PM, updated Mar. 27, 2012, 2:34 PM), http://www.huffingtonpost.com/2012/03/23/lebron-heat-trayvon-tweet_n_1375831.html.

[28] Rutland, *supra* note 27 ("the firing stemmed from the impact of Lee's handling of the Trayvon Martin [case]").

[29] Jeff Weiner, *George Zimmerman Defense Ponders Request to Combine 'Stand Your Ground' Hearing with Trial*, ORLANDO SENTINEL, Feb. 17, 2013, *available at* http://articles.orlandosentinel.com/2013-02-17/news/os-george-zimmerman-stand-your-ground-trial-20130217_1_george-zimmerman-trayvon-martin-mark-o-mara.

[30] Jeff Black, *Zimmerman Won't Seek 'Stand Your Ground' Hearing in April*, NBC NEWS.COM, http://usnews.nbcnews.com/_news/2013/03/05/17197493-zimmerman-wont-seek-stand-your-ground-hearing-in-april?lite (last visited Mar. 17, 2013).

SYG law before going to trial.[31] Zimmerman waived his right to a separate stand your ground hearing that was scheduled for April 2013.[32] If Zimmerman had appeared at the stand your ground hearing, he could have claimed self-defense and sought immunity under the statute.[33]

The Martin case is particularly disturbing because it appears to be a racially motivated killing of an innocent teenager.[34] First, Martin was an unarmed youth walking in a neighborhood where he had every right to be.[35] He had gone to the store for snacks,[36] an apparently innocent activity. Zimmerman's call to police suggests that Zimmerman found Martin suspicious because he was black.[37] While talking to the dispatcher, Zimmerman mentioned Martin's race at least twice.[38] Zimmerman also seemingly objected to Martin's clothing and claimed Martin looked like he was intoxicated.[39] This suggests racial stereotyping or that Zimmerman had an implicit racial bias because, reasonably speaking, there isn't anything particularly suspicious about wearing a sweatshirt with the hood pulled up while walking in the rain.[40]

The second disturbing issue surrounding the Martin shooting is that Zimmerman's actions were not apparently motivated by self-defense, nor were they necessary to prevent a crime.[41] Rather, Zimmerman seemed to be concerned that

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[31] FLA. STAT. ANN. §§776.012-.013; 776.031-.032; *Florida's Stand Your Ground Law*, Sammis Law Firm, http://www.criminaldefenseattorneytampa.com/PracticeAreas/DomesticViolenceBattery/StandYourGroundLaw.aspx (last visited march 17, 2013) ("During the evidentiary hearing the trial court considers the disputed issues of fact and must make a finding under the preponderance of the evidence standard. The court can either dismiss the charges or allow the prosecution to go forward.").

[32] *Id.*; *see* Weiner, *supra* note 29; Black *supra* note 30.

[33] FLA. STAT. ANN. §§776.012-.013; 776.031-.032; *George Zimmerman Loses Attempt To End GPS Monitoring Before Trayvon Martin Trial*, CBS NEWS (Dec. 11, 2012), http://www.cbsnews.com/8301-201_162-57558461/george-zimmerman-loses-attempt-to-end-gps-monitoring-before-trayvon-martin-trial ("[Judge] Nelson has set a trial date for June 10. She can also set a 'stand your ground' hearing 45 days before trial where Zimmerman can argue it was self-defense and ask the judge to drop the charges.").

[34] Zimmerman repeatedly mentions Martin's race in his call to police. *Transcript, supra* note 10; Tamara F. Lawson, *A Fresh Cut in an Old Wound - A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 272-72 (2012) ("Fundamentally, the Martin killing is a hybrid case about both race and law, and the government's response to each.").

[35] Gutman & Tienabeso, *supra* note 6 ("Martin had been staying at his father's girlfriend's house during the night of the NBA All-Star game Feb. 26.").

[36] Gutman & Tienabeso, *supra* note 6 ("The teenager went out to get some Skittles and a can of ice tea.").

[37] *Transcript, supra* note 10 (describing Martin, Zimmerman stated, "He's got his hand in his waistband. And he's a black male.").

[38] *Id.*

[39] Zimmerman told the dispatcher, "This guy looks like he's up to no good, or he's on drugs or something." *Id.*

[40] Lawson, *supra* note 34, at 279 ("Trayvon was unarmed, not committing any crime, and was walking from the store with a bottle of iced tea and candy. It seems the only thing he was doing that was suspicious, was being - unfortunately for Trayvon, being Black.").

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> The encounter between George Zimmerman and Trayvon Martin was ultimately avoidable by Zimmerman, if Zimmerman had remained in his vehicle and awaited the arrival of law enforcement, or conversely if he had identified himself to Martin as a concerned

Martin might be trying to burglarize houses in the neighborhood.[42] While SYG was designed to provide immunity for self-defensive use of deadly force, Zimmerman followed and confronted Martin even though Martin posed no physical threat to him,[43] nor was Martin in Zimmerman's *castle*.[44] Martin would have been equally, if not more, justified in claiming that he had the right to stand his ground and defend himself against Zimmerman's aggression because Zimmerman targeted and followed Martin.[45] He approached Martin after he was instructed to stay in his vehicle.[46] It is probable that a teenager on foot would feel more threatened by an armed adult in a car who was following him, rather than the reverse. Zimmerman had the gun. Under SYG law, the question remains, does might make right?

III. SELF-DEFENSE LAW: FROM PAST TO PRESENT

A. *A Brief History of Self-Defense Law*

The right of a person to use deadly force in self-defense has evolved over time and reflects the values of the society in which it evolved. Context and history are key to understanding modern self-defense laws. English common law changed over the centuries from no right to kill in self-defense[47] to a limited right to kill in self-defense after retreating.[48] Castle doctrine was established in England as an

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> citizen and initiated dialog [sic] in an effort to dispel each party's concern" . . . There is no indication that Trayvon Martin was involved in any criminal activity.

Police: Trayvon Martin's Death 'Ultimately Avoidable,' CNN (May 18, 2012, 11:13 AM) (quoting Sanford, Florida police documents); *Transcript, supra* note 10 ("[Martin] was just staring . . . looking at all the houses").

[42] *Id.*; *Transcript, supra* note 10, (quoting Zimmerman, "Hey, we've had some break-ins in my neighborhood, and there's a real suspicious guy . . . . ").

[43] *Id.*

[44] "Castle" here refers to the traditional use of the term, when a person has the right to defend himself without first retreating because he is in his home. *See* State v. James, 867 So.2d 414, 416 (Fla. App. Ct. 2003) (discussing castle doctrine). Zimmerman and Martin were both on the street. *Transcript, supra* note 10.

[45] FLA. STAT. ANN. §§776.012-.013; 776.031-.032; *see Transcript, supra* note 10

[46] Gutman & Tienabeso, *supra* note 6 ("A dispatcher told [Zimmerman] to wait for a police cruiser, and not leave his vehicle.").

[47] The "right to kill in self-defense was slowly established, and is a doctrine of modern rather than medieval law." Joseph H. Beale, *Retreat from Murderous Assault*, 16 HARV. L. REV. 567, 567 (1903). At early English common law, there was no justification or excuse for homicide. *See* Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly legal Doctrines*, 14 J. L. & POL'Y, 617, 626 (2006).

The monarch maintained a monopoly on the use of force. Jason W. Bobo, *Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand their Ground*, 38 CUMB. L. REV. 339, 343 (2008) (citing BROWN, NO DUTY, *infra* note 48, at 4 ("the state wanted to keep a monopoly over the resolution of conflict at the level of dispute between individuals"); Benjamin Levin, *Note, Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS., 524, 528 (2010). "[T]he king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge of one another." JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY, 58 (2009) (quoting MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 481 (photo. reprint 2003) (1736).

[48] WILLIAM BLACKSTONE, 4 BLACKSTONE'S COMMENTARIES, http://www.lonang.com/exlibris/blackstone/bla-414.htm (last visited Apr. 23, 2013) [hereinafter BLACKSTONE] ("For which reason the law requires, that the person who kills another in his own

exception to the duty to retreat before using lethal force to self-defend in one's home.[49] Castle doctrine empowered a person in his home to use deadly force if he

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defense, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant"). In England, certain limited exceptions to the homicide prohibition gradually gained ground, though the legal presumption was against the actor claiming self-defense. RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY, 3 (1991) [hereinafter BROWN, NO DUTY] (discussing BLACKSTONE). English common law was formulated to prevent subjects from confusing self-defense with the prerogative to kill a fellow subject. *Id.* (quoting BLACKSTONE). Justified homicide, a killing that was not deemed wrongful, was limited to those authorized by writ from the King. Levin, *supra* note 47, at 528 The King's writ only sanctioned the killing of criminals who could not be taken without force. *Id.* (quoting Beale, *supra* note 47, at 567). Hence, only killings in service of the crown were justified. *Id.* Homicides committed in self-defense were excused rather than justified, attaching a degree of guilt to the killing. *Id.*(citing RICHARD MAXWELL BROWN, NO DUTY TO RETREAT 4 (1991); BLACKSTONE, *supra*. In order to qualify for a king's pardon on the basis of a self-defensive killing, the killer was required to retreat "to the wall" prior to the use of force and show that the killing was necessary for self-defense. BLACKSTONE *supra* ("But if A upon a sudden quarrel assaults B first, and upon B's returning the assault, A really and *bona fide* flees; and being driven to the wall, turns again upon B and kills him; this may be *se defendendo* according to some of our writers"); BROWN, NO DUTY, *supra* , at 3 (quoting FREDERICK S. BAUM & JOAN BAUM, LAW OF SELF-DEFENSE 5-9 (1970)) ("Before the court in the English common-law tradition would countenance killing in self-defense two essential tests had to be met: that of retreat or avoidance and that of 'reasonable determination of necessity.'"). This retreat requirement demonstrates the English ideal of civility and the rule of law over violence. Jason W. Bobo, *Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand their Ground*, 38 CUMB. L. REV. 339, 343 (2008) (citing BROWN, NO DUTY, *supra*,, at 20); Levin, *supra*, note 47, at 530 (discussing BLACKSTONE). English government intended to prevent murder and adjudicate disputes in the courts, resulting in low homicide rates. BROWN, NO DUTY, *supra*, at 4-5.

[49] Semayne's case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1604), *available at* http://esurveillance.ist.psu.edu/SemaynesCase1604.pdf; Beale, *supra* note 44, at 575-76 (citing 2 P. & M. Hist. 476). While the English held tightly to the notion of retreat before employing deadly force in self -defense, the castle doctrine was an early exception to the retreat rule in England. *See supra* notes 47-48; Semayne's case, 5 Co. Rep. 91a, 91b (K.B. 1604). In 1604, Semayne's case affirmed Castle Doctrine.

> [T]he house of everyone is to him as his castle and fortress, as well as for his defence against injury and violence, as for his repose; and although the life of a man is a thing precious and favoured in law;…if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not a felony, and he shall lose nothing.

Id. In one's home, a person who was attacked had the right to self-defense without first retreating. Beale, *supra* note 47, at 574-75 (citing 2 P. & M. Hist. 476). English culture had embraced the belief that "a man's home is his castle" and the home was, therefore, afforded greater protection in the law. Levin, *supra* note 47, at 530. "[I]n the home, the tenderness for peace of which Blackstone spoke was overridden by 'tender…regard to the immunity of a man's house.' SUK, *supra* note 47, at 59 (2009) (quoting BLACKSTONE'S COMMENTARIES).

The castle/home was the first realm in which a man could stand his ground in self-defense. The state monopoly on violence yielded when a man was attacked in his home because of the high regard in which English society held land and the home. *Cf.* SUK, *supra* note 47, at 59 (2009). American law adopted the castle doctrine as it was applied in England. People v. Tomlins, 107 N.E. 496, 97 (N.Y. 1914) ("The homicide occurred in the defendant's dwelling. It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.").

felt threatened, without first retreating.[50] American courts generally, however, did not retain the duty to retreat prior to using self-defensive deadly force.[51] As Americans settled the west, judges in the western states began to make the *stand your ground* rule the common law.[52] Even with the decline of the duty to retreat, castle doctrine's notion of the home as a unique refuge remained.[53]

The shift in self-defense law, from the duty to retreat to *stand your ground*, revealed a shift in fundamental civic and cultural values. "The centuries-long English legal severity against homicide was replaced in our country by a proud new tolerance for killing in situations where it might have been avoided by the duty to retreat."[54] The value of civility was supplanted by the masculinity of the "true man."[55] *Erwin v. State* gave America the "true man" standard of self-defense, meaning that a *true man* need not retreat from a threat.[56] Defendant, Erwin, was a landowner leasing farmland to his son-in-law.[57] The two men had a disagreement about who controlled the shed that sat between their houses.[58] They argued about control of the shed and the defendant, who was in the shed and had a pistol, warned his son-in-law not to come closer.[59] The son-in-law had an ax in his hands and came towards the defendant within striking distance.[60] The defendant fatally shot his son-in-law.[61] The Ohio Supreme Court found the killing justified and held that "[i]f a thief assaults a true man either abroad or in his house to rob him or kill him, the true man is not bound to give back, but may kill the assailant, and it is not a

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[50] Semayne's case, 5 Co. Rep. 91a, 91b.

[51] The movement away from the retreat duty originated with the ideas of Englishmen Sir Michael Foster. BROWN, NO DUTY, *supra* note 48, at 6-7. Foster wrote in 1762 that "the injured party may repel force by force in defence of his person." *Id.* at 6. East introduced the notion that a man need not retreat before using deadly force in self-defense: i.e. a man may stand his ground. *Id.* But England was not substantially influenced by the idea of standing one's ground and ultimately retained the duty to retreat. *Id.* at 7, (citing IAN MCLEAN AND PETER MORRISH, HARRIS, CRIMINAL LAW 455 (22nd ed. 1973)). American Joel Prentiss Bishop wrote the first text on American law underived from English books. BROWN, NO DUTY, *supra* note 48, at 7 (citing JOEL PRENTISS BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW (1856); H.W. HOWARD KNOTT, BISHOP, JOEL PRENTISS ; DICTIONARY OF AMERICAN BIOGRAPHY, II, 295-96). Bishop vehemently argued for the stand your ground rule adopted from Foster and East as the law of the land in America. BROWN, NO DUTY, *supra* note 48, at 7-8 (quoting Bishop, "if a man murderously attacked by another flies instead of resisting, eh commits substantially [the] offense of misprision of felony."). He went so far as to suggest that retreating from murderous attack is itself a criminal offense. BROWN, NO- DUTY, *supra* note 48, at 8.

[52] BROWN, NO DUTY, *supra* note 48, at 8 ("state after state saw its highest court repudiate the duty to retreat in favor of the doctrine of standing one's ground").

[53] *See generally* D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006) (discussing the significance of the concept of the home).

[54] BROWN, NO DUTY, *supra* note 48, at 5.

[55] Erwin v. State, 29 Oh. St. 186, 195 (1876) ("If a thief assaults a true man either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not a felony.").

[56] *Id.*

[57] *Id.* at 192.

[58] *Id.* at 192-93.

[59] *Id.* at 193.

[60] *Id.*

[61] *Id.*

felony."[62] The *true man* doctrine holds that a man who is threatened may stand his ground and need not retreat.[63]

In *Runyon v. State*, the Indiana Supreme Court also upheld the no retreat rule, explaining that the "American mind" is opposed to retreating, even to save a life.[64] The decision equated retreat with cowardice, suggesting that retreat is un-American.[65] The trend in American law was geared towards more freedom to use deadly force.[66] A number of state supreme court cases adopted the no retreat rule in western and frontier states,[67] resulting in an eventual majority embracing no retreat.[68] This *no retreat* ethic is arguably the precursor to today's stand your ground movement that commenced with the passage of Florida's 2005 SYG law.[69]

B. *Florida's Law Prior to Stand Your Ground*

1. Florida's Old Retreat Rule

To understand how Florida's law has changed since the passage of SYG in 2005, an explanation of the earlier law is necessary. Prior to the passage of SYG, courts in Florida required retreat before using lethal force in self-defense.[70] "Florida, in accord with a strong minority of jurisdictions throughout the country, has imposed . . . [a] requirement that the defender against a violent attack has a duty to avoid the difficulty and retreat from the affray, before using deadly force."[71] The rationale for the retreat rule was articulated by American courts as recognizing the value of human life.[72] Retreat was not required before using non-deadly force

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[62] *Id.*

[63] *Id.* at 196 ("there are cases in which the man may, without retreating, oppose force to force, even to the death").

[64] Runyan v. State, 57 Ind. 80, 84 (1877) ("Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to safe human life").

[65] BROWN, NO DUTY, *supra* note 48, at 17.

[66] Steven P. Aggergaard, *Criminal Law-Retreat from Reason: How Minnesota's New No-Retreat Rule Confuses the Law*, 29 WM. MITCHELL L. REV. 657, 660 (2002) ("As crime rates rose in the latter half of the 20th century, Americans increasingly voiced a right to self-defense as debate intensified over levels of force available to protect self, family, and home.").

[67] BROWN, No Duty, *supra* note 48 ("state after state saw its highest court repudiate the duty to retreat in favor of the doctrine of standing one's ground").

[68] *Id.* at 682 (discussing State v. Glowacki, 630 N.W.2d 392 (Minn. 2001)) ("the court adopted a new no-retreat rule and professed to join a majority of states that do not require flight from one's home when faced with attack from a co-resident."); *Cf.* Redondo v. State, 380 So. 2d 1107, 1110 (Fla. Dist. Ct. App. 1980) (explaining that retreat jurisdictions are the minority).

[69] *Cf. Id.* at 660 (2002) (As crime rates rose in the latter half of the 20th century, Americans increasingly voiced a right to self-defense as debate intensified over levels of force available to protect self, family, and home.")

[70] Redondo, 380 So. 2d at 1110 ("Florida, in accord with a strong minority of jurisdictions throughout the country, has imposed an additional requirement that the defender against such a violent attack has a duty to avoid the difficulty and retreat from the affray, before using deadly force, if he can do so consistent with his own safety without exposing himself to death of great bodily harm.").

[71] *See, e.g.,*. Redondo, 380 So. 2d at 1110; Reimel v. State, 532 So. 2d 16, 18 (Fla. Dist. Ct. App 1988) (requiring retreat "retreat to the wall" before using deadly force).

[72] Weiand v. State, 732 So. 2d 1044 (Fla. 1999) (quoting Hedges v. State, 172 So. 2d 824 (Fla. Dist. Ct. App. 1965)) ("In instructing the jury on the law of self-defense, the court informed the

because the policy underlying the retreat rule was preservation of life, and non-deadly force is, by its definition, not a threat to life.[73]

2. Florida's Old Castle Doctrine

Florida recognized the castle doctrine exception to the retreat duty prior to using deadly force in self-defense.[74] "A man is under no duty to retreat when attacked in his own home. His home is his ultimate sanctuary."[75] Castle doctrine was narrowly construed by Florida courts prior to 2005[76] in that the privilege was limited to one's own home and was not applicable to a guest in another's home.[77] The doctrine did, however, apply to a person at work "while lawfully engaged in his occupation at a place of business owned by his employer."[78] Florida courts refused to include cars within castle doctrine, on the basis that cars provide ample retreat opportunity.[79] The castle doctrine was meant to preserve life and maintain the home as a sanctuary.[80] If one flees her home, usually a place of refuge, she is arguably in more danger than before she took flight; therefore, allowing a victim to stand her ground and defend herself is more likely to preserve her life.[81]

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jury that the defendant was required to use 'all reasonable means within his power and consistent with his own safety to avoid the danger and avert the necessity of taking a human life.'").

[73] *Cf.* Redondo, 380 So. 2d at 1110; Lydia Zbreznj, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FLA. COASTAL L. REV. 231, 240-41 (2012) ("The policy justification for imposing a duty to retreat was the importance of preserving human life").

[74] State v. James, 867 So.2d 414, 416 (Fla. Dist. Ct. App. 2003).

[75] James, 867 So.2d at 416, (citing Weiand, 732 So. 2d at 1049).

[76] *Id.* ("Florida courts have defined the castle doctrine as a privilege one enjoys in *one's own* dwelling place.").

[77] *See, e.g. id.* at 416-17 ("granting castle doctrine protection to a social guest or visitor would necessarily grant the guest or visitor innumerable castles wherever he or she is authorized to visit. That, in turn, would expand the privilege of non-retreat and encourage the use of deadly force. We . . . decline to extend the 'castle doctrine' privilege to a temporary social guest or visitor in the home of another.").

[78] Redondo, 380 So.2d at 1108.

[79] Baker v. State, 506 So.2d 1056, 1059 (Fla. Dist. Ct. App. 1987).

[80] *Cf.* James, 867 So.2d at 417 (quoting Weiand, 732 So. at 1052) ("The Florida Supreme Court has said that 'the privilege of non-retreat from the home stems not from the sanctity of property rights, but from the time-honored principle that the home is the ultimate sanctuary.").

[81] *Cf. id.*; Weiand , 732 So. 2d at 1049 (quoting New York v. Tomlins, 107 N.E. 496, 197-98 (1914)).

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

3. Florida's Old Reasonable Belief Standard

While Florida's old law narrowly defined one's castle,[82] it also required that use of deadly force be reasonable.[83] Florida's old reasonable belief standard placed meaningful limits on an individual's use of deadly force in self-defense.[84] Before it was amended in 2005, Florida law only allowed the use of deadly force if the actor had a reasonable belief that the force "[was] necessary to prevent imminent death or great bodily harm . . . or to prevent the imminent commission of a forcible felony."[85] This reasonableness requirement applied to the use of force whether the actor was at home and could employ the defense of habitation or was in public and had retreated to the wall.[86] In either instance, the actor had to have a reasonable belief that the force was necessary to prevent imminent harm to himself or to prevent a forcible felony.[87]

In *Quaggin v. State*, a Florida court clarified that a homeowner using deadly force did not need to prove beyond a reasonable doubt that a felony was in fact being committed.[88] Rather, the homeowner had to prove beyond a reasonable doubt that he *reasonably believed* a burglary was being committed, that he reasonably believed the degree of force was needed, and that the crime could "only be avoided through the use of force."[89] Reasonable belief in its necessity had to precede the use of deadly force.[90]

Before 2005, Florida's self-defense law was in the majority in requiring that the use of deadly force in self-defense be reasonable,[91] and it was in the

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[82] *Id.* (limiting castle doctrine to a person's own home); Baker, 506 So. 2d at 1059 (excluding vehicles from castle doctrine).

[83] Quaggin v. State, 752 So.2d 19, 25-26 (Fla. Dist. Ct. App. 2000) ("there had to be proof beyond a reasonable doubt that Quaggin's *belief* about whether a burglary was being committed and about the necessity of using deadly force was unreasonable").

[84] *Cf. id.* (discussing the standard of proof for a reasonable use of deadly force).

[85] Wyatt Holliday, *The Answer to Criminal Aggression is Retaliation: Stand Your Ground Laws and the Liberalization of Self-Defense*, 43 U. TOL. L. REV. 406, 414 (citing FLA. STAT. ANN § 776.012) (internal quotations omitted).

[86] Weiand, 732 So. 22 at 1057, n.5, (quoting Falco v. State, 407 So. 2d 203, 208 (Fla. 1981)) (explaining that use of deadly force under castle doctrine still had to be reasonable under the circumstances).

[87] *See* Quaggin, 752 So. 2d at 25-26.

[88] *Id.* ("the evidence need not have established beyond a reasonable doubt that the boys were committing burglary").

[89] *Id.*

> In deciding whether defendant was justified in the use of force likely to cause death or great bodily harm, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of force likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the defendant must have actually believed the danger was real.

Id.

[90] *Cf. id.*

[91] *Id.* at 23. Caroline Forell, *What's Reasonable?: Self-Defense and Mistaken in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1403 (2010) ("In a strong majority of American jurisdictions, a defendant who is not an aggressor in an encounter is justified in using deadly force

minority in requiring retreat before using deadly force in self-defense outside one's castle.[92] The passage of SYG in 2005 pushed Florida to the opposite end of the spectrum.[93] Retreat was no longer a prerequisite for using deadly force,[94] nor in some instances, did deadly force have to be reasonable.[95] As discussed below, two presumptions created by the statute eliminate the requirement that the use of force be reasonable.[96] This was a radical departure from the traditional self-defense law.[97]

C. Florida's 2005 Stand Your Ground Law

In 2005, the Florida legislature barbarized Florida's self-defense law at the urging of the NRA.[98] SYG removed the traditional safeguards against inappropriate use of deadly force.[99] One SYG proponent suggested that the law creates "the unfettered right to shoot first and ask questions later."[100] The changes were implemented in two ways. The "use of force" portions of the law were amended, and two new sections were added, creating powerful presumptions and immunities for people who exercise their right to use deadly force under the statute.[101] The effects of the law are explored below.

1. Stand Your Ground Eliminated the Duty to Retreat

The most obvious change wrought in the law, and the one from which the popular name derives, is the rejection of the duty to retreat.[102] A person who "reasonably believes that [deadly] . . . force is necessary to prevent imminent death

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against another person if he *honestly and reasonably* believes . . . he is in imminent or immediate danger . . . and . . . the use of deadly force is necessary").

[92] *See generally Florida Legislation-The Controversy Over Florida's New "Stand Your Ground" Law-Fla. Stat. 776.013,* 33 FLA. ST. U. L. REV. 351 (2005); Michael, *supra* note 2, at 200-201 (2006) (citing Erwin v. State, 29 Ohio St. 186 (1876)); H.B. 249, amending FLA. STAT. § 776.012(2) (2005)) ("since the late nineteenth century, the duty to retreat has eroded as most jurisdictions have begun to view it as an unreasonable burden on societal notions of courage and dignity. Florida joins these jurisdictions and now allows a person to stand his ground when attacked and to meet force with force"). *See supra* note 70.

[93] *See generally* Michael, *supra* note 2.

[94] FLA. STAT. ANN. § 776.012.

[95] FLA. STAT. ANN. § 776.013.

[96] FLA. STAT. ANN. § 776.013.

[97] *See* Forell, *supra* note 91,, at 1403 (discussing that a strong majority of American jurisdictions require a reasonable use of force in self-defense). *See generally* Stuart Green, *Castles and Carjackers: Proportionality and the use of Deadly Force in Defense of Dwellings and Vehicles,* 1999 U. ILL. L. REV. 1, 6 (1999) (discussing the need for a proportionality requirement in use of deadly force).

[98] Michael Ono, *NRA Pushed for 'Stand Your Ground' Laws*, ABC NEWS (Mar. 31, 4:33 PM), http://abcnews.go.com/blogs/politics/2012/03/nra-pushed-for-stand-your-ground-laws ("The pro-gun group championed the passage of the original law in Florida back in 2004 and lobbied to pass similar legislation in other states, according to the Center for Public Integrity").

[99] *Cf.* Forell, *supra* note 91, at 1403 (explaining that a strong majority of American jurisdictions require a reasonable use of force in self-defense). *See generally* Green, *supra* note 97, at 6 (discussing the need for a proportionality requirement in use of deadly force).

[100] Michael B. de Leeuw, *The (New) Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 FORDHAM URB. L.J. 1449, 1490 (2012).

[101] FLA. STAT. ANN. §§776.012-.013; 776.031-.032; Holliday, *supra* note 85, at 416.

[102] FLA. STAT. ANN. §§ 776.012, 776.031.

or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony" or who otherwise acts pursuant to § 776.013 is justified in using deadly force without first retreating.[103] Under the 2005 law, "[a] person does not have a duty to retreat if the person is in a place where he or she has a right to be."[104] This is a departure from previous Florida law requiring retreat.[105] The Florida legislature intentionally dispensed with the retreat duty.[106] The responsible legislative committee explained, "[this bill] abrogates the common law duty to retreat when attacked before using [deadly] force."[107] The legislature intentionally empowered Floridians to act with less restraint when using deadly force.[108]

The adoption of SYG represents a shift in priorities for the State of Florida. Florida's previous law mirrored Professor Beale's stance that "[n]o killing can be justified . . . when the assailed can defend himself by the peaceful though often distasteful method of withdrawing to a place of safety."[109] Requiring retreat before employing deadly force is one way to show that a killing was necessary.[110] Another rationale for requiring retreat is the traditionally high value society placed on human life and the understanding that requiring retreat would prevent the unnecessary taking of a life.[111] By rejecting the retreat rule, Florida has surrendered one value in place of another. The right to use deadly force has supplanted the singular value that was formerly assigned to human life. Discarding the duty to retreat means that the law recognizes a provoked killing as a lesser evil than a person retreating from provocation because the killing goes unpunished, even if it is unnecessary.[112] Thus, the no-retreat rule places one person's honor above another person's life,[113] distorting traditional American values.[114]

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[103] FLA. STAT. ANN. §§ 776.012-.013.
[104] FLA. STAT. ANN. § 776.031.
[105] James, 867 So. 2d at 415 (affirming the duty to retreat under Florida law).
[106] Holliday *supra* note 85, at 418, (quoting Fla. S. Judiciary Comm. Staff Analysis and Economic Impact Statement, S. 19-CS/CS/SB 436, 1st Reg. Sess., at 4 (Fla. 2005)).
[107] *Id.*
[108] *Id.*
[109] Beale, supra note 47, at 580; James, 867 So. 2d at 417, (quoting State v. Bobbitt, 415 So. 2d 724, 728 (Fla. 1982)) ("human life is precious, and deadly combat should be avoided if at all possible when imminent danger to oneself can be avoided").
[110] *Cf. id.*
[111] *See* Zbreznj, *supra* note 73.
[112] *Cf.* Elizabeth B. Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to "Get Away with Murder,"* 34 AM. J. TRIAL ADVOC. 105, 115 (2010) (citing Michael, *supra* note 2, at 200; Weiand , 732 So. at1049 (quoting Frazier v. State, 681 So. 2d 824, 825 (Fla. Dist. Ct. App. 1996)) ("The law has always recognized that, where no safe method of retreat is available, a person may meet force with force in defense of an attack. Now anytime one claims to perceive a threat, that individual would be justified in reacting violently; they would have little incentive to diffuse the situation by retreating.").
[113] Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 Rutgers L.J. & Pub. Pol'y 504, 534 (2007) ("the southern gentleman should not be forced to surrender his privacy and dignity to one who would break the law").
[114] *Cf.* Megale, *supra* note 112 at 116 (discussing the American valuation of life and the DECLARATION OF INDEPENDENCE PARA 2 (U.S. 1776)).

2. The Castle Doctrine and Stand Your Ground

A similar criticism can be made of SYG's reinvention of *castle doctrine*. Florida's 2005 law distorts the castle doctrine far beyond its original purpose because the *castle* is enlarged to any place the person has the right to be.[115] The SYG statute expands the castle doctrine to vehicles, temporary structures, and guests visiting other homes - a sharp departure from the earlier law.[116] The old castle doctrine was merely a limitation on the duty to retreat before using self-defensive deadly force.[117] Under the old law, use of deadly force could only be employed in one's castle if it was reasonable.[118] The following are jury instructions that explain the standard for reasonable use of force in self-defense in one's home.

> In deciding whether defendant was justified in the use of force likely to cause death or great bodily harm, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of force likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the defendant must have actually believed the danger was real.[119]

In an unprecedented move by the Florida legislature in adopting SYG, the above reasonableness requirement for use of deadly force was eradicated.[120] The bill

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[115] Ross, *supra* note 5, at 2 ("The retreat line is moving and expanding beyond the castle and into the streets. The retreat element is losing its significance and is being abrogated by a 'stand your ground anywhere you have a right to be' doctrine."); Sharon Finegan, *Watching The Watchers: The Growing Privatization Of Criminal Law And The Need for Limits On Neighborhood Watch Associations*, 8 U. MASS. L. REV. 88, 120 (2013) (citing Ross, *supra* at 2).

> (a) "Dwelling" means building or conveyance of any kind, including an attached porch, whether…temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.
> (b) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.
> (c) "Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

FLA. STAT. ANN. § 776.013(5).

[116] James, 867 So.2d at 416 (citing Weiand, 732 So. 2d at 1049) ("The 'duty to retreat' has an exception, known as the 'castle doctrine,' which espouses that one is not required to retreat from one's residence, or one's 'castle,' before using deadly force in self-defense, so long as the deadly force is necessary to prevent death or great bodily harm.").

[117] *Id.*

[118] *Id.;* Quaggin, 752 So.2d at 25-26 (holding that reasonable belief depends on the circumstances and not the victim's state of mind).

[119] Quaggin, 752 So. 2d at 23.

[120] FLA. STAT. ANN. § 776.013(4) ("A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence"); Koons, *supra* note 47, at 618 n.3 (citing S.B. 436, 107th Leg. Reg. Sess.) ("Florida joined a number of states that have abrogated the duty to retreat outside of a dwelling, but was the first to adopt a system of statutory presumptions justifying the use of deadly force and immunities from civil action and criminal prosecutions

created non-rebuttable presumptions, discussed below, that replaced the reasonableness and necessity requirements that acted as safeguards against unnecessary use of deadly force in the old law.[121]

3. Reasonable Belief/Presumption and Stand Your Ground

The presumptions created by SYG can produce absurd and lethal results.[122] Under the old law, an actor who used lethal force in self-defense had to prove that the force was necessary and reasonable.[123] SYG largely dispenses with the requirement that deadly force be reasonable and replaces it with conclusive presumptions.[124] The 2005 law creates two presumptions that work together to justify homicides that would not have been justified under the old law.[125] One presumption pertains to the person's state of mind who is using force; the other presumption pertains to the state of mind of the "criminal."[126] Presumption #1 provides that

> A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive [deadly] force if:
> (a) The person against whom the . . . force was used was . . . forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if the person had removed or was attempting to remove another against that person's will . . . ; and
> (b) The person who uses . . . force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.[127]

Presumption #2 states, "[a] person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence."[128] The legislature intended to create presumptions that are non-rebuttable.[129] The

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where force is authorized."); *See* Hair v. State, 17 So. 3d 804, 806 (Fla. Dist. Ct. App. 2009) ("The statute makes no exception from the [SYG] immunity when the victim is in retreat at the time defensive force is employed.").

[121] *See* Michael, *supra* note 2, at 201 (discussing the effects of SYG's presumptions).

[122] *See generally* Megale, *supra* note 112, at 105-120, for a discussion of the problems with SYG's presumptions.

[123] Quaggin, 752 So. 2d at 23 ("the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed the danger could be avoided only through the use of force").

[124] FLA. STAT. ANN. § 776.013.

[125] FLA. STAT. ANN. § 776.013. *Cf.* Megale, *supra* note 112, at 116 ("Overly-broad Stand Your Ground statutes place lives in danger because a person is permitted to harm, or even kill, another before considering whether an actual threat exists.").

[126] FLA. STAT. ANN. § 776.013.

[127] FLA. STAT. ANN. § 776.013(1).

[128] FLA. STAT. ANN. § 776.013(4).

[129] Michael, *supra* note 2, at 201; FL Staff An., S.B. 436, 2/10/2005, Florida Senate Staff Analysis, S.B. 436, 2/10/2005

> The practical effects of this section include: Eliminating the questions of fact regarding whether a person had a reasonable belief that the use of deadly force was necessary - the presumption requires that the jury find that when he or she uses deadly force he or she is necessarily in reasonable fear to that

committee report indicates that the presumptions created by the law are conclusive and that when the law's requirements are met, there is no question of fact for the jury in terms of reasonableness or necessity in the use of deadly force.[130] Conclusive presumptions are highly suspect.[131]

> The conclusive presumption is not really a procedural device at all. Rather it is a process of concealing by fiction a change in the substantive law. When the law conclusively presumes the presence of B from A, this means that the substantive law no longer requires the existence of B in cases where A is present, although it hesitates to say so forthrightly.[132]

Conclusive presumptions create problems in the law because if the existence of a fact is presumed, the law makes a final determination of what the facts are, whether or not the *fact in question actually exists.*[133] Under SYG, it is conclusively determined that if the elements of the law are met, the person was justified in her actions.[134] These conclusive presumptions substantively change the law in an indirect, but profound, way.

The implications of these presumption provisions are staggering. The *actual* intent of the person entering a vehicle or building is rendered irrelevant and the *actual* state of mind of the person using deadly force is also irrelevant in an analysis of whether a killing is justified. Reasonableness and necessity have traditionally been required to justify the use of deadly force.[135] Indeed, it is difficult to imagine a civilized society in which people are allowed to kill one another without having to prove that the killing was unavoidable. Certainly, the mark of a civilized society is respect for life.[136] Yet, Florida courts have held that deadly force may be used "even if other [less extreme] means of self-protection are available, and . . . even if the attacker is unarmed."[137] Thus, Florida's SYG law has established the right to kill with impunity under some circumstances, and other states are following Florida's lead.[138]

> extent . . . The intent to commit an unlawful act involving force or violence will be presumed to be true, not a question of fact. *Id.*

[130] *Id.* FL Staff An., S.B. 436, 2/10/2005, Florida Staff Analysis, S.B. 436, 2/10/2005; *See* Michael, *supra* note 2 at 201, n.20 (quoting Fla. S. Rep. No. 107-436, 6pt. III, at 6 (2005) (Judiciary Rep.) ("Legal presumptions are typically rebuttable. The presumptions created by the committee substitute, however, appear to be conclusive.").

[131] Megale, supra note 112, at 108, n.24 (citing Tot v. United States, 319 U.S. 463, 467 (1943)) ("If a statutory presumption cannot be rebutted or proof offered against it, then the rationality of the connection can never be questioned [as required by *Tot v. U.S.*] Thus, an irrebuttable presumption is necessarily unconstitutional.").

[132] Michael, *supra* note 2, at 204 (quoting FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 7.9, at 248 (1st ed. 1965)).

[133] *Cf.* Michael, *supra* note 2 at 204 ("a conclusive presumption that extends to the justifiable use of deadly force to these circumstances [Quaggin facts] conceals a change in the elements of self-defense **that now allows for deadly force to be used in protection of property**") (emphasis added).

[134] FLA. STAT. ANN § 776.013; *see supra* note 129-130.

[135] Quaggin, 752 So. 2d at 23; *see supra* note 123.

[136] *Cf.* Megale, *supra* note 112, at 116.

[137] Pearl Goldman, *Criminal Law: 2007-2010 Survey of Criminal Law*, 35 NOVA L. REV. 95, 107 (citing McWhorter v. State, 971 So. 2d 154 (Fla. Dist. Ct. App. 2007)).

[138] *See infra* note 318.

These presumptions can produce tragic outcomes. One illustrative scenario comes to mind from a conversation with a colleague.[139] People in cities often live in apartments that are virtually indistinguishable from one another. Imagine that an intoxicated resident mistakenly forces his way through a door into the wrong apartment and passes out on the couch. This intruder is likely not a danger to anyone but himself. He is devoid of criminal intent and the lawful resident knows him and is not in fear for her safety because she realizes his mistake. Under Florida's SYG law, the resident could shoot and kill the intruder *with impunity* because her state of mind, as well as the intruder's state of mind, are conclusively presumed.[140] There is, consequently, no question of fact for the jury to decide.[141] The killing is legally justified even if the killer is motivated by racism or malice. The law opens the door to race-motivated killings without legal consequences.[142] Human life has been rendered subordinate to a person's right to use deadly force, regardless of whether the use of force is justified or necessary.[143]

4. Conclusive Presumptions, Immunity, and Stand Your Ground

SYG's grant of immunity to killers shows disregard for the value of human life. "A person who uses force as permitted [by this law] is justified . . . and is immune from criminal prosecution and civil action. . . . A law enforcement agency may . . . [investigate] the use of force . . . but may not arrest the person for using force unless it determines . . . that the force . . . used was unlawful."[144] A person using force as sanctioned under the statute *cannot be arrested, prosecuted or sued*, regardless of the motivation, reasonableness, or necessity of her actions.[145] Significantly, under SYG, a private person who shoots someone has greater

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[139] Tamara Martin shared this anecdote with me. After coming up with this hypothetical, a real shooting was in the news, disturbingly similar to the apartment scenario. A teenage boy sneaked out of his house and consumed alcohol. When he went home, he entered the wrong house and was shot and killed. Claudine Zap, *Teen Fatally Shot when he Mistakenly Went into the Wrong House*, YAHOO NEWS (Mar. 19, 2013), http://news.yahoo.com/blogs/lookout/teen-fatally-shot-mistakenly-walked-wrong-house-163650001.html.

> When he returned around 2 a.m. he slipped into the house he thought was his. Friends said he had been drinking and mistook his neighbor's similar house two doors down for his own and climbed in through the back window. . . . Police are continuing to investigate the shooting, but Virginia law gives 'wide latitude to people who fear for their safety when someone breaks into their homes.'

Id.

[140] FLA. STAT. ANN. § 776.013 ; *see supra* note 129.

[141] *Id.*

[142] Ross, *supra* note 5, at 35 ("These new statutes present potential danger for society at large, but they particularly endanger racial minorities."). *Id.* at 36 ("the law has as long history for creating pretexts for using deadly force in cases where racial bias or personal feuds exist").

[143] *Cf.* Ross, *supra* note 5, at 42 (citing Granger v. State, 13 Tenn. 459 (1830)) ([Stand Your Ground] " implies that innocent people are expendable as long as fearful people are reasonable when they kill.").

[144] FLA. STAT. ANN. § 776.032. *See* Lawson, *supra* note 34, at 287 n.50 (citing Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010)) (discussing that FLA. STAT. ANN. § 776.032(1) "expressly grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force.").

[145] *Id.*

immunity than a police officer who shoots someone while on the job.[146] "A law enforcement officer cannot use deadly force in a non-deadly situation."[147] Police officers are prohibited by the Fourth Amendment from using excessive deadly force.[148] And, when a police officer uses deadly force, the incident is investigated.[149] In contrast, private citizens are not restrained by the Fourth Amendment,[150] and SYG provides wide broad immunity against investigation and prosecution.[151]

SYG grants broad powers to private citizens;[152] evaluating their impact is crucial to understanding the law. Florida's old law, like traditional American law, placed a relatively high value on human life.[153] The 2005 law instead places great freedom and power in the hands of people who use deadly force at the expense of protecting human life.[154] SYG as a self-defense law theoretically seeks to "justify" homicides that fall within the statute.[155] While American law lacks consensus on the concept of justification,[156] one widely accepted formulation is that a killing is justified when it is the lesser evil.[157] Avoiding the greater harm lies at the heart of the justification.[158] Criminal law expert Stuart Green explains that "[t]he decisions a legal regime makes regarding its justified homicide rules, ultimately, will reflect deeply held societal values."[159] Justified homicide dispenses with liability for the actor because society deems the harm committed to be less egregious than the harm she faced.[160] SYG treats the killing of almost *any* intruder into a car or a house as the *ultimate lesser evil* because the law definitively presumes that killing an intruder is almost always justified.[161]

Yet, as discussed above in the drunken apartment-dweller example, a homicide may be legally justified under the statute, but morally unjustified because

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[146] *When 'Self-Defense' Violates Civil Rights,* Editorial, THE NEW YORK TIMES, June 19, 2012, at A28, *available at* http://nytimes.com/2012/06/20/opinion/when-self-defense-violates-civil-rights.html.

[147] Daniel Michael, *supra* note 2 at 210, n.92.

[148] Mercado v. City of Orlando, 407 F.3d 1152, 1160 (11th Cir. 2005) (citing Tennessee v. Garner, 471 U.S. 1, 11-12 (1985)).

[149] Ross, *supra* note 5, at 42.

[150] *See infra* notes 450-51 and accompanying text.

[151] FLA. STAT. ANN. §§776.012-.013; 776.031-.032 ; *see supra* note 144 and accompanying text.

[152] FLA. STAT. ANN. §§776.012-.013; 776.031-.032.

[153] *See supra* notes 72-73; Ross, *supra* note 5, at 42 n.245 (citing WAYNE LAFAVE, CRIMINAL LAW 547 (4th ed. 2003)) ("There is a strong policy against the unnecessary taking of human life.").

[154] Ross, *supra* note 5, at 42 (citing Grainger v. State, 13 Tenn. 459 (1830)).

[155] FLA. STAT. ANN. § 776.032; *see supra* Part III.C.

[156] Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L.REV. 1095, 1096 (1998)

> [T]here is disagreement over the underlying theory of the justification principle, and thus the proper legal formulation of such defenses. At the core of the debate about the principle is the following question: Are justification defenses given because the actor's deeds avoid a greater harm, or because she acted for the right reason? *Id.*

[157] Elaine M. Chiu, *Culture in our Midst*, 17 U. FL. J. L. & PUB. POL'Y. 231, 238 (2005) (discussing PAUL ROBINSON, 1 CRIMINAL LAW DEFENSES § 21, at 70 (1984)) ("Justification defenses represent those instances in which defendants are not liable despite the fact their actions caused legally recognized harms. These legally recognized harms are justified because, by the same actions, defendants managed to avoid greater harms.").

[158] *See generally* Robinson & Darley, *supra* note 156, at 1098.

[159] Green, *supra* note 97, at 40.

[160] Chiu, *supra* note 157, at 238.

[161] FLA. STAT. ANN. § §776.013, 776.032; *see supra* notes 126-30, 144 and accompanying text.

the killing did not truly avoid the greater harm.[162] If the killing falls within artificial boundaries set by the statute, the killer has civil and prosecutorial immunity regardless of the actual harms that result.[163] SYG fails to distinguish between a truly honorable killing which was necessary to save an innocent life and a killing motivated by racism or malice. The grant of immunity leaves victims with no recourse and renders police and prosecutors powerless.[164] "Together, the combination of a presumption of reasonable fear and immunity converts the presumption of reasonable fear from a rebuttable affirmative defense into an irrebuttable conclusion and absolute bar to prosecution."[165] Removing discretion from the legal system allows abuses to go unchecked.[166] Allowing one citizen to kill another without at least the appearance of necessity, and without facing legal consequences, shows a diminished estimation of the value of life.

5. The Application of Stand Your Ground's Presumptions and Immunity Clauses

Another consequence of SYG is that an actor may be legally justified in killing over relatively trivial property offenses.[167] There is a deep history in English and American common law that life is more highly valued than property.[168] SYG rejects this longstanding principle.[169] Under Florida's old law, a person would have to show that he feared for his life in order to be justified in using deadly force in self-defense.[170] In contrast, SYG requires only that "[t]he person who uses defensive [deadly] force knew or had reason to believe that an unlawful and forcible

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[162] Killing a harmless drunk person is arguably more egregious than letting him sleep off his intoxication on an innocent person's couch. *See supra* note 157 and accompanying text.
[163] FLA. STAT. ANN. § 776.032.
[164] Megale, *supra* note 112, at 108; *see supra* note 144 and accompanying text.
[165] *Id.* Steven Jansen & Elaine Nugent-Borakove, *Expansions to the Castle Doctrine*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, American Prosecutors Research Institute 10, http://www.ndaa.org/pdf/Castle% 20Doctrine.pdf (last visited Feb. 17, 2013) ("the presumption of reasonableness strips away prosecutors' discretion in making charging decisions. The new laws have created a situation in which prosecutors-and, ultimately, the triers of fact-are unable to pass judgment on those individuals who negligently or recklessly choose to use deadly force.").
[166] *Id.*
[167] *See generally* Jansen & Nugent-Borakove, *supra* note 165, at 5, 7; Michael *supra* note 2, at 199; *see supra* note 133.
[168] 25 A.L.R. 508 (Originally published in 1923)

> One may prevent a trespasser from carrying away his property, using no more force than necessary for that purpose, and then not to the extent of taking life, or inflicting great bodily harm. The owner can, at most, only use sufficient force to prevent the trespass or the carrying away of his property; and this right does not go so far as to authorize the taking of life, or the infliction of great bodily injury. He is not allowed to sacrifice human life in order to retain the possession.

Id. (quoting Chapman v. Com. (1891)); 12 Ky. L. Rep. 704; Storey v. State, 71 Ala. 329, 341 (1882) ("It would be shocking to the good order of government to have it proclaimed, with the sanction of the courts, that one may, in broad daylight, commit a willful homicide in order to prevent the larceny of an ear of corn.").
[169] *See generally* Jansen & Nugent-Borakove, *supra* note 165, at 5, 7; Michael, *supra* note 2, at 199.
[170] Anthony J. Sebok, *Florida's New "Stand Your Ground" Law: Why It's More Extreme than Other States' Self-Defense Measures, and How it Got That Way*, FINDLAW, http://writ.news.findlaw.com/sebok/200520205.html (last visited Feb. 17, 2012).

entry or unlawful and forcible act was occurring or had occurred."[171] The National District Attorneys Association reports that "[t]his language can be interpreted to allow for the use of deadly force even if the danger has ceased. The wording 'had occurred' appears to shield from prosecution an individual who fires at fleeing suspects no longer posing a threat to the property owner."[172] Shooting a fleeing thief is difficult to justify on self-defense grounds.

Professor Anthony Sebok poses several thought-provoking scenarios that illustrate the morally questionable, but legally justified, application of deadly force allowed by SYG. First, a teacher approaches his car only to discover a student who was breaking into the car intending to vandalize it. Because of the statutory presumptions, the teacher can shoot his student and be immune from prosecution.[173] Second, a doctor whose brother is a drug addict breaks into the doctor's house to steal pharmaceuticals. The doctor is free to shoot his brother, so he alone will inherit his parents' money.[174] Under traditional self-defense law, both of these shootings would probably be investigated and prosecuted as murder.[175] Under SYG, the shooter is legally justified because both victims were illegally entering or trying to enter the shooter's house or car.[176]

SYG's presumptions and immunity create a surprising degree of freedom for a person to kill another in or around one's home or car. An individual with depraved motives could be able to kill with impunity under the statute, as described in the example about the doctor killing his brother to gain an inheritance.[177] A killer motivated by greed, jealousy or racism would face no penalty for killing if the homicide fit the law's requirements.[178] The National District Attorney's Association states that the requirement that an actor must merely have "reason to believe" that a crime is occurring amplifies the probability that prejudice or racism may be the underlying motivator in the justified use of force.[179] SYG opens the door to legally justified moral wrongs.[180]

IV. EXPRESSIVE LAW THEORY AND STAND YOUR GROUND LAWS

The theory of legal expressivism provides a means of exploring the wrongs sanctioned by SYG because decoding SYG's deep subtext requires more than a

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[171] FLA. STAT. § 776.013(1)(b).
[172] Jansen & Nugent-Borakove, *supra* note 165, at 7.
[173] Sebok, *supra* note 170; FLA. STAT. ANN. § 776.013.
[174] Sebok, *supra* note 170.
[174] FLA. STAT. ANN. § 776.013.
[175] *Cf.* Sebok, *supra* note 170 ("The old version of castle doctrine told homeowners that they could kill when they reasonably believed their lives were in danger. Now the law tells average citizens they can kill when they reasonably believe that their homes or vehicles have been illegally and forcibly invaded.").
[176] FLA. STAT. ANN. § §776.013, 776.032.
[177] *See generally* Jansen & Nugent-Borakove, *supra* note 165, at7 ("the fact that one must now only have 'reason to believe' that an unlawful entry is occurring increases the possibility of prejudice or simple mistake leading to tragic consequences").
[178] The law requires that the victim have entered or attempted to enter the actor's house or car. FLA. STAT. ANN. § 776.013. *See* Ross, *supra* note 5, at 36 (discussing the pretext used to justify killings that are based on racial bias).
[179] Jansen & Nugent-Borakove, *supra* note 165, at 7.
[180] *Id.;* Sebok, *supra* note 170.

superficial reading of the statute.[181] Understanding the influence of SYG necessitates analyzing its origin and meaning.[182] Expressive law theory explains the importance of laws not simply for what they *do*, but for what they *say*.[183] *Expression* means that a deed or declaration gives life to a mental state.[184] "[E]xpressive theories tell actors - whether individuals, associations, or the State - to act in ways that express appropriate attitudes toward various substantive values."[185] This theory suggests that the morality of a law results from whether it assigns the appropriate valuation to different social and cultural values, and that expressive law theory is a useful tool for evaluating the ethics of a given law.[186] "At the level of state action . . . deliberative principles and policies can be appropriately interpreted as expressing official state beliefs and attitudes, such as hostility toward certain racial groups."[187] Laws are the expression of official (governmental and societal) thought.[188] When a law fails to embody appropriate societal values, the law is flawed. Equal protection cases provide an instructive example.[189]

Fourteenth Amendment jurisprudence can be understood as embodying expressive law ideas.[190] Further, Fourteenth Amendment cases provide a useful illustration of implicit bias theory.

> [T]he Court has consistently held that equal protection cannot be applied by looking at the means or consequences of laws alone. One must also examine the law's expressive purpose and the justificatory connection between its means and ends….
>
> Second, the Court recognizes the distinctive character of expressive harms as harms inherent in the principle on which the laws are enacted, rather than in the causal consequences of the laws.[191]

Expressive law theory explains the Court's rationale behind enforcing equal protection claims: the *message* of equal protection is as valuable as the protection itself.[192]

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[181] Louis N. Schulze, *Of Trayvon Martin, George Zimmerman and Legal Expressivism: Why Massachusetts Should Stand its Ground on "Stand Your Ground,"* 47 NEW ENG. L. REV. ON REMAND 34, 38-39 (2012) ("Understanding the mistaken assumption of the applicability of Florida's SYG law in the Zimmerman prosecution entails deconstructing the messages those laws convey to citizens.").

[182] *See generally* Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002), for a discussion of the theory of expressive law.

[183] *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L. REV. 1503 (2000). "Expressive theories, therefore, do not deny that consequences matter. Rather, they tell us why the consequences matter, and which consequences matter." *Id. at* 1514. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*: *A General Statement*, 79 OR. L. REV. 339, 339 (2000) ("Legal theorists sometimes posit that law affects behavior 'expressively' by what it says rather than what it does.")

[184] Anderson & Pildes, *supra* note 183, at 1506.

[185] *Id.* at 1504.

[186] *Id.* ("much of our existing practices of moral and legal evaluation are best understood through expressivist perspectives").

[187] *Id.* at 1506.

[188] *Cf. Id.* at 1520.

[189] *Id.* at 1542.

[190] *Id.*

[191] *Id.*

[192] *Cf. Id.* ("Policies adopted out of contempt or hostility toward a racial group. Or with the purpose of branding a racial group as inferior, are expressively harmful and therefore

In his seminal work on stigmatic harm and equal protection, discussed in the expressive law literature,[193] Paul Brest explains the result in *Brown v. Board of Education*[194] and other civil rights cases under the "antidiscrimination principle."[195] The "antidiscrimination principle" asserts that racial classifications and discrimination are wrong, not just because they deny equal access to opportunity, but because of the stigma that results from differential treatment.[196] "Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior."[197] The stigmatic effect of a discriminatory law results from the statement the law makes about the value of groups of people as much as the function of the law that deprives them of a particular right.[198]

Similar to the way the Court rejected racial classifications because of their expressive value[199] (codifying racial inferiority), people routinely analyze and either accept or reject laws based on the messages they convey. For instance, many Americans support capital punishment, not for its deterrent value, but for its meaning.[200] Bicycle helmet laws, as a practical example, set a standard for safety that becomes internalized. American parents often require their children to wear helmets when riding bicycles in Mexico on vacation, though Mexican laws do not require helmets. Laws make a powerful statement about what behavior is socially accepted. The importance of the expression/statement made by these laws lies in the way the expression influences social norms.[201]

Expressive law theorist, Richard McAdams, explores how the statements made by laws influence and change social norms.[202] McAdams argues that "law changes behavior by signaling the underlying attitudes of a community or society. Because people are motivated to gain approval and avoid disapproval, the information signaled by legislation and other law affects their behavior."[203] Individuals seek approval, and if they receive signals via legislation that society approves certain behavior, they will adapt their behavior and beliefs to conform to perceived norms.[204] Studies show that individuals' beliefs are strongly influenced by legislation.[205] The effect of a change in the law can be substantial because "a law may . . . create a feedback effect, thereby producing a discontinuously large

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unconstitutional regardless of their direct material, social, and psychological consequences. . . . [T]he harm from racial segregation does not lie simply in its material consequences.").

[193] Matthew Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. Pa. L. Rev. 1363, 1428-29 (2000).

[194] *Brown v. Board of Ed. of Topeka*, 347 U.S. 483 (1954).

[195] Paul Brest, *The Supreme Court 1975 Term-Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 2, 8 (1976); Brown v. Board of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting); Strauder v. West Virginia, 100 U.S. 303 (1880).

[196] Brest, *supra* note 195, at 8.

[197] *Id.*

[198] *Id.*

[199] Brown, 347 U.S. 483.

[200] Cass R. Sunstein, *On the Function of Expressive Law*, 144 U. PA. L. REV. 2021, 2023 (1996) (citing Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude*, 17 L. & SOC'Y REV. 21, 40 (1982)).

[201] *Cf.* Sunstein, *supra* note 200, at 2026

[202] *See generally* McAdams, *supra* note 183.

[203] *Id.* at 340.

[204] *Id.* at 367 (citing Bayes Theorum),

[205] *Id.* at 368 (2000) (citing PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE (1993)).

change in behavior."[206] Interest groups may exploit these effects by seeking passage of laws furthering their interests, thus causing people to assume that the groups' position has widespread acceptance.[207] The NRA perhaps tacitly acknowledged this in its strategy of starting SYG in Florida and spreading it across the nation.[208] People frequently assume that legislators have superior knowledge about the benefits of a law.[209] Thus, expressive effects of SYG become more pronounced each time a state adopts SYG legislation because it arguably influences public opinion about what the law should be and what behavior is acceptable.[210]

Expressive law theory is useful in evaluating SYG because it explains the social harm threatened by SYG resulting from the value assumptions underlying the law.[211] What SYG *says* about people and the value of their lives is just as significant as the fact that some killers will not face prosecution under SYG.[212] The message SYG conveys will likely influence the beliefs and behaviors of citizens who assume that the message expresses valid social norms.[213] Further, the implicit biases held by Americans put racial minorities at risk of being on the receiving end of defensive

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[206] *Id.* at 372 .

[207] *Cf. id*. at 341.

[208] NRA-ILA, *This Train Keeps a Rollin': Castle Doctrine Sweeps America*, NRA-ILA (June 28, 2006) http://www.nraila.org/news-issues/articles/2006/this-train-keeps-a-rollin%60.aspx [hereinafter *Train*].

> Although anti-gun groups, politicians and newspaper editors in 2005 screamed of blood on the tracks in Florida after passage of that state's Castle Doctrine law, the legislation has proven beneficial to not only Florida's law-abiding citizens, but also to citizens in other states who have seen the light at the end of the tunnel.
>
> Castle Doctrine, in essence, simply places into law what is a fundamental right: self-defense. If a person is in a place he or she has a right to be—in the front yard, on the road, working in their office, strolling in the park—and is confronted by an armed predator, he or she can respond in force in defense of their lives. . . .
>
> Castle Doctrine also protects the law-abiding from criminal and civil charges for defending themselves against an attacker whereby, after enduring the trauma of a violent attack, they aren't again tied to the tracks of a drawn-out, nightmarish legal battle that could derail their financial future.
>
> *Today, the NRA is feeding the firebox of Castle Doctrine legislation in states throughout the country, conducting a self-defense whistle stop campaign that is turning focus from criminals' rights to those of the law-abiding who are forced to protect themselves.*
>
> *After the NRA helped gain passage of Florida's Castle Doctrine law in April 2005, the Association promised to push for similar laws throughout the nation.*
>
> *A year later, the National Rifle Association is continuing to fulfill that promise.* (emphasis added).

[209] McAdams, *supra* note 183, at 358 ("Law signals the existence of information held by the law-maker.").

[210] *Cf. id.* at 361-63 (discussing the correlation between legislation and popular opinion).

[211] *Cf.* Schulze, *supra* note 181, at 39 ("SYG laws subordinate human life to values like honor, manliness, and machismo; if one has the option to retreat, one need not spare the life of the attacker if one instead chooses to act in accordance with one's honor or natural tendency of a 'true man' to use violence.").

[212] *Cf. id.; see supra* notes 144, 145 and accompanying text.

[213] *See id*. 37-38 (citing McAdams, *supra* note 183, at 358-59) (discussing expressive law theory).

force.[214] This development in the law devalues human life because there is greater freedom to kill,[215] and it sends the message the lives of people of color are less valuable.[216]

V. SOUTHERN CULTURE & STAND YOUR GROUND: HOW SOUTHERN CULTURE ALIGNS WITH STAND YOUR GROUND

The message of SYG is closely related to the law's birthplace because the cultural values that enabled passage of the law[217] may become embedded in the law.[218] Plants take on properties of the soil in which they grow. Likewise, laws take on the properties of the metaphorical soil in which they are planted. Understanding the culture that produced SYG is crucial to understanding the message of the law.[219] The NRA arguably used Florida to launch SYG because it is a gun-friendly southern state receptive to liberal self-defense laws.[220] Understanding Florida's

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[214] Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 3 (2010) ("In simulations, Americans are faster and more accurate when firing on armed blacks than when firing on armed whites"); *see infra* Part VII.

[215] *See supra* Part III.C.; Schulze, *supra* note 181, at 39.

[216] *Cf.* Schulze, *supra* note 181, at 41 ("Given the historical antecedents of these laws - specifically the slavery and Wild West cultures-legislatures should understand the values they are tacitly embracing."). *See supra* note 214; *see infra* Part VII; *see* Lawson, *supra* note 34, at 306 ("The Stand Your Ground law may in fact communicate to Floridians it is more acceptable to kill minorities, Black-as-criminal-types, because such actions will ultimately be viewed as reasonable, justified, and therefore immune from criminal and civil liability.") (citing the preamble to Fla. Stat. 776.036).

[217] *Shoot-First*, *supra* note 1; *see supra* notes 1, 2.

[218] *See generally* Chiu, *supra* note 157 (discussing how culture and law influence each other); Schulze, *supra* note 181 at 41 ("[G]iven SYG laws' shared moral lineage with lynching, patriarchal views of justified homicide, and dueling, legislators ought to give serious pause before adopting values of this ilk.").

[219] *Cf.* Chiu, *supra* note 157, at 232 (citing Robert Post, *Law and Cultural Conflict*, 78 CHI-KENT L. REV. 485, 487 (2003)) ("First, the law does not merely enforce cultural norms; indeed, the law frequently creates new norms which may be contrary to cultural tendencies. Second, culture itself is not stable, coherent, or singular, and thus its malleability challenges the law.").

[220] FLORIDA HAS BEEN CALLED THE "GUNSHINE STATE." ADAM WEINSTEIN, *HOW THE NRA AND ITS ALLIES HELPED SPREAD A RADICAL GUN LAW NATIONWIDE*, MOTHER JONES, (JUNE 7, 2012, 2:10 AM), HTTP://WWW.MOTHERJONES.COM/POLITICS/2012/06/NRA-ALEC-STAND-YOUR-GROUND.

> Since 2005, Florida lawmakers have taken aim at gun control with a barrage of deregulation measures:
>
> - Requiring employers to let employees keep guns in their cars while at work
> - Requiring city and county governments to allow guns in public buildings and parks
> - Lifting a long-standing ban on guns in national forests and state parks
> - Allowing military personnel as young as 17 to get concealed-weapons licenses. (Age limit remains 21 for everyone else.)
> - Withholding the names of concealed-carry licensees in public records
> - Permitting concealed-carry licensees "to briefly and openly display the firearm to the ordinary sight of another person." (The original bill would have allowed guns on college campuses, but it was amended after a GOP lawmaker's friend's daughter was accidentally killed with an AK-47 at a frat party.)
> - Prohibiting doctors from asking patients if they keep guns or ammo in the house unless it's "relevant" to their care or safety. (Overturned by a federal judge.)

"southernness" is crucial to understanding the values that SYG expresses and incorporates.[221]

Southern attitudes toward equality and justice are shaped in part by history.[222] Traditionally, the South has been more conservative than other regions.[223] Elitism, landownership, and feudalism were imported by early settlers to the region, creating a stratified society hostile to change.[224] Because status was derived from ownership and wealth, rather than from freedom and equality, inequality became socially entrenched.[225] Institutionalized racism and slavery offer compelling evidence of the inequality that plagued the South.[226] Some scholars posit that underfunded educational institutions created a less educated population more accepting of a system of injustice and inequality in place of the rule of judicial law.[227]

A. Southern Honor Culture

Forces of southern history combined justice and violence to replace formal legal authority.[228] In large part due to its rural and agricultural frontier, its

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- Allowing legislators, school board members, and county commissioners to carry concealed weapons at official meetings. (Didn't pass; another bill to let judges pack heat "at any time and in any place" died in 2009.)
- Designating a day for tax-free gun purchases. (Didn't pass.)
- Exempting guns manufactured in Florida from any federal regulations. (Didn't pass.)

Id. See Shoot-First, supra note 1 ("The NRA believes it has a favorable climate, especially in the South…in which to market its macho bill"). For the purposes of this paper Florida is considered a southern state. While there is some debate surrounding the issue of whether Florida is genuinely "southern," this author subscribes to the theory propounded in *Southern Violence,* supra note 2. This theory holds that, rather than southern culture being diluted by northerners moving south, the influence of southerners in the rest of the nation has caused a "southernization of America." *Id.* at 226 (discussing RAYMOND GASTIL, CULTURAL REGIONS OF THE UNITED STATES, 116, 109 (1975) and John Reed, *Below the Smith and Wesson Line: Reflections on Southern Violence* (Apr. 21, 1977)). By some objective measures, Florida is *southern. See* LEAGUE OF THE SOUTH, http://dixienet.org/rights/thesouthasitsownnation.shtml (last visited Apr. 29, 2013) ("measured by congressional votes, [Florida] . . . remains politically a Southern State"). Anecdotal evidence also suggests that Florida is culturally southern. "It is easy to forget that Florida is, indeed, a Southern state since one is often surrounded by folks who speak just as they do. But if you go to nearly any smaller town in Florida, you immediately hear the lilt of Southern accents and are jolted back to the reality that we are farther South than Georgia, Alabama or Mississippi." Douglas Spangler, *Here's a Guide to Getting Along with this State's Southernness*, ST. PETERSBURG TIMES ONLINE, (Aug. 4, 2000), http://www.sptimes.com/News/080400/Pasco/Here_s_a_guide_to_get.shtml.

[221] *See generally Southern Violence, supra* note 2, at 226 (discussing "southernness").

[222] *Cf.* Warf, *supra* note 2, at 92.

[223] *Id.*

[224] *Id.* at 93 (discussing K. RAITZ, APPALACHIA: A REGIONAL GEOGRAPHY (1984)).

[225] *Cf. Id.* at 93.

[226] *Cf. Id.* at 94.

[227] *Id.* at 93.

[228] *Southern Violence, supra* note 2, at 230 (discussing H. REDFIELD, HOMICIDE, NORTH AND SOUTH: BEING A COMPARATIVE VIEW OF CRIME AGAINST THE PERON IN SEVERAL PARTS OF THE UNITED STATES 4-14 (1880)) ("The problem of the ubiquitous killing encounters was compounded and exacerbated by the equally widespread phenomenon of unpunished murder, a feature that was so deeply embedded in southern society as to be in reality a system supported by all classes, men of family, position, and standing, and even the church.").

slaveholding past, and its lack of strong governmental authority, the South developed a unique brand justice that was more accepting of violence and inequality than other regions.[229] "Violence was inextricably woven into the most fundamental aspects of life in the South and constituted an important phase of the total experience of its people,"[230] and it served as an enforcement mechanism for the unwritten honor code in the absence of a strong legal system.[231] Without effective law enforcement, it is common for a "culture of honor" to develop.[232] The honor culture that developed in the South created an entrenched system of extrajudicial justice.[233] In place of a strictly legal code, the southern code included the Constitution, the Bible, honor, family, and slavery.[234] Disputes were settled through fighting, rather than courts, resulting in a substantial number of unprosecuted homicides.[235] In honor cultures, self-defense becomes broadly construed because individuals must take swift and definitive action in the face of an affront or threat to avoid becoming a target for exploitation.[236]

This honor culture persists into the modern era.[237] A study of the attitudes of northern and southern college students bears out the contention that an honor culture exists among present-day southerners, rather than being merely a relic of the past.[238] Researches performed a series of experiments: white male participants were grouped into northern and southern categories and rated in terms of their levels of

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[229] *Southern Violence*, *supra* note 2, at 227-28 (quoting J. FRANKLIN, THE MILITANT SOUTH: 1800-1861, at 12-13 (1964)) ("[v]iolence was inextricably woven into the most fundamental aspects of life in the South and constituted an important phase of the total experience of its people"); *Id.* at 28 (citing J. REED, THE ENDURING SOUTH 45-56 (1972) ("southerners retain a value system and behavior patterns that make them more tolerant of violence and 'the use of force' than other Americans"); *id.* at 27-28 (discussing Sydnor, *The Southerner and the laws in* THE PURSUIT OF SOUTHERN HISTORY 62 (G. Tindal led. 1964)); Warf, *supra* note 2, at 94 (discussing D. FISHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA (1989)) ("Fisher argues that Southern tolerance of violence reflected the long history of the British border regions.).

[230] *Southern Violence*, *supra* note 2, at 227 (quoting J. FRANKLIN, THE MILITANT SOUTH: 1800-1861, at 12-13 (1964)) (Warf, *supra* note 2, at 94 (citing MONTELL, KILLINGS: FOLK JUSTICE IN THE UPPER SOUTH (1986) ("Punishment without due process was relatively common in many southern communities until the twentieth century.")

[231] *Id. Southern Violence*, *supra* note 2, at 228 (citing Sydnor, *The Southerner and the Laws*, *in* THE PURSUIT OF SOUTHERN HISTORY 62 (G. Tindall ed. 1964)).

[232] Dov Cohen & Richard E. Nisbettt, *Self-Protection and the Culture of Honor: Explaining Southern Violence*, 20 (5) PERSONALITY AND SOC. PSYCHOL. BULL. 551, 552 (1994) (*hereinafter Self-Protection*) ("In systems . . . where self-protection is essential, a *culture of honor* will develop."); Schulze, *supra* note 181, at 39 (quoting Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 432-33 (1999)) ("By virtue of the slave culture in the [South] . . . [it] had inherited rich systems of honor that put a premium on physical displays of courage and on violent reactions to slights.")

[233] *Southern Violence*, *supra* note 2, at 230 (discussing REDFIELD, *supra* note 228 at 4-17).

[234] *Id.* at 227-28 (citing Sydnor, *supra* note 229, at 62).

[235] *Id.*

[236] *Self-Protection*, *supra* note 232, at 552 (discussing J.K. Campbell, *Honour and the Devil in* HONOUR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY, 112-175 (1965) and J. Pitt-Rivers, *Honor and Social Status in* HONOR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY 21-77 (1965) ("Therefore, if one has been crossed or trifled with, retribution must follow as a preemptive strike and warning to the community. Self-defense becomes very broadly defined as preservation of one's person, one's family, one's home, or one's honor.").

[237] Cohen et al., *Insult, Aggression, and the Southern Culture of Honor: An "Experimental Ethnography,"* 70(5) JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 945, 496-97 (1996) (discussing the presence of honor culture in the modern South).

[238] *Id.*

aggression when confronted or provoked.[239] In the first experiment, volunteers were unexpectedly bumped in a hallway and each called an "a**hole."[240] In the second experiment, saliva samples were analyzed to determine changes in cortisol (stress hormone) and testosterone levels before and after study participants were bumped.[241] The third experiment was designed to test whether enduring an insult would cause southern participants to act more aggressively in a subsequent encounter.[242] The study found that after an insult or unwanted physical contact, southerners and northerners displayed substantially different attitudes.[243]

> [S]outhern participants differed from northern participant in several important cognitive, emotional, physiological, and behavioral respects. . . . (a) Southerners were made more upset by the insult . . . (b) Southerners were more likely to believe the insult damaged their masculine reputation or status in front of others . . . (c) Southerners were more likely to be cognitively primed for future aggression in insult situations . . . (d) Southerners were more likely to show physiological preparedness for dominance or aggressive behaviors . . . (e) Southerners were more likely to actually behave in aggressive ways in subsequent challenge situations . . . and (f) Southerners were more likely to actually behave in domineering ways during interpersonal encounters.[244]

The significance of this study in understanding SYG is two-fold. First, honor culture is still a force that shapes attitudes in the South.[245] Second, researchers found that "culture-of-honor norms are embodied in the laws and social policies of southern states – as reflected in looser gun control laws [and] less restrictive self-defense statutes. . . . "[246] Hence, SYG can be understood as an outgrowth of southern honor culture, and this honor culture is being spread, via SYG laws, to other regions where it was not previously as prominently established.

B. Violence and "Southernness"

Honor culture and violence are mutually reinforcing.[247] In the words of sociologists, "[i]t is not hard to see how insult-aggressions cycle lead to violence and death in real-life situations. Arguments that start over petty matters can quickly escalate into deadly conflicts once a challenge or insult has been issued."[248] While embracing honor culture,[249] Southerners disproportionately approve the use of violence for defensive purposes.[250] When queried about acceptable uses of violence,

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[239] *See generally id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.* at 957.
[245] *See generally id.*
[246] *Id.* at 946 (citing Dov Cohen, *Law, Social Policy, and Violence*, 70 J. PERSONALITY & SOC. PSYCHOL. 961-978 (1996)).
[247] *Id.* at 957.
[248] *Id.*
[249] *See generally id.*
[250] *Self-Protection, supra* note 232, at 554.

southerners were far more likely than other Americans to believe that "a man has the right to kill another man in a case of self-defense" or in defense of his house.[251] These attitudes are compatible with SYG values and norms because SYG has broader categories of justified homicides.[252] Attitudes tend to influence behavior,[253] so it is not surprising that southern attitudes toward violence result in grim statistics in "poverty, homicide rates, racial violence, gun ownership, illiteracy, [and] poor schools."[254]

The South has higher rates of violent crime, particularly homicide, compared with other regions of the United States.[255] From the 1870s on, "the South has been the national leader in homicide."[256] According to FBI reports, in 2007 murder rates decreased in every region in the United States except the South.[257] In 2007 when the murder rate in other regions dropped, murder rates in the South increased.[258] In 2009 the South had the highest murder rate in the nation.[259] Looking beyond just murder rates, the Institute for Economics and Peace compiled data that revealed that the South was the most violent region in the country.[260] And reflecting the conservatism prevalent in the South, southerners were more likely to support the use of violence to secure social order but not to effectuate change.[261]

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[251] *Self-Protection, supra* note 232, at 554 (citing M.D. Blumenthal, et al., *More About Justifying Violence: Methodological Studies of Attitudes and Behavior*, Ann Arbor, MI: INSTITUTE FOR SOCIAL RESEARCH (1975)).

[252] FLA. STAT. ANN. §§776.012-.013; 776.031-.032; *see supra* Part III.

[253] THE HANDBOOK OF MOTIVATION AND COGNITION: FOUNDATIONS OF SOCIAL BEHAVIOR 206 (Richard M. Sorrentino & Edward Tory Huggins, eds. 1986) ("There can be no doubt that attitudes do sometimes relate to subsequent behavior and that the field has achieved some understanding of just when the 'sometimes' is.").

[254] Warf, *supra* note 2, at 95; *see* State Rankings—Statistical Abstract of the United States: Violent Crimes per 10,000 Population—2006, US CENSUS BUREAU, http://www.census.gov/statab/ranks/rank21.html (last visited Mar. 3, 2013) (showing Florida had a higher rate of violent crime in 2006 than any state except Washington, D.C., South Carolina and Tennessee).

[255] *Southern Violence, supra* note 2, at 226 (citing REDFIELD, supra note 228, at 9-14).

[256] *Id.*; *Murder Rate Declines in Every Region Except the South, Where Executions are Most Prevalent*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/murder-rate-declines-every-region-except-south-where-executions-are-most-prevalent (last visited Apr. 24, 2012). The regions of the United States are defined as the South, West, Midwest and Northeast.

[257] *Id.*

[258] *Id.*

[259] *Studies 2009 FBI Crime Report—Murder Rate Highest in the South, Lowest in the Northeast*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/studies-2009-fbi-crime-report-murder-rate-highest-south-lowest-northeast (last visited Apr. 24, 2012).

[260] David Edwards, '*U.S. Peace Index' Finds Most Violence in Conservative Southern State*, THE RAW STORY (April 8, 2011, 11:17 EST), http://www.rawstory.com/rs/2011/04/08/u-s-peace-index-finds-most-violence-in-conservative-southern-states. The most violent states, in order, were Louisiana, Tennessee, Nevada, Florida, Alabama, Texas, Arkansas, Oklahoma, South Carolina, Maryland. The most peaceful states were Maine, New Hampshire, Vermont, Minnesota, North Dakota, Utah, Massachusetts, Rhode Island, Iowa, and Washington. *Id.*

[261] *Self-Protection, supra* note 232, at 554.

C. Violence and Racism

Over time, southern honor culture and violence powerfully intersected with racism.[262] Slavery and race played an important role in southern culture, and extrajudicial justice "became deeply racialized, as evidence in the lynchings of blacks well into the twentieth century."[263] In addition to social control,[264] violence was used as a tool of racial oppression in the South, intended to control blacks after the Civil War and at least through the 1950s.[265] While southern violence was not reserved exclusively for blacks, the injustice of racial violence directed at blacks is unparalleled in America.[266] Black men were killed for offenses as trivial as "whistling at a white woman,"[267] seeking higher pay,[268] or attempting to vote.[269] Deaths of black men at the hands of white men were typically whitewashed by the legal system, often with the help of local law enforcement.[270] These racially motivated killings still affect the black community.[271]

Some commentators have connected past racial violence with the killing of Trayvon Martin.[272] "The long tradition of impunity that historically followed the unprovoked killing of Black men in America is an old, and deep, wound that many people in the African American community still grieve."[273] The hypothesis is that SYG set the stage for Martin's killing because it demonstrated renewed acceptance of the use of violence as a means of problem solving. While difficult to quantify, some scholars maintain that racism remains a force in the South.[274]

In spite of the progress of the Civil Rights Movement"[275] and the election of America's first black president, racial prejudice persists.[276] Indeed, prejudice

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[262] *Cf.* Warf, *supra* note 2 at 95 ("punishment was generally meted out unevenly by class, and it was typically, the poor, minorities, and the illiterate who most commonly went to the gallows").
[263] *Id.*
[264] *Southern Violence*, *supra* note 2, at 230 (discussing REDFIELD, *supra* note 228, at 4-14).
[265] Suzanne Hall, *Racial Violence*, 13-2 SOUTHERN CHANGES 23, 24 (1991) (discussing George Wright) *available at* http://beck.library.emory.edu/southernchanges/article.php?id=sc13-2_010.

> Whites used violence to keep blacks in their place after the disruption of society and culture following the civil war. . . . After the turn of the century, mob lynchings became less 'respectable' . . . But with the decline in illegal killings came a rise in what Wright aptly terms 'legal lynchings,' executions following hasty, procedurally inadequate trials.

[266] *Cf. id*; *see* Brown v. Mississippi, 297 U.S. 298 (1936) (describing black defendants' tortured confessions).
[267] Lawson, *supra* note 34, at 275 (quoting STEPHEN J. WHITEFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL vii (1998)).
[268] *Id.* (citing James C. Clark, *Civil Rights Leader Harry T. Moore and the Ku Klux Klan in Florida*, 73 FLA. HIST. Q. 166, 166 (1994)).
[269] *Id.* (citing David R. Colburn, *Rosewood and American in the Early Twentieth Century*, 76 FLA. HIST. Q. 175, 190-91 (1997)).
[270] *Id.* (citing WHITEFIELD, *supra* note 267, at vii).
[271] *Id.* at 274 ("The long tradition of impunity that historically followed the unprovoked killing of Black men in America is an old, and deep, wound that many people in the African American community still grieve.").
[272] *See generally* Schulze, *supra* note 181, at 39; s*ee generally* Lawson, *supra* note 34.
[273] *See* Lawson, *supra* note 34. at 274.
[274] *Cf.* Warf, *supra* note 2, at 95 ("Indeed, to this day, white southern culture frames the degree to which a substantial share of the region's white population accepts racism or inequality as natural").
[275] *See* U.S. Const. amend. XIII; U.S. Const. amend. XIV; U.S. Const. amend. XV; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 stat. 241 (codified as amended at 42 U.S.C. §§ 2000(a)-(h) (2000)).

against minorities has reportedly *increased* in recent years.[277] Between 2008 and 2012, the percentage of Americans expressing explicit bias against blacks has increased from 48 to 51 percent.[278] "When measured by an implicit racial attitudes test, the number of Americans with anti-black sentiments jumped to 56 percent, up from 49 percent during the last presidential election. In both tests, the share of Americans expressing pro-black attitudes fell."[279] While many Americans have embraced the notion of "colorblindness . . . asserting that race does not matter,"[280] the foregoing statistics do not support the notion that ignoring race solves the racism problem.[281] While racial prejudice plagues the United States as a whole, it is "exceptionally pronounced in the South."[282]

D. Stand Your Ground and Southern Culture

Southern attitudes, while originating in the South, are not restricted to the South.[283] Scholars have argued that the values and experiences of "southernness" strongly influence other Americans' attitudes.[284] Modern homicide rates, both inside and outside of the South, have been linked to southern culture.[285] As southerners leave the South and migrate to other regions, they bring their attitudes toward violence with them.[286] As such, the U.S. has become increasingly *southern* in its values as southern culture spreads.[287] Renowned historian Richard Maxwell Brown argues that "there has been a southernization of America and that this trend has been basic to America's traditionally high homicide rate."[288] The spread of southern values seems to be a precursor to the spread of SYG and its values.

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[276] *Cf.* Michael Ewens, Bryan Tomlin & Liang Choon Wang, *Statistical Discrimination or Prejudice*? *A Large Sample Field Experiment*, http://ewens.tepper.cmu.edu/papers/stat-disc.pdf (last visited Jan. 22, 2013) (explaining that "discrimination in the [rental] screening process can predict lower marginal return…for the discriminated-against group.")

[277] *AP Poll: Majority Harbor Prejudice Against Blacks*, ASSOCIATED PRESS (Oct. 27, 2012, 6:57 AM) http://usnews.nbcnews.com/_news/2012/10/27/14740413-ap-poll-majority-harbor-prejudice-against-blacks?lite.

[278] *Id.*

[279] *Id.*

[280] MONICA Williams, *Colorblind Ideology is a Form of Racism*, PSYCHOLOGY TODAY (Dec. 27, 2011) http://www.psychologytoday.com/blog/colorblind/201112/colorblind-ideology-is-form-racism (discussing the inadequacy of "colorblindness" as a remedy to racism).

[281] *Id.* ("[C]olorblindness helped make race into a taboo topic that polite people cannot openly discuss. And if you can't talk about it, you can't understand it, much less fix the problems that plague our society."

[282] Warf, *supra* note 2, at 95.

[283] *Cf. Southern Violence*, *supra* note 2, at 226 (discussing RAYMOND GASTIL, CULTURAL REGIONS OF THE UNITED STATES, 116, 109 (1975) and John Reed, *Below the Smith and Wesson Line: Reflections on Southern Violence* (Apr. 21, 1977)).

[284] *Id.*

[285] *Id.* ("there has been a southernization of American and that this trend has been basic to America's traditionally high homicide rate").

[286] *Id.* (discussing the Gastil-Reed hypothesis) ("the homicide rate, state-by-state, tends to reflect the index of southernness").

[287] *Id.* (discussing the theory that "southernness" accounts for murder rates); Warf, *supra* note 2 at 95 (describing "mob justice").

[288] *Southern Violence*, *supra* note 2, at 226 (discussing RAYMOND GASTIL, CULTURAL REGIONS OF THE UNITED STATES, 116, 109 (1975) and John Reed, *Below the Smith and Wesson Line: Reflections on Southern Violence* (Apr. 21, 1977)).

By choosing Florida as the birthplace of SYG, the NRA has exploited the southern pattern of using extrajudicial violence for problem solving.[289] SYG essentially codified the practice of violence-as-justice[290] because of the lack of justice system oversight resulting from the presumptions and immunity provisions of SYG.[291] This reality sends a message about the depreciated value of human life and society's tolerance of violence as a problem-solving technique. The racism underlying this pattern is barely below the surface.[292] The NRA is tapping into a racially troubled southern milieu[293] to spread problematic and deeply criticized gun laws across the country[294] while the values that underlie the law find expression in SYG.

The influence of SYG is far-reaching and not limited to individuals with conscious racial prejudices and stereotypes. "Advances in implicit social cognition reveal that most people carry biases against racial minorities beyond their conscious awareness. These biases affect critical behavior, including the actions of individuals performing shooting tasks."[295] Because SYG may affirm biases which are often unrecognized by those affected by them,[296] the reach of SYG could be enormous.[297] As the NRA brings SYG to the rest of the country, it brings all of its baggage along with it.

A recent case provides an apt and tragic illustration of what can be exported via SYG. In an episode eerily similar to the Martin killing, white gun enthusiast, Michael Dunn, shot and killed 17-year-old black male Jordan Davis.[298] Dunn pulled into a gas station and parked next to the SUV in which Davis and his

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[289] *Id.* at 230 (discussing H. REDFIELD, HOMICIDE, NORTH AND SOUTH: BEING A COMPARATIVE VIEW OF CRIME AGAINST THE PERON IN SEVERAL PARTS OF THE UNITED STATES 4-14 (1880)) ("The problem of the ubiquitous killing encounters was compounded and exacerbated by the equally widespread phenomenon of unpunished murder, a feature that was so deeply embedded in southern society as to be in reality a system supported by all classes, men of family, position, and standing, and even the church."); *see supra* notes 1- 3; *see supra* Parts V.A-C.

[290] *Id.*; *Cf.* Lawson, *supra* note 34, at 282 ("Impunity was often the preferred prosecutorial response to the suspicious killing of black men."); *see supra* notes 1- 3; *see supra* Parts V.A-C.

[291] *Id.;* FLA. STAT. ANN. §§776.012-.013; 776.031-.032. Lawson, *supra* note 34, at 287 ("If the defendant is successful in proving his self-defense claim at the pre-trial hearing, the criminal case is dismissed, and the defendant is deemed immune from criminal prosecution for the killing. The immunity is granted on the judge's order alone, with the case never being heard by a jury."); *see supra* Part III.C.

[292] *See* Schulze, *supra* note 181 at 39 (citing Kahan, *supra* note 232) (discussing how the southern history of slavery relates to SYG); s*ee generally* Lawson, *supra* note 34, for a discussion comparing Trayvon Martin's killing to historic patterns of violence against blacks in the South; *see supra* notes 1- 3; *see supra* Parts V.A-C.

[293] *See generally* Lawson, *supra* note 34 for a discussion of Florida's SYG law and racism, *see supra* notes 1-3; *see supra* Parts V.A-C.

[294] *See supra* note 1 and accompanying text. *Cf. Shoot-First*, *supra* note 1 ("The NRA believes it has a favorable climate, especially in the South…in which to market its macho bill"); *see supra* note 208.

[295] Benforado, *supra* note 214, at 3.

[296] *See infra* Parts VI-VIII; *see infra* notes 417-421, *see generally* Lawson, *supra* note 34 for a discussion about SYG and race.

[297] Implicit bias is explored in greater depth in Part VII.

[298] *New Evidence Introduced in Jordan Davis Murder Case Including Pictures, 911 Calls*, ATLANTA DAILY WORLD (Mar. 13, 2013); http://atlantadailyworld.com/201303134549/Featured/new-evidence-introduced-in-jordan-davis-murder-case-including-pictures-911-calls [hereinafter *Jordan Davis*]; Solotaroff, *supra* note 2 at 60.

friends listened to loud music.[299] Dunn asked the boys to turn down their radio.[300] They refused and exchanged heated words with Dunn.[301] Dunn retrieved his gun from the glove box, opened fire on the vehicle, killed Davis, and continued shooting as Davis and his friends fled in the SUV.[302]

When police came to Dunn's home to arrest him, he seemed unconcerned about the legality of his actions, telling police, "[t]hey defied my orders. What was I supposed to do if they wouldn't listen?"[303] Only after consulting with a lawyer a few days after the shooting did Dunn justify his actions, saying "he fired 10 shots in a crowded shopping plaza because he felt threatened by the boys."[304] Dunn's story also evolved to include the claim that Jordan and his companions had a shotgun pointed at him,[305] but in his early version of events, Dunn omitted the shotgun allegedly held by the boys.[306] No shotgun has been found.[307] Unlike the Martin case, Dunn was immediately arrested and charged with murder.[308] Like George Zimmerman, however, Dunn is expected to invoke a SYG defense.[309]

The killing of Jordan Davis provides an instructive example of SYG at work. From one point of view, Dunn simply acted out of anger and exercised fatally poor judgment, and the justice system is holding him accountable. Viewed through the expressive law lens, [310] Dunn was practicing traditional southern extrajudicial justice,[311] codified by SYG.[312] He may have acted as he did because he believed SYG sanctioned his use of force. One commentator wrote, "[u]nderstanding the mistaken assumption of the applicability of Florida's SYG law in the Zimmerman prosecution entails deconstructing the messages those laws convey to citizens."[313] Dunn seemed to share the same "mistaken assumption of applicability" of SYG. [314] The assumption that SYG sanctions almost all extrajudicial self-help demonstrates the danger inherent in the law. And another (seemingly innocent and unarmed) black teenager is dead.

VI. THE NATIONAL RIFLE ASSOCIATION AND STAND YOUR GROUND LAW

A. The National Rifle Association's Strategy

In view of the problems with SYG, outlined above, evaluating its genesis and trajectory is critical. Rather than a populist movement, Florida's SYG law was

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[299] Solotaroff, *supra* note 2, at 60.
[300] *Jordan Davis*, *supra* note 298.
[301] Solotaroff, *supra* note 2, at 60.
[302] *Id.*
[303] *Id.*
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Jordan Davis*, *supra* note 298.
[308] *Jordan Davis*, *supra* note 298.
[309] *Jordan Davis*, *supra* note 298.
[310] *See supra* Part IV.
[311] *See supra* notes 233, 235, 236.
[312] FLA. STAT. ANN. §§776.012-.013; 776.031-.032.
[313] Schultz, *supra* note 181, at 38.
[314] *Id.*

conceived and promoted by the NRA.[315] NRA leader Wayne LaPierre said that Florida's law is the "first step of a multi-state strategy" to loosen gun laws across the nation.[316] The NRA strategy to spread *right-to-use-your-gun* laws[317] state by state has succeeded.[318] At least 28 states how have SYG-style laws.[319] The rationale behind the law is purportedly to empower "law abiding" citizens to freely use self-defense.[320] The NRA's political action wing, the Institute for Legislative Action ("ILA") used folksy railroad references to explain its legislative strategy. "Today, the NRA is feeding the firebox of Castle Doctrine legislation in states throughout the country, conducting a self-defense whistle stop campaign that is turning focus from criminals' rights to those of the law-abiding who are forced to protect themselves."[321] The NRA's use of the phrase *castle doctrine* is notable because NRA's castle doctrine is a reinvention of the term.[322]

Traditional castle doctrine, discussed above, allowed a person to defend himself in his home without first retreating.[323] While SYG did codify the castle doctrine,[324] what makes SYG exceptional is the permission given to gun owners not simply to use their guns to defend themselves at home, but rather to defend themselves anywhere.[325] This vastly exceeds true castle doctrine.[326] The law has been referred to as "super castle doctrine,"[327] "castle doctrine on steroids,"[328] and a "legal Incredible Hulk."[329] The expansion of castle doctrine significantly expands a

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[315] *Cf.* Solotaroff, *supra* note 2, at 61 ("[Florida's] prolific gun lobbyist , Marion Hammer, rammed home legislation in 2005 that limited the ability of law enforcement to prosecute shooters who had evidence of provocation, no matter how slight").

[316] Manuel Roig-Franzia, *Fla. Gun Law to Expand Leeway for Self-Defense*, WASHINGTON POST, April 26, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2005/04/25/AR2005042501553.

[317] Solotaroff, *supra* note 2, at 61 ("gutted gun laws are only useful to shooters if they know they won't be charged for opening fire").

[318] Among the states that have been reported to have adopted stand your ground laws are: Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming. Joshua G. Light, Comment, *The Castle Doctrine-The lobby is my Dwelling*, 22 WIDENER L. J. 219, 225 n.52 (2012) (citing Castle Doctrine, NRA, http://www.nraila.org/maps/cd.pdf). A state-by-state analysis of self-defense laws is outside the scope of this comment.
THE CONSERVATIVE POLICY GROUP, THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL (ALEC), WORKING IN TANDEM WITH THE NRA, ADOPTED AND PROMOTED STAND YOUR GROUND LAWS IN MANY STATE LEGISLATURES. WEINSTEIN, *SUPRA* NOTE 220.

[319] *See supra* note 315.

[320] *See supra* note 208.

[321] *Id.*

[322] *Id. See* Solotaroff, *supra* note 2, at 62 (describing SYG's castle doctrine as a "wild debasement of existing law, this one dating back to a distinctly American iteration of English common law").

[323] *See supra* note 81.

[324] FLA. STAT. ANN. § 776.013.

[325] FLA. STAT. ANN. §§776.012-.013; 776.031-.032.

[326] *Compare* Semayne's case, 5 Co. Rep. 91a, 91b, *supra* note 49 (defining traditional castle doctrine) *with* FLA. STAT. ANN. § 776.013(5) (defining Florida's castle doctrine under Stand Your Ground legislation).

[327] Holliday, *supra* note 85, at 408.

[328] Daniel Ruth, *You Talkin' To Me?*, TAMPA TRIBUNE, Apr. 22, 2005, at 2.

[329] Sebok, *supra* note 170.

person's self-defense rights.[330] And though the no-retreat rule is the majority rule in the United States, calling it *castle doctrine* is somewhat disingenuous because castle doctrine was already recognized in Florida prior to SYG,[331] and SYG is a dramatic departure from true castle doctrine.[332] Using disarming terminology shows a sophisticated effort on the part of the NRA to make SYG palatable.

B. The National Rifle Association's Rhetoric

The NRA's strategy has apparently been to sell SYG in a hospitable environment[333] using appealing language.[334] But the NRA appeals to a particular slice of the population. The NRA leadership has repeatedly used racially inflammatory language and ideas to promote their agenda, pitting armed white *victims* against racial minority *oppressors*.[335] Speakers employing racist language include celebrities like Charlton Heston and Ted Nugent, as well as less prominent NRA leaders.[336] It is worth repeating specific examples. Charlton Heston used fear-mongering to rally NRA members, suggesting that white conservatives are under siege and must fight back.[337] Heston declared:

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[330] *See supra* Part III.C.2-5.

[331] *See* James, 867 So. 3d at 416 (discussing Florida's castle doctrine prior to Stand Your Ground's passage).

[332] Aggergaard, *supra* note 66, at, 668 (discussing State v. Glowacki, 630 N.W.2d 392 (Minn. 2001)) ("the court adopted a new no-retreat rule and professed to join a majority of states that do not require flight from one's home when faced with attack"); *see supra* note 49; *see supra* Part III.

[333] *See* Shoot-First, *supra* note 1; *see supra* note 220; s*ee infra* Part V.

[334] *See supra* note 208.

[335] *See* Malloy, *supra* note 1; s*ee Train*, *supra* note 208; *At Last, Balance Shifts Away From Criminal*, NRA-ILA (May 2, 2005), http://www.nraila.org/news-issues/in-the-news/2005/5/at-last,-balance-shifts-away-from-crimi.aspx?s=%22castle+doctrine%22&st=&ps= [hereinafter *Balance*] ("Marion Hammer, former NRA President who conceived SYG, wrote 'Florida`s new Castle Doctrine law reverses the pendulum that for far too long has swung in the direction of protecting the rights of criminals over the rights of their victims.'"); *see infra* notes 336-358 and accompanying text; *see* Eitches, *infra* note 336, at 8 (discussing the NRA's "alienation as identity").

[336] *NRA Family Values: The Extremism, Racism, Sexism, Legal Woes, and Gun Industry Ties of the National Rifle Association's Board of Directors*, VIOLENCE POLICY CENTER, http://www.vpc.org/studies/nrafamst.htm (last visited Mar. 14, 2013) [hereinafter *NRA Family Values*]. Prominent NRA board member, Ted Nugent, made the following statement.

> [A]partheid isn't that cut and dry. All men are not created equal. The preponderance of South Africa is a different breed of man. . . . they are different. They still put bones in their noses, they still walk around naked, they wipe their butts with their hands . . . These are different people. You give 'm toothpaste, they f---ing eat it.

*Id. (*citing *Detroit Free Press Magazine*, July 15, 1990).

Nugent further explained, "I use the word n----r a lot because I hang around with a lot of n-----rs, and they use the word n----r, and I tend to use words that communicate." *Id.*; *see Gun War*, *infra* note 343, at 17. *Charlton Heston (Former President)*, MEET THE NATIONAL RIFLE ASSOCIATION LEADERSHIP, http://www.meetthenra.org/statement/charlton-heston-former-president-1 (last visited Feb. 9, 2014); Eliana Rae Eitches, *The National Rifle Association and the White Male Identity*, COLUMBIA UNIVERSITY ACADEMIC COMMONS, (Dec. 21, 2012) (discussing the NRA's rhetoric); Charlton Heston, First Vice-President, Nat'l Rifle Assoc., Address At The Free Congress Foundation's 20th Anniversary Gala (Dec. 7, 1997), http://www.vpc.org/nrainfo/speech.html [hereinafter Heston].

[337] *Id.*

> I . . . realize that a cultural war is raging across our land . . . storming our values, assaulting our freedoms, killing our self-confidence in who we are and what we believe, where we come from. . . . You are a casualty of the cultural warfare being waged against traditional American freedom of beliefs and ideas.[338]

Heston emphasized that conservatives "have been assaulted and robbed of the courage of your convictions," and he then drew a comparison between Jews in Nazi Germany forced to wear identifying stars, and the cultural pressure facing conservatives in 1990s America.[339] The suggestion is that if conservatives do not take up arms against their oppressors, they face their own holocaust. He continued,

> [h]eaven help the God-fearing, law-abiding, Caucasian, middle class, Protestant, or even worse, Evangelical Christian, Midwest or Southern, or even worse, rural, apparently straight, or even worse, admittedly heterosexual, gun-owning, or even worse, NRA-card-carrying average working stiff, or even worse, male working stiff, because not only you don't count, you're a downright obstacle to social progress. . . . That's how cultural war works. And you are losing.[340]

Lest one miss the racial overtones in the culture wars, Heston made them explicit.

> The Constitution was handed down to guide us by a bunch of those wise old dead guys who invented this country. Now, some flinch when I say that. Why? It's true…they were white guys. . . . So why should I be ashamed of white guys? Why is "Hispanic pride" or "black pride" a good thing, while "white pride" conjures up shaved heads and white hoods?[341]

Heston's comments emphasize racial divisions and suggest that whites should coalesce as a group to further their own interests.[342] Heston encouraged his audience to fight for their interests against racial minorities and others who are not white conservatives.

> Mainstream America is depending on you—counting on you—to draw your sword and fight for them. These people have precious little time or resources to battle misguided Cinderella attitudes, the fringe propaganda of the homosexual coalition, the feminists who preach that it's a divine duty for women to hate men, blacks who raise a militant fist with one hand while they seek preference with the other.[343]

Heston is far from the only NRA leader who has utilized inflammatory rhetoric. NRA board member Jeff Cooper made the following defense of American slavery in his publication *Jeff Cooper's Commentaries*.[344]

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[338] *Id.*
[339] *Id.*
[340] *Id.*
[341] *Id.*
[342] *Id.*
[343] *From the Gun War to the Culture War: How the NRA Has Become the Pillar of the Right*, VIOLENCE PREVENTION CAMPAIGN, 10 [hereinafter *Gun War*].
[344] Jeff Cooper, *The Big Bang*, 8 JEFF COOPER'S COMMENTARIES 7, (July 2000), *available at* http://myweb.cebridge.net/mkeithr/Jeff/jeff8_7.html [hereinafter 8 COOPER'S COMMENTARIES]., Cooper also wrote, "[w]ithout slavery, civilization would never have been achieved, for no one could ever done anything intellectual if he had to spend all his time hewing and digging and

> We reflect, in this period of racist agitation, that slavery has been the normal condition of mankind for most of history. What do you do with the losers? You either kill them outright or put them to work. If you pen them up you have to feed them, and you have enough trouble feeding yourself. Despite this a large number of semi-literate types in the States seem to think of slavery as a unique invention of the southern states of the US over a period of a few generations.[345]

It is disturbing that a prominent NRA leader attempted to rationalize or justify the American institution of slavery, particularly in light of the other racist comments the NRA leadership has put forth.

The NRA consistently relies on polarizing language: *law abiding citizens* are lauded while *criminals* are demonized.[346] The difficulty with *us versus them* language is in the definitions. Who is law-abiding and who is criminal? Wayne LaPierre, Executive Vice President of the NRA suggested one distinction. "[T]he dirty little secret is [criminals are] overwhelmingly black and hispanic. But everybody's so scared of being called racist they won't admit the level of killing among non-white teenaged gangbangers."[347] La Pierre is not alone in labeling racial minorities as dangerous. Paul Blackman, Research Coordinator of the NRA/ILA (Institute for Legislative Action), claims that "Violence is . . . epidemic only among young blacks and Hispanics."[348] He explains, "[f]or the most part, gun-related violence is a growing problem among young urban black and Hispanic males."[349] The language conveys the message that *law-abiding* means white, and *criminal* means minorities.

Blackman makes some bold statements that some might consider biased. He writes that most gunshot accident *victims* are criminals[350] who are essentially *better off dead*.[351] To Blackman, being poor seemingly makes a person more likely to be a criminal.[352] He apparently fails to consider the systemic racism that can

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fighting." Jeff Cooper, *Hunting Season*, 9 JEFF COOPER'S COMMENTARIES 11 (Oct. 2001), *available at* http://www.dvc.org.uk/jeff/jeff9.pdf.

[345] *See* 8 COOPER'S COMMENTARIES,

[346] *See Train, supra* note 208; *Balance, supra* note 335.

[347] Reva Siegel, *Dead Or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, n.230 (2008) (quoting Wayne LaPierre, Executive Vice President, Nat'l Rifle Assoc., Speech Before NRA Annual Meeting in Charlotte, N.C. (May 20, 2000)).

[348] Paul H. Blackman, *The Federal Factoid Factor on Firearms and Violence: A Review of CDC Research and Politics*, 7 J. FIREARMS & PUB. POL'Y 21, 30 (1995).

[349] *Id.*

[350] *Id.* at 31-32 (citing Hutson, et. al., *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, NEW ENG. J. MED. 330, 324-327 (1994) ("victims [of gunshot wounds] are largely unsavory persons; some are just poor; many are just unsavory . . . One recent study found, for example, that 71% of children and adolescents injured in drive-by shootings 'were documented members of violent street gangs."); *id.* at 31(citing Michael D. McGonigal, et al., *Urban Firearm Deaths: A Five-Year Perspective*, 35 J. OF TRAUMA 532-36) ("A recent study of the victims of gun-related homicides in Philadelphia found that '84% of victims in 1991 had antemorten drug use or criminal history.'")

[351] *Id.* 51-52 (describing how the deaths of alleged criminals are good for society).

[352] *Id.* at 31 (citing GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA (1991) ("Even accident victims are apt to involve persons unusually aggressive, and from the underclass, persons with criminal records, rather than ordinary citizens.").

contribute to crime statistics.[353] Blackman's words suggest that being a racial minority also makes someone more likely to be a criminal.[354] He explains people killed with guns are commonly criminals "and/or drug abusers. It is quite possible that their deaths, in terms of economic consequences to society, are net gains."[355] Victims of violence are apparently better off dead.[356]

Better off dead is an idea shared by NRA board member Jeff Cooper. Referring to Los Angeles's murder rate, Cooper pronounced, "the consensus is that no more than five to ten people in a hundred who die by gunfire in Los Angeles are any loss to society. These people fight small wars amongst themselves. It would seem a valid social service to keep them well-supplied with ammunition."[357] It follows that some NRA leadership thinks killing so-called criminals benefits society.[358] Based on the tenor of these statements, it is not surprising that the NRA has very few minority members.[359]

The NRA has used twin tactics of employing racially charged language[360] and fear mongering in promoting its agenda.[361] NRA leader and SYG booster, Marion Hammer, played on people's fear of crime in pushing for the passage of SYG in Florida.[362] In promoting SYG, Hammer, a woman of slight stature, frequently told a story "about the night she pulled a gun on a carload of men who were threatening her. . . . [S]he said the men quickly took off and the gun saved her

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[353] *See infra* notes 397-404 and accompanying text. NRA board member Ken Blackwell and Family Research Council member Ken Klukowski wrote "the tremendous overall success of Asians and Indians proves there's no systemic racism that keeps all minorities down." *Who is the NRA Leadership?*, MEET THE NATIONAL RIFLE ASSOCIATION LEADERSHIP, (last visited Feb. 9, 2011), http://www.meetthenra.org/issues?field_issue_value_many_to_one=Race.

[354] *See* Blackman, *supra* 348, at 31(citing Fingerhut et. al., *Firearm Mortality Among Children and Youth*, NCHS Advance Data No. 178, CDC NATIONAL CENTER FOR HEALTH STATISTICS (Nov. 3, 1989) ("Homicide, and particularly escalating homicide rates, largely, are limited to the inner city, and, indeed, to low-income minorities within inner cities.").

[355] *Id. at* 51-52.

[356] *Id.*

[357] *Gun War*, *supra* note 343, at 16 (quoting Jeff Cooper, 261*Cooper's Corner*, GUNS & AMMO, April 1991, at 104, as cited in *NRA Family Values, The Extremism, Racism, Sexism, Legal Woes, and Gun Industry Ties of the National rifle Association's Board of Directors,* VIOLENCE POLICY CENTER (June 1996)).

[358] *Id.*

[359] Robert Farago, *Rick Ector: Why The NRA Doesn't Include Blacks*, THE TRUTH ABOUT GUNS.COM (April 25, 2012), http://www.thetruthaboutguns.com/2012/04/robert-farago/rick-ector-why-the-nra-doesnt-include-blacks ("Twelve African Americans at a convention with over 73,700 attendees is as good an example of the RITZ (Round It To Zero) principle as you're going to get"); *See generally Gun War*, *supra* note 343.

[360] *See supra* notes 336-357and accompanying text.

[361] *See infra* notes 363-66, and accompanying text; *see Train*, *supra* note 208; *see infra* note 377 and accompanying text; *see* Schulze, *supra* note 181 at 39 ("commentators have claimed that the National Rifle Association has succeeded in its attempts to expand SYG laws to more states by playing on our increasing fears of violence.") (citing Joshua Dressler, *Feminist (or "Feminist") Reform of Self-Defense Law: Some Critical Reflections*, 93 MARQ. L. REV. 1475, 1481-82 (2010), *see* Eitches, *supra* note 336, at 4-5 (discussing the NRA and its culture of fear); *see* FREEDOM IN PERIL, *supra* note 2 (providing an example of the NRA's use of fear and racial polarization in promoting its agenda).

[362] Gina Jordan, *The Lobbyist Behind Florida's Stand Your Ground Law*, Around the Nation, NATIONAL PUBLIC RADIO (Mar. 29, 2012, 4:00 PM) (NPR radio broadcast transcript), http://www.npr.org/2012/03/29/149591067/the-lobbyist-behind-floridas-stand-your-ground-law.

life."[363] Interestingly, Hammer never filed a police report.[364] The subtext of Hammer's story seems to be that guns are "the great equalizer," allowing a small woman to defend herself from a dangerous group of men.[365] Hammer sums up her fear-inspired ideology by explaining, "I heard somebody say one time we don't shoot to kill, we shoot to live. And that's what it's all about, being able to protect yourself when you're under threat of death or great bodily harm."[366] Though Hammer justified SYG on the basis of enabling self-defense,[367] the law goes far beyond traditional notions of bodily protection.[368]

NRA rhetoric reveals the values underpinning SYG. What SYG *does* is justify more homicides than the old law would have justified or excused.[369] What SYG *says* is that law-abiding white people need to arm themselves against dangerous criminals who are often racial minorities,[370] and the use of deadly force against them is socially sanctioned and maybe even morally required.[371] Indeed, the right to kill may be perceived as a *duty* to kill people identified as a threat.[372] The

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[363] *Id.*

[364] Weinstein, *supra* note 220.

[365] Some advocates have gone so far as to call gun control measures "sexist." "An assault weapon in the hands of a young woman defending her babies in her home becomes a defense weapon. . . . And the peace of mind she has … knowing she has a scary-looking gun gives her more courage when she's fighting hardened violent criminals." Caitlin Dickson, *Gayle Trotter: The Woman Who Called Gun Control Sexist*, THE DAILY BEAST (Feb. 7, 2013, 4:45 AM) http://www.thedailybeast.com/articles/2013/02/07/gayle-trotter-the-woman-who-called-gun-control-sexist.html (quoting gun rights advocate Gayle Trotter testifying before the Senate).

[366] Jordan, supra note 362.

[367] *See infra* note 399 (quoting Marion Hammer).

[368] *See supra* Parts III.C.

[369] *Cf.* Ross, *supra* note 5, at 45 ("These laws are passed to protect the law-abiding people from criminals. Yet innocent people may end up being killed because of the new [SYG] law, while nothing will happen to the killers. No one will be punished. There once was a time when we punished all homicides. Soon, we will punish none."); *see supra* Part III.C.

[370] *See supra* notes 336-358and accompanying text; *see supra* note 216; *see* Schulze *supra* note 181 at 40-41 (discussing the message of SYG laws); *see* Eitches, *supra* note 336, at 3-5 (discussing the NRA's culture of fear); (discussing the NRA's culture of fear); *see* FREEDOM IN PERIL, *supra* note 2 (showing an example of the NRA's propaganda); *see infra* note 399; *see* Blackman, *supra* note 348 at 30; *see generally* Lawson, *supra* note 34, for a discussion of racism and SYG law.

[371] Some interpretations of castle doctrine transform the right to defend oneself into a duty to defend the community using deadly force. *See* Catalfamo, *supra* note 113, at 543. (citing David I. Caplan & Susan Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments-And the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. Rev. 1076, 1096-1101 (2005)).

> In the past, this sense of [southern] community translated the privilege of non-retreat provided by the castle doctrine into an obligation. Men owed a *duty to their community* to see to it that the laws were enforced: if you killed a would-be robber or rapist, there was no chance that he would continue on to rob or rape your neighbors. The sense of gratitude from a man's neighbors, if kills a rapist in his inner-city neighborhood, is inevitably immense: not only has the man prevented a rape of his wife, and prevented a rape of the home, but he has protected his neighbors' homes, wives, and daughters from the trauma and horror. (emphasis added) *Id.*

Of course, this begs the question about how certain of guilt one must be before killing a "would-be" criminal, and how many "would-be" criminals that were killed were actually innocent.

[372] Catalfamo, *supra* note 113, at 542 n.176 (quoting David I. Caplan & Susan Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments-And the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. Rev.

expressive value of SYG instructs that "there *is* an increasing threat and citizens *should* take the punishment of would-be violent criminals into their own hands."[373] Because laws express ideas, what a law *says* is crucial in understanding its impact.[374] As states follow Florida's lead in adopting stand your ground laws, they are incorporating the values and assumptions underlie the law.

Expressive law theory explains that people are influenced by ideas embodied in the law.[375] As SYG law fosters racial divisions[376] and a culture of fear[377] part of its message is that SYG sanctions greater use of force in self-defense

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1076, 1100 (2005)) ("A justifiable homicide protected future victims. Dispatching a violent felon was considered to be not only a prerogative of the victim but also a duty of citizenship and a welcome service to the community.").

[373] *See* Schulze, *supra* note 181, at 40.

[374] *See supra* Part IV.

[375] *Id.*

[376] *See supra* notes 336-357 and accompanying text.

[377] *See* Schulze, *supra* note 181, at 40 (discussing the message of SYG as fear-inducing). Marion Hammer used fear-based rhetoric to advocate for the passage of SYG legislation. Florida State Senator Don Gaetz and Florida State Representative Matt Gaetz wrote an op-ed in a Florida newspaper meant to justify the existence of SYG in the aftermath of the Trayvon Martin killing.

> Consider an elderly woman in a dimly lit parking lot or a college girl walking to her dorm at night. If either was attacked, [prior to SYG's adoption] her duty was to turn her back and try to flee, probably be overcome and raped or killed. Prior to "Stand Your Ground," that victim didn't have the choice to defend herself, to meet force with force.
>
> Calls to repeal "Stand Your Ground" are anti-woman, Imposing a duty-to flee places the safety of the rapist above a woman's own life. In fact, until "Stand Your Ground" was passed, criminals were suing victims because victims, in protecting themselves, were allegedly using excessive force against the criminals.

Peter Schorsch, *Sen. Don Gaetz & Rep. Matt Gaetz op-ed: Standing up for "Stand Your Ground,"* SAINTPETERSBLOG, (May 2, 2012), *available at* http://www.saintpetersblog.com/sen-don-gaetz-rep-matt-gaetz-op-ed-standing-up-for-stand-your-ground. "The letter was also distributed by the National Rifle Association, and specifically Marion Hammer . . . to push back on calls for repeal of Stand Your Ground." Annie-Rose Strasser, *Florida Lawmakers Claim "Stand Your Ground" is Pro-Woman, Despite Exemption for Domestic Violence*, THINK PROGRESS (May 1, 2012), http://thinkprogress.org/justice/2012/05/01/474652/stand-your-ground-anti-woman. Brian Malte, of the Brady Campaign, stated, "Marion Hammer and the NRA are the masterminds of a dangerous paranoid mentality that got Trayvon Martin killed, the mentality that is responsible for endangering all our lives. It's based on a lie that you need to be armed to the teeth anywhere you go." Ann O'Neill, *NRA's Marion Hammer Stands her Ground*, CNN (Apr. 15, 2012, 9:20 AM), http://www.cnn.com/2012/04/15/us/marion-hammer-profile.

In fact, the duty to retreat was only required if one could do so safely. Redondo, 380 So. 2d at 1110 (explaining that retreat was only required if it could be done so safely).

> A climate of fear helped spread Stand Your Ground, according to the National District Attorneys Association. In 2007, it conducted the first in-depth study on the expansion of the castle Doctrine and found that it took root in part because "there was a change in perceptions of public safety after the terrorist attacks of 9/11. Many citizens . . . became concerned that government agencies could not protect every citizen in the event of subsequent terror attacks." Indeed, the NRA used 9/11 to promote its legislative agenda, most notably in its unsuccessful push to let airline pilots pack heat.

against racial minorities.[378] By tapping into a victim/oppressor concept, the NRA has harnessed a powerful framework for establishing the importance of the right to defend oneself. Setting up a victim/oppressor dichotomy[379] allows the actor using self-defense to assert a purported moral high ground while maintaining a sympathetic posture.[380] Not only does the NRA engender an "us versus them" mentality with respect to individuals,[381] it sets itself up as a victim of the culture wars,[382] a defender of white culture,[383] and a bastion of the values established by the founding fathers.[384] One commentator asserts that "the NRA [sees] itself [as] a David called by God to do battle against its own Goliath."[385] The NRA has compared its struggle to the Jews in Nazi Germany,[386] and it has suggested that those who oppose it are un-American.[387] This victimhood perspective is crucial to justifying SYG.

But even as it asserts an overarching victimhood rationale, by its own admission SYG is not strictly necessary to protect the law-abiding citizens it portrays as victims.[388] NRA leadership has explicitly denied that white middle class Americans are commonly the victims of violent crime.[389] NRA research coordinator, Blackman, explains, "[h]omicide, and particularly escalating homicide rates, are largely limited to the inner city, and indeed, to low-income minorities

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Weinstein, *supra* note 220 (discussing Jansen & Nugent-Borakove, *supra* note 165 at 4); *see generally* Eitches, *supra* note 336 (discussing the NRA's culture of fear); *see* FREEDOM IN PERIL, *supra* note 2 (showing an example of NRA propaganda).

[378] *See* Catalfamo, *supra* note 372; *see supra* note 377.

[379] *See supra* notes 336-357 and accompanying text; *see* Heston, *supra* note 338 and accompanying text (describing the NRA audience as a "casualty of the cultural warfare"); *see generally* Eitches, *supra* note 336 (discussing the NRA's culture of fear); *see* FREEDOM IN PERIL, *supra* note 2 (showing an example of NRA propaganda)

[380] *See* Andrew J. Karmen, *Who's Against Victims' Right? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Law*, 8 ST. JOHN'S J. LEGAL COMMENT. 157, 157 (1992) ("Who could oppose the legitimate demands of people espousing such a just and noble cause as the 'empowerment' of innocent victims who suffered physical injuries, psychological harm, or financial losses?").

[381] *See infra* notes 393-394 and accompanying text; *see* Eitches, *supra* note 336, at 9 (quoting DOUGLAS KELLNER, GUYS AND GUNS AMOK: TERRORISM AND SCHOOL SHOOTINGS FROM THE OKLAHOMA CITY BOMBING TO THE VIRGINA TECH MASSACRE 25 (2008)) (discussing the NRA's "us versus them" mentality).

[382] *See generally* Gun War, *supra* note 343 (discussing the NRA and the culture war).

[383] *See* Eitches, *supra* note 336, at 10 (quoting Kellner, *supra* note 14, at 94) (discussing "white male identity politics" and perceived threats to "white american values and people").

[384] *Id.* at 7-9 (discussing WAYNE LA PIERRE, GUNS, CRIME, AND FREEDOM 15 (1994) ("La Pierre avers that 'historical research shows that the founding fathers out NRAed the NRA'").

[385] Eitches, *supra* note 336, at 6 (quoting Kevin Lewis O'Neill, *Armed Citizens and the Stories They Tell: The National Rifle Association and Masculinity*, 9 MEN AND MASCULINITIES 457, 469 (Apr. 2007)).

[386] *See supra* notes 337-340 and accompanying text.

[387] Eitches, *supra* note 336, at 7 (quoting ERIK LARSON, LETHAL PASSAGE: HOW THE TRAVELS OF A SINGLE HANDGUN EXPOSE THE ROOTS OF AMERICA'S GUN CRISIS 137 (1994) (discussing how the NRA "distorts 'anti-gun' into 'anti-Constitution").

[388] *Cf.* Blackman, *supra* note 348, at 30 ("Violence is endemic in American, but it is epidemic only among young blacks and Hispanics. For most other age-and-ethnic-groups, gunshot wounds are stable or declining. . . . For the most part, gun-related violence is a growing problem among young urban black and Hispanic males."); *see supra* notes 347-349 for a discussion of the definition of "law-abiding."

[389] *Id.*

within inner cities."[390] Decreasing crime rates further undermine the justification for the law.[391] Violent crime rates have actually significantly decreased since the 1990s.[392] In advocating for SYG, former NRA President, Marion Hammer, admitted that the law was not written in reaction to specific instances of crime, but instead to increase the rights of *victims* in light of the rights provided by the law to criminals.[393] The racially charged dichotomy between *victims* and *criminals*, frequently discussed by the NRA, is at the heart of SYG's rationale.[394]

VII. RACE, IMPLICIT BIAS, AND STAND YOUR GROUND

SYG intersects with racial bias in two ways. As discussed previously, it reinforces racial bias.[395] First, the message embedded in the law is that racial minorities are dangerous,[396] and the use of force against them is socially acceptable and necessary.[397] Second, it puts racial minorities at greater risk of being harmed by aggressive self-defense because of implicit bias/stereotypes that minorities are criminals.[398] The purpose of SYG was to remove impediments to the use of deadly force in self-defense.[399] Critics of the law assert that it encourages vigilantism, thus

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[390] *Id.* at 31.

[391] Janine Young Kim, *The Rhetoric Of Self-Defense*, 13 BERKELEY J. CRIM. L. 261, 267 (2008) (citing Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L. J 536, 554, n.83 (2006)) (explaining that the majority of the population mistakenly thinks crime rates are increasing in spite of actual decreases in the 1990s). "Steven Jansen, vice president and CEO of the Association of Prosecuting Attorneys and a former prosecutor in Detroit…[noted] the law was 'troublesome to me….We didn't really see a public safety need for it, and it could only muddy the legal waters.'" Weinstein, *supra* note 220.

[392] *Black America: Nearer to Overcoming*, THE ECONOMIST, May 8, 2008, *available at* http://www.economist.com/node/11326407 ("Violent crime has also fallen sharply since the 1990s").

[393] Michael *supra* note 2, at 203, (discussing Marion Hammer, *At Last, Balance Shifts Away from Criminals*, ATLANTA JOURNAL-CONSTITUTION, May 2, 2005 at 11A) ("the bill was not introduced in response to a specific case or incident but rather was an attempt to counterbalance the protection courts give to the rights of criminals").

[394] *Compare supra* notes 336-357 and accompanying text, *with supra* notes 380-382 and accompanying text; *see* FREEDOM IN PERIL, *supra* note 2 (illustrating the NRA's notion of victims and criminals).

[395] *See supra* Part VI.B.

[396] *See supra* Part VI; s*ee supra* notes 336-358 and accompanying text*; see supra* note 388.

[397] *Train, supra* note 208*; Balance, supra* note 335; Blackman, *supra* note 348, at 51-52 ("It is quite possible that their deaths, in terms of economic consequences to society, are net gains."); *see supra* notes 371-373 and accompanying text; *see supra* Part VI.B, *see supra* notes 371, 372.

[398] Ross, *supra* note 5, at 35 (citing DEATH WISH (Paramount 1974)) "These new [SYG] statutes present potential danger for society at large, but they particularly endanger racial minorities. These statutes create a vigilante atmosphere."); *see infra* Part VII.

[399] *Former NRA President Exposes the Lies and Misinformation Aimed at Florida's "Castle Doctrine Law*, DEMOCRATIC UNDERGROUND, http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=118x444678 (last visited Feb. 27, 2014). Following is a quote from Marion Hammer describing the purpose of SYG.

> The castle law doctrine has three major components. It restores the right of a law-abiding citizen to protect himself and his family in his home. It establishes the presumption that if someone breaks into your home or forcefully intrudes into your home of your occupied vehicle, that they are there to do harm and that you may therefore use force, including deadly force, to protect yourself and your family and you are not going to be badgered by a

emboldening people to take the law into their own hands.[400] Traditional self-defense law limited actors to using necessary force.[401] SYG allows greater use of deadly force and particularly exposes minorities to danger because of entrenched racial bias.[402] The racial bias that minorities live with in America puts them at greater risk because people are more likely to perceive minorities as threats as compared to white people, even when they are acting innocently.[403]

While one might argue that it is rational to perceive blacks as more threatening in light of the disproportionate numbers of blacks convicted of crimes,[404] these convictions are largely a product of socioeconomic status and systemic bias.[405] National drug enforcement policies have placed an undue emphasis on policing communities of color, thereby producing disproportionate arrests and incarceration of racial minorities.[406] In addition, laws that severely penalize drug possession in school zones unequally affect people of color largely because racial-minority urban communities tend to be more densely populated and contain more schools than rural white communities.[407] Socioeconomic disparities affect the justice system because "people of color are disproportionately low income [and] . . . are more likely to rely on an overburdened public defense system and . . . [have] limited access to treatment and alternative sentencing options."[408] Finally, race can play a role in prosecutors' charging decisions.[409] Whether due to

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> justice system that protects criminals. . . . The second thing that it does is it removes the duty to retreat when you are under attack by a criminal. . . . The third component deals with a prohibition against civil lawsuits by criminals or the families of criminals who had begun to profit by their crimes by suing victims who may have harmed or killed criminals who were attacking them or intruding into their homes.

Id.

Id.; see supra Part III.C.

[400] *See* Ross, *supra* note 5, at 35 (citing People v. Goetz, 497 N.E. 2d 41 (N.Y. 1986) and PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES & CONTROVERSIES, TEACHER'S MANUAL 503 (2005). Miami police chief, John Timoney, called SYG a "License to Murder," that would lead to a higher murder rate in Florida. O'Neill, *supra* note 377.

[401] *See* O'Neill, *supra* note 377*; see supra* Part III.

[402] Ross *supra* note 5, at 35 ("These new statutes present potential danger for society at large, but they particularly endanger racial minorities."); *see supra* note 214.

[403] *Cf.* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 403 (1996) (citing Adeno Addis, *Hell Man, They Did Invent Us*: *The Mass Media, Law, and African Americans*, 41 BUFF. L. REV. 523, 555 (1993) ("One of the stereotypes most often applied to African American males is that they are more dangerous, more prone to violence, and more likely to be criminals or gang members than other members of society.").

[404] Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, THE SENTENCING PROJECT 3(2007), http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf ("African Americans are incarcerated at nearly six (506) tunes the rate of whites; Hispanics are incarcerated at nearly double (1.8) the rate of whites").

[405] *Id.* at 16-19.

[406] "Due to the intersection of racially skewed policing and sentencing policies, the federal crack cocaine mandatory sentencing laws, for example, have produced highly disproportionate rates of incarceration for low-level offenses." *Id.* at 17.

[407] Urban offenders are more likely to be near a school. *Id.*

[408] *Id.* at 18.

[409] Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 467 (2009) ("Prosecutorial discretion not only provides broad authority to bring or not bring criminal charges, it can also serve to mask racial bias.").

personally held bias or in response to public pressure, prosecutors may selectively prosecute racial minorities. With little prosecutorial oversight,[410] implicit bias and the resulting inequality affect both society[411] and the criminal justice system.[412]

Social scientists writing about implicit bias recognize that "most racialized conduct or thought is unconscious, rather than intentional."[413] The law has made progress toward equality by forbidding intentional discrimination via the use of racial classification in employment, education and housing.[414] Incidents of explicit discrimination have declined in the past 25 years.[415] Blacks, however, suffer far more than whites, on average, in areas of poverty, substandard housing, unemployment, low quality education, and high rates of incarceration, due in part to entrenched bias.[416] The law falls short of remedying implicit bias because the Supreme Court has limited judicial remedies to intentional discrimination.[417] Unconscious racism, bias, and stereotyping fall outside the scope of legal remedies.[418]

Unconscious racism has gained recognition as the primary cause of persistent racial inequality.[419] Stereotypes are one way to understand racial bias.[420]

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[410] Charles E. MacLean & Stephen Wilks, *Response & Perspective: Keeping Arrows in the quiver: Mapping the Coutours of Prosecutorial Discretion*, 52 WASHBURN L. J. 59, 71 (2012) (quoting Angela J. Davis, *Prosecutors' Overreaching Goals Unchecked*, NY TIMES (Aug. 19, 2012, 7:00 PM) http:// www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/federal-proscutors-have-way-too-much-power ("We live in a democracy in which we hold accountable those to whom we grant power, but we have fallen short when it comes to prosecutors.").

[411] *See generally* L. Elizabeth Sarine, Comment, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CALIF. L. REV. 1359, 1364-1367 (discussing the "pervasiveness of implicit bias").

[412] *Cf.* Mauer & King, *supra* note 404, at 18.

[413] R.A. Lenhardt, *Understanding The Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 803 (2004).

[414] *Id.* at 806 (citing Brown, 347 U.S. 483) (discussing race and education); (citing Shelley v. Kraemer, 334 U.S. 1 (1948)) (discussing race and housing); (citing Griggs v. Duke Power, 401 U.S. 424 (1971)) (discussing race and employment).

[415] L. Song Richardson & Phillip Atiba Goff, Essay, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 311 (2012) (citing Lawrence Bobo, *Whites' Opposition to Busing: Symbolic Racism or Realistic Group Conflict*?, 45 J. PERSONALITY & SOC. PSYCHOL. 1196, 1196 (1983)); John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 834 (2001); Phillip Atiba Goff, Claude M. Steele & Paul G. Davies, *The Space Between Us: Stereotype, Threat and Distance in Interracial Contexts*, 94 J. Personality & Soc. Psychol. 91, 91 (2008); *see, e.g.*, Philip Perlmutter, *The Decline of Bigotry in America*, 46 SOC. 517 (2009)).

[416] EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN CONTEMPORARY AMERICA 1-2 (2010) (internal citations omitted); Lenhardt, *supra* note 413, at 806-07.

[417] Lenhardt, *supra* note 413, at 803 ("The Supreme Court regards intentional discrimination as the principal source of racial injury in the United States."). "Racial stigma is seen by the court as one of the harms of intentional discrimination, not one of its causes." *Id.* at 875. *See, e.g. Shaw v. Reno*, 509 U.S. 630 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[418] *Cf.* Lenhardt, *supra* note 413, at 877 ("In failing to adopt a consistent approach to racial stigma, the Court, in a very real sense, becomes complicit in its perpetuation.").

[419] *Id.* at 808-09 (discussing Charles R. Lawrence III, *The Id, the Ego And Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330, 332 (1987)) ("racial motive was most often reflected in unconscious conduct bearing a disparate racial impact").

[420] Lee, *supra* note 403, at 401 ("In self-defense cases involving defendants or victims of color, race, or to be more precise, racial stereotypes, may influence our assessment of whether the defendant's use of force against the victim was reasonable.").

Ample evidence demonstrates that blacks are more likely to be perceived as a threat than whites.[421] A common stereotype contributing to negative perceptions of black people is the "black-as-criminal" stereotype.[422] Television media portrayals reinforce these negative racial stereotypes, causing white viewers to be "more fearful of crime when around African Americans or in the assumed presence of African Americans."[423] Stereotypes perpetuate negative perceptions of members of the stereotyped group.[424] "The Black-as-criminal stereotype may cause people to perceive ambiguously hostile acts as violent when a Black person engages in those acts and non-violent when a non-Black person engages in the same acts."[425] Race bias is extremely pervasive. About 70% of people "who have taken a race-bias . . . test were found to exhibit 'an unconscious, or implicit, preference for white people compared to blacks.'"[426] This is true among blacks and whites,[427] including people who do not consciously harbor racist thoughts and consider themselves unbiased.[428] Even children often harbor race bias.[429]

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[421] *Id.* at 401 ("people tend to view the behavior of Blacks as more hostile or aggressive than the same behavior conducted by Whites").

[422] *Id.* at 402 (discussing the Bernhard Goetz case).

[423] *See generally* Shannon T. Issacs , *Portrayal of African Americas in the Media: An Examination of Law and Order*, PENNSYLVANIA STATE UNIVERSITY, 173, http://forms.gradsch.psu.edu/diversity/mcnair/mcnair_jrnl2010/files/Isaacs.pdf (last visited Mar. 24, 2013) (citing Moellar (1989); St. John & Herald-Moore (1996)).

[424] *Cf. id.*

[425] Lee, *supra* note 403, at 404-405 (discussing Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limit of Stereotyping of Blacks*, 4 J. PERSONALITY & SOC. PSYCHOL. 590, 592-97 (1976)). Studies have borne out the suspicion that Americans view black people as generally more dangerous than whites. *Id.* In Birt Duncan's study, university students watched an intense argument between two individuals which ended in one individual pushing the other. Student observers then evaluated and described the behavior of the pusher. Four racial configurations were examined: white pusher/white victim, black pusher/ black victim, white pusher/black victim and black pusher/white victim.

> Duncan found that when the person shoving was a Black person and the person being shoved was White, 75% of the subjects thought the shove constituted "violent" behavior, while only 6% characterized the shove as "playing around." When subjects observed the same events with a White person as the shover and a Black person as the victim, only 17% characterized the White person's shove as "violent," while 42% described the White person's shove as "playing around." Duncan concluded that the threshold for labeling an act as violent was significantly lower when subjects viewed a Black person committing the act than when subjects viewed a White person committing the same act.

Id. at 404-05. One can readily extrapolate to the application of force in self-defense. If use of deadly force is justified when one perceives a threat, and blacks are perceived as highly more threatening, they are more likely to be the victims of mistaken deadly force. *Cf. id.* (discussing Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limit of Stereotyping of Blacks*, 4 J. PERSONALITY & SOC. PSYCHOL. 590, 592-97 (1976).

[426] Benforado, *supra* note 214, at 39 (citing *Predictive Validity Meta-Analysis of the Implicit Association Test is Published*, PROJECT IMPLICIT (June 19, 2009)).

[427] *Id.* (citing Brian A. Nosek, et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 Group Dynamics 101, 104-05 (2002).

[428] *Id.* (citing Joy Gaba & Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 137 (2010) and Brian A. Nosek, et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUROPEAN REV. SOC. PSYCHOL. 1, 36 (2007)).

[429] Lenhardt, *supra* note 413, at 832-33 (discussing Linda Hamilton Kreger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, STAN. L. REV. 1161, 1188 (1995), discussing H. Andrew Sagar & Janet Ward Schofield, *Racial*

Legal scholars have developed the idea of implicit bias and assumptions about criminality, labeling it the "suspicion heuristic."[430] The work combines the ideas of "heuristics" or unconscious "mental shortcuts," [431] with analysis of unconscious racial bias.[432] Research on the "automatic associations" between the

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and Behavior Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts, 39 J. PERSONALITY & SOC. PSYCHOL. 590 (1980)). In a study discussed by Lenhardt, elementary school students were shown a picture representing two children sitting at desks in school, one seated behind the other. *Id.* The scene was characterized as "Mark was sitting at his desk, working on his social studies assignment, when David started poking him in the back with the eraser end of his pencil. Mark just kept working. David kept poking him for a while, and then he finally stopped." *Id.* When David, the poker, was portrayed as black, the students perceived him as more aggressive than when he was portrayed as white. *Id.* The study's outcome indicates that even children perceive blacks as more threatening. *Id.* Stigma and stereotypes are related, though not identical, ways of understanding prejudice. *Id.* at 830-31 (citing Jennifer Crocker et al. *Social Stigma, in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 511 (Gilbert et al. eds. 4th ed. 1998)). "Racial stigma and stereotypes . . . play mutually reinforcing roles in the dehumanized and marginalization—social, as well as economic and political,--of minority groups…[R]acial stigma contributes to the development of negative racial stereotypes about stigmatized groups." *Id.* Stigmas lead to stereotypes, which become so ingrained as to be subconscious. *Id.* at 832 (citing Jody Amour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 741 (1995).

[430] Richardson & Goff, *supra* note 415, at 296-97 (discussing DANIEL KAHNEMAN, FAST THINKING AND SLOW and Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124-34 (1974)). Racial stigmas are one way to understand implicit racial bias. Lenhardt, *supra* note 413, at 808-09 (discussing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Racial stigma goes beyond stereotyping and slurs, and can be defined as "negative social meaning of 'dishonorable meanings socially inscribed on arbitrary bodily marks [such as skin color], of 'soiled collective identities." *Id.* (discussing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963) and GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY (2002)). "The person bearing the racialized attribute is not only disliked but socially dehumanized, a devalued individual whose ability to participate as a full citizen in society is fundamentally compromised by the negative meanings associated with his or her racial status." *Id.* at 818 (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963)). While many may consciously and intentionally mean to be *color blind* and imagine themselves as unprejudiced, "cognitive economy" serves to reinforce stigmatized thinking. *See id.* at 826 (Charles Stangor & Christian S. Crandall, *Threat And The Social Construction of Stigma*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA, 63-64.) People use unconscious mental shortcuts to make sense of their environments, fitting people and objects into easily recognizable categories, making it very difficult to examine the ideas that underlie thoughts and actions. *Id.* (citing STEPHEN C. AINLAY ET AL. STIGMA RECONSIDERED IN THE DILEMMA OF DIFFERENCE: A MULTIDISCIPLINARY VIEW OF STIGMA 18-21 (Stephen C. Ainlay et al. eds, 1986); Charles Stangor & Christian S. Crandall, *Threat And The Social Construction of Stigma*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA, 63-64.)

[431] Richardson & Goff, *supra* note 415, at 296-97 (citing DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011); *see supra* notes 422-425 and accompanying text.

[432] Richardson & Goff, *supra* note 415, at 296-97 ("In the field of social psychology, researchers have found that implicit biases tend to disadvantage stigmatized social groups such as Blacks, women, and the poor.") (citing Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision To Shoot, 92* J. PERSONALITY & SOC. PSYCHOL. 1006, 1015-22 (2007); Eberhardt, *supra* note 8, at 876, 888-g1; Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 PERSONALITY & SOC. PSYCHOL. 292, 302-05 (2008); Brenda Major & Laurie T. O'Brien, *The Social Psychology of Stigma*, 56 ANN. REV. PSYCHOL. 393, 396,400,407-o8 (2005); Heather E. Bullock, *Class Acts: Middle-Class Responses to the Poor, in* THE SOCIAL PSYCHOLOGY OF INTERPERSONAL DISCRIMINATION 118, 1 18-59 (Bernice Lott & Diane Maluso eds., 1995)).

stereotype of "blacks" and "criminal" have found strong automatic mental connections, even among consciously unprejudiced study participants.[433] The concept of *suspicion heuristic* is that "biases . . . and implicit racial associations . . . explain how merely perceiving race - even absent racial animus - can influence judgments of criminality beyond conscious awareness."[434] The biased person may be completely unaware of his bias.[435]

Suspicion heuristic, coupled with SYG and no retreat laws, place blacks at greater risk of violence because when making split second, life-or-death decisions, people unconsciously rely on mental categories, rather than careful rational thought, when deciding whether to use deadly force in self-defense.[436] Under these circumstances, the fact that blacks are more likely to be perceived as criminals, and thus more threatening, increases the odds that they will be shot in mistaken self-defense.[437] "The suspicion heuristic reveals that the right to act in self-defense can place those stereotyped as criminal at greater risk of death or serious bodily injury at the hands of those who honestly, but mistakenly, fear them."[438] By at least one measure, blacks suffer substantial injuries because, nationally, 54% of victims of all gunshot wounds are black.[439]

Mistaken self-defense becomes significantly more threatening when guns are widely available and carried.[440] Guns increase the probability that mistakes will be deadly, as well as the likelihood that a person will act quickly without enough information to make a sound decision.[441] "Criminologists say that when people with guns get the message that they have a right to stand and fight, rather than retreat, the threshold for using that gun goes down."[442] Studies show that because of implicit biases, "Americans are faster and more accurate when firing on armed blacks than when firing on armed white, and faster and more accurate in electing to hold their fire when confronting unarmed whites than when confronting unarmed blacks."[443]

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[433] *Id.* at 302 (citing L. Song Richardson, *Arrest, Efficiency, and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2043-56 (2011), Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6-7, 15-6 (1989)).
[434] *Id.* at 307.
[435] *See Id.*
[436] *Id.* at 309-10 ("Faced with a potentially life-threatening situation, people are unlikely to take the time necessary for deductive reasoning. Rather, they will make their judgments of criminality quickly, based on only small slices of behavior").
[437] *Cf. id.* at 310 (citing Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1718-8 (2002) ("This is because Blacks serve as our mental prototype (i.e. stereotype) for the violent street criminal.").
[438] *Id.* at 326.
[439] Benforado, *supra*, note 214, at 20 (citing Marianne W. Zawitz & Kevin J. Strom, *Firearm Injury and Death From Crime*, Dep't of Just., Bureau of Statistics, 1993-97 (2000)).
[440] Richardson & Goff, *supra*, note 415, at 331 ("the ready availability of guns increases the likelihood of mistakes since a person can no longer rely upon close physical proximity to deduce the victim's intent").
[441] *Cf. id.*
[442] Kris Hundley, Susan Taylor Martin & Connie Humburg, *Florida 'Stand Your Ground' Law Yields Some Shocking Outcomes Depending on How The Law Is Applied*, TAMPA BAY TIMES, June 1, 2012, *available at* http://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133 [hereinafter *Shocking Outcomes*].
[443] *Cf.* Benforado, *supra* note 214, at 3.

Requiring retreat before employing deadly force in self-defense would help prevent deadly mistakes, particularly those inflicted on racial minorities.[444]

VIII. STAND YOUR GROUND'S APPLICATION

A. Race and Stand Your Ground's Application in Florida

As the implicit bias studies suggest, SYG has arguably been applied disparately to racial minorities.[445] One significant criticism of Florida's SYG law is that there is no tracking system following the law's application.[446] In the absence of effective tracking,[447] news organizations have tried to fill in the gaps. The *Tampa Bay Times* analyzed approximately 200 SYG cases on the basis of race and found differential treatment depending on the race.[448] "Seventy-three percent of those who killed a black person faced no penalty compared to fifty-nine percent of those who killed a white."[449] Criminologist Kareem Jordan attributed these outcomes to unconscious bias resulting from "how the media depicts black life."[450] The *Tampa Bay Times* has done an extensive analysis of SYG cases and found "many cases where people went free after killing a black victim under questionable circumstances."[451] These statistics, though incomplete, confirm that bias may affect SYG's application.

B. Stand Your Ground and the Privatization of Law Enforcement

SYG and neighborhood watch efforts may be affected by implicit bias on several levels. First, neighborhood watch volunteers can be influenced by their own

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[444] *See* Richardson & Goff, *supra* note 415, at 332-333.

[445] *Cf. Shocking Outcomes*, *supra* note 442 ("If you claim 'stand your ground' as the reason you shot someone, what happens to you can depend less on the merits of the case than on who you are, whom you killed and where your case is decided. . . . Defendants claiming 'stand your ground' are more likely to prevail if the victim is black."); John K. Roman, *Race, Justifiable Homicide, and Stand Your Gound Laws: Analysis of FBI Supplementary Homicide Data*, URBAN INSTITUTE 7 (July 2013), *available at* http://www.urban.org/UploadedPDF/412873-stand-your-ground.pdf

> Overall, states with SYG laws have statistically significant higher rates of justifiable homicides than non-SYG states ($p < 0.0001$). The presence of a SYG law is associated with a statistically significant increase in the likelihood that a homicide is ruled to be justified for white-on-black . . . homicides. The change in likelihood for black-on-white homicides being found justified is not significant.

Id.

[446] *Shocking Outcomes*, *supra* note 442 ("When police and prosecutors decide not to press charges, they don't always keep records showing how they reached their decisions. And no one keeps track of how many "stand your ground" motions have been filed or their outcomes.").

[447] Susan Taylor Martin, Kris Hundley & Connie Humburg, *Race Plays Complex Role in Florida's "Stand Your Ground Law,"* TAMPA BAY TIMES (June 2, 2012, 12:00 PM) http://www.tampabay.com/news/courts/criminal/race-plays-complex-role-in-floridas-stand-your-ground-law/1233152 [hereinafter *Complex Role*] ("No one knows for sure how often 'stand your ground' is used for a defense or what racial and ethnic groups are most affected by it. That's because no one keeps track of race or ethnicity in those cases.").

[448] *Shocking Outcomes*, *supra* note 442.

[449] *Id.*

[450] *Complex Role*, *supra* note 439.

[451] *Id.*

implicit biases to act aggressively toward racial minorities in their policing efforts.[452] Many observers speculate that racial profiling was a cause of Trayvon Martin's killing.[453] Second, if the law implies that homeowners should take up arms against minority criminals, biases and stereotypes of "blacks-as-criminals" are reinforced.[454]

SYG empowers private citizens to zealously police their neighborhoods with little oversight.[455] "[S]elf-defense doctrines and the right to bear arms have been expanded; allowing private citizens greater power to conduct police-like activities without legal restrictions found in the rules of criminal procedure."[456] Police powers are limited by the Constitution,[457] but constitutional limits do not apply to private actors, [458] so private citizens can act with greater impunity than police.[459] Under some circumstances, private citizens have the right to arrest other citizens.[460] Private law enforcers may attempt to question and search people while on patrol, all without constitutional limitations.[461] Further, neighborhood watch

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[452] *See* Finegan, *supra* note 115, at 125 (citing Donald Braman, *Cultural Cognition and the Reasonable Person*, 114 LEWIS & CLARK L. REV. 1455, 1461 (2010)) ("Burdened by (and perhaps unaware of) their own individual biases and without procedural rules or training to restrict them from acting on those biases, neighborhood watch members may target individual suspects based upon their race or ethnicity.").

[453] *Id.* at 125 n.231 (citing Robin Givham, *Hoodies, Trayvon Martin, and America's Racial Fears*, THE DAILY BEAST, http://www.thedailybeast.com/articles/2012/03/29/hoodies-trayvon-martin-andamerica-s-racial-fears.html (Mar. 29, 2012); Peter Grier, *Trayvon Martin case: Is hoodie a symbol of menace or desire for justice?*, CHRISTIAN SCIENCE MONITOR, http://www.csmonitor.com/USA/Justice/2012/0326/Trayvon-Martin-case-Ishoodie-a-symbol-of-menace-or-desire-for-justice-videoChristian Science Monitor (Mar. 26, 2012)).

[454] *Cf.* Lee, *supra* note 403, at 401 (discussing the "Black as criminal stereotype); Heston, *supra* note 338 (describing the NRA audience as a "casualty of the cultural warfare*"); see supra* note 377; Blackman, *supra* note 348, at 30; Schulze, *supra* note 181, at 40; *Train*, *supra* note 208; *Balance*, *supra* note 335; Blackman, *supra* note 348, at 51-52 ("It is quite possible that their deaths, in terms of economic consequences to society, are net gains."); *see supra* Part VI.B.

[455] *Cf.* Finegan, *supra* note 115, at 107(citing Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 935 (2007).

[456] *Id.*

[457] *Terry v. Ohio*, 392 U.S. 1, 8 (1968) ("The Fourth Amendment provides that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."). The exclusionary rule prevents the admission of illegally obtained evidence. *Id.* at 13.

[458] Finegan, *supra* note 115, at 111 (citing BRIAN FORST & PETER K. MANNING, THE PRIVATIZATION OF POLICING 4 (1999) ("The Supreme Court has repeatedly held that the application of the Fourth, Fifth, Sixth, and Fourteenth Amendments are limited to governmental conduct..").

[459] Constitutional limitations on police are inapplicable to private actors. *Id.* at 128-29 (quoting David Slansky, *The Private Police*, 46 U.C.L.A. L. REV. 1165, 1186 (1999) ("[E]vidence generated by an illegal arrest by a police officer is, as a general matter, inadmissible against a criminal defendant; the fruits of a private illegality are not similarly excluded."). *Id.*at 114 (quoting FORST & MANNING , THE PRIVATIZATION OF POLICING: TWO VIEWS 21 (1999) ("Private agents have the authority to stop and challenge any person, without probable cause, for trespassing in a designated private area, and they can make arrests without having to give *Miranda* warnings to arrestees.").

[460] Finegan, *supra* note 115, at 113 (citing Lester Bernhardt Orfield, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, at 7 (1947) ("at common law, arrests might be made either by a privilege person or by a police officer"); *see supra* note 459.

[461] *See supra* note 459.

volunteers may interpret SYG as permission to use force, as arguably occurred in the Trayvon Martin case.[462]

> Certainly, a suspect can refuse to answer questions or have his person searched by a member of a neighborhood watch,, and can walk away at will. But when that neighborhood watch member carries a weapon and is authorized to defend himself with deadly force should a confrontation ensue, the power of the neighborhood watch to coerce a suspect into stopping or permitting a search greatly increases.[463]

Neighborhood watch volunteers carrying guns makes resistance to their instructions much riskier.[464]

Further compounding the potential abuses of private law enforcers is the risk that biases against stigmatized racial groups will go unchecked because there are no meaningful limits placed on private actors' use of racial profiling, and the actors may be unaware of their own subconscious biases.[465] Police are limited in their use of racial profiling.[466] Law enforcement officers are not permitted to rely solely on race and ethnicity in determining whether to search an individual.[467] Yet, there are few limitations on racial profiling with respect to neighborhood watch or other private law enforcers.[468]

"Burdened by (and perhaps unaware of) their own individual biases, coupled with the lack of procedural safeguards or training, neighborhood watch members may act on their biases and target individual suspects on the basis of race or ethnicity." [469] Racial minority community members could be alienated by racial profiling and aggressive volunteer policing, which are reminiscent of the vigilantism and lynchings of Jim Crow.[470] While there are potential criminal and civil remedies for private law enforcement abuses, [471] public law enforcement

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[462] Finegan, *supra* note 115, at 129-30 (discussing private policing and Trayvon Martin's death) (citing Patrick Jonsson, *Trayvon Martin Case Reveals Confusion over how Stand Your ground Works*, CHRISTIAN SCIENCE MONITOR (Apr. 11, 2012); *Florida's Stand Your Ground Law: Investigation*, TAMPA BAY TIMES, Eyder Perlata, *Trayvon Martin Killing Puts 'Stand Your Ground' Law in Spotlight*, NPR.ORG (Mar. 19, 2012)) ("This incident is an extreme example of what can happen when private citizens are engaged in law enforcement activities without the restrictions and training of police offices.")

[463] *Id.* at 123-24.

[464] *Id.*

[465] *Id.* at 124 (citing Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1479 (2010); *see supra* Part VII , *see supra* note 459.

[466] Finegan, *supra* note 115, at 124 (citing Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON U. CIV. RTS. L.J. 219, 224-46 (2005)) ("While [racial profiling] certainly still occurs, the race or ethnicity of an individual cannot, by itself, provide suspicion to stop or detain that individual.").

[467] *Id.*

[468] Finegan, *supra* note 115, at 125.

[469] *Id.*, (citing Braman, *supra* note 465, at 1479).

[470] *Cf.* Lawson *supra* note 34, at 276 ("The repetitive combination of Black males being killed under suspicious, questionable, and irreconcilable facts coupled with law enforcement's inaction, acquiescence, or even affirmative cover-up is a chronic injury that the African American community has suffered, for decades,.")

[471] Finegan, *supra* note 115, at 128 (citing Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 872 (citation omitted).

agencies may not be motivated to pursue convictions because they profit from the evidence obtained by these groups.[472] SYG, as discussed previously, carries with it the notion that individuals can, and indeed, *should* take the law into their own hands.[473] SYG could contribute to potential abuses, motivated by racial bias, committed by neighborhood watch volunteers because they perceive expanded rights and responsibilities flowing from the law.[474] Trayvon Martin arguably fell victim to George Zimmerman's racial profiling.[475] George Zimmerman apparently found Martin's appearance suspicious because of his race and his wearing of a hooded sweatshirt.[476] Trayvon Martin died on February 26, 2012,[477] possibly because George Zimmerman felt empowered by Florida's SYG law.

IX. CONCLUSION

Florida's SYG law has been criticized as encouraging vigilantism[478] and a Wild West atmosphere where men shoot first and ask questions later,[479] if ever. This freer use of deadly force in self-defense has far-reaching implications beyond giving people the right to protect their lives and property from dangerous intruders.[480] The freedom to kill encompasses the absurd: an apartment dweller who unintentionally wanders into the wrong apartment can be legally killed by the rightful apartment dweller, even in the absence of true danger.[481] The panorama of possibilities is unlimited.

Not only does SYG arguably increase gun violence,[482] it increases racial bias.[483] Though technically race neutral, implicit bias is fundamental to this law.[484]

> A civil suit is also unlikely to be an effective remedy for conduct that violates an individual's civil rights under these circumstances. Just as a criminal suspect is unlikely to have the resources or knowledge to file a § 1983 (42 U.S.C. § 1983 (1996)) action against a public officer who violates his civil liberties, it follows that a suspect would also be unlikely to file such an action against private individuals who encroach upon his civil liberties.

Id.

[472] Finegan, *supra* note 115, at 127-28 (citing Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 274 (2010)).

[473] *See supra* notes 371-373 and accompanying text; *see supra* Part VI.B.

[474] *Id. Cf.* Finegan, *supra* note 115, at 116 ("the ability of these private citizens to conduct law enforcement activities is particularly troubling, in part, because of laws that have expanded upon the ability of individuals to carry weapons and act in self-defense").

[475] *See supra* Part II; *see supra* note 462 and accompanying text.

[476] *Transcript supra* note 10.

[477] Gutman & Tienabeso, *supra* note 6.

[478] Lawson, *supra* note 34, at 272 (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); *see* Ross, *supra* note 5 at 35.

[479] David McGrath, *McGrath: 'Stand Your Ground' Laws Recall the Wild West*, SOUTHTOWN STAR, April 20, 2012, http://southtownstar.suntimes.com/opinions/guestcommentary/11991942-474/mcgrath-stand-your-ground-laws-recall-the-wild-west.html.

[480] *See supra* Part III.C.

[481] *See supra* Parts III.C.3-5.

[482] Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine* 5 (forthcoming in the JOURNAL OF HUMAN RESOURCES), http://econweb.tamu.edu/mhoekstra/castle_doctrine.pdf) ("we find significant evidence that the laws lead to more homicides. Estimates indicate that the laws increase homicides by a statistically significant 8 percent, which translates into an additional 600 homicides per year across states that expanded castle doctrine.").

Its genesis reveals this prejudice.[485] The NRA conceived SYG[486] and has used questionable rhetoric and appeals to fear to advance its agenda.[487] It created an "us versus them" atmosphere that relied on racial bias.[488] Unsurprisingly, the NRA chose to launch SYG in the southern state of Florida with its troubled racial history and social acceptance of violence.[489] Furthermore, racial minorities are regarded as more criminal and dangerous than whites, and loosening restrictions on the use of deadly force puts minorities at greater risk of harm.[490] Additionally, fewer convictions for killing blacks than for killing whites reveal evidence of racial disparity in the application of the law.[491]

Even more important than what the law *does* is what the law *says*.[492] The law implicitly says that human life is less valuable than property[493] and pride.[494] Be a true man and kill the intruder. Do not retreat! The law is on your side. With its implicit bias[495] and southern beginnings,[496] the law expresses that black lives are less valuable than white lives.[497] One can only wonder what George Zimmerman was thinking when he shot and killed Trayvon Martin and later claimed he was standing his ground.[498]

State legislators have a role to play as well. Although previously influenced by the NRA,[499] states with SYG legislation need to reexamine their laws and consider their repeal. These SYG laws undermine American ideals of protecting human life[500] and promoting racial equality,[501] and nothing is more American than those values.

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[483] *See supra* Parts V.- VII; *see generally* Roman, *supra* note 445 (discussing statistics that show SYG laws result in more justified homicides when the victim is black).
[484] *See supra* Parts V.-VI.
[485] *Id.*
[486] *See Train*, *supra* note 208; *see* Solotaroff, *supra* note 2; *supra* note 98.
[487] *See supra* Part VI.B.
[488] *See supra* Part VI.B; *see generally* Eitches, *supra* note 336 (discussing the NRA and its rhetoric); *see* FREEDOM IN PERIL, *supra* note 2 (showing an example of NRA propaganda).
[489] *See supra* Part V; *see supra* note 335 and accompanying text.
[490] *See supra* Part VII.
[491] *See supra* notes 437, 440-42 and accompanying text; *see supra* note 445.
[492] *See supra* Part IV.
[493] *See supra* Part III.C.5.
[494] *See supra* notes 109-114 and accompanying text.
[495] *See supra* Parts VI.-VII.
[496] *See supra* Part V.
[497] *See supra* Part V.-VIII.
[498] *See* Gutman & Tienabeso, *supra* note 6.
[499] *See supra* note 98.
[500] *See supra* notes 109-114 and accompanying text.
[501] *See supra* note 214 and accompanying text; *see supra* Parts VI.B., VII.