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## The “White” to Bear Arms: How Immunity Provisions in Stand Your Ground Statutes Lead to An Unequal Application of The Law for Black Gun Owners

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# THE “WHITE” TO BEAR ARMS: HOW IMMUNITY PROVISIONS IN STAND YOUR GROUND STATUTES LEAD TO AN UNEQUAL APPLICATION OF THE LAW FOR BLACK GUN OWNERS

*Victoria Bell\**

## ABSTRACT

*Twenty-five states across the country have enacted some form of “Stand Your Ground” (SYG) laws, undercutting the traditional notion of a duty to retreat when faced with a perceived threat. Proponents of SYG argue that these laws derive from a fundamental right of self-defense and are intended to safeguard all citizens from imminent threats of bodily harm. However, the application and enforcement of SYG laws do not offer the same protections to black shooters as they do white shooters. Of these twenty-five SYG jurisdictions, six provide immunity from arrest for those who stand their ground in “reasonable” self-defense. While there are various factors that contribute to the unequal enforcement of SYG law, this Note examines the statutory responsibility placed on law enforcement to make the initial determination of what is “reasonable.” Because immunity determinations are largely formed on the basis of police discretion, human nature and implicit biases inform the reality that this discretion is being exercised in a biased way. As a result, immunity determinations reinforce a presumption that black shooters*

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\* J.D. Candidate, 2020, Fordham University School of Law; B.A., 2017, The College of New Jersey. First, I would like to thank Professor Youngjae Lee, Professor of Law, for his guidance during this process and for his overall love of learning that will continue to inspire me throughout my career. I would also like to thank my parents, Haylee and Edward Bell, for their overwhelming encouragement throughout my life and for shaping me into the woman I am today. Last, I would like to thank Paul Lowry for his endless love and support throughout my time as a law student and beyond.

*are inherently unreasonable, leading to a disparate impact of increased arrest and prosecution for black shooters.*

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## INTRODUCTION

Originally introduced to the United States in 2005, Stand Your Ground (“SYG”) laws came to the forefront of controversy after the shooting of Trayvon Martin in February of 2012.<sup>1</sup> Trayvon Martin, a seventeen-year-old black male, was walking in a gated community in Sanford, Florida on his way to his father’s home, when George Zimmerman, a twenty-eight-year-old Latino male and neighborhood-watch volunteer, spotted him and phoned law enforcement.<sup>2</sup> Zimmerman maintained that he called the police because he thought Martin appeared “suspicious” in a hooded sweatshirt, and because there had been recent burglaries in the area that were attributed to young black men.<sup>3</sup> Records show that Zimmerman called the police to report the presence of “suspicious” black men five times that year.<sup>4</sup> During this particular call, law enforcement advised Zimmerman to wait for them to arrive at the scene and not to follow or engage with Martin.<sup>5</sup> After hanging up, however, an alleged altercation broke out between Zimmerman and Martin.<sup>6</sup> Zimmerman claimed Martin was

1. The NAACP called Trayvon Martin shooting this generation’s Emmett Till, an infamous and brutal murder of a fourteen-year-old in Mississippi in 1955. *See Weekend Edition Sunday: NAACP Calls for Federal Action*, NAT’L PUB. RADIO (July 14, 2013), <http://www.npr.org/templates/story/story.php?storyId=202011023> [<https://perma.cc/4J7Y-KS3K>]; *see also* Sean Sullivan, *Everything You Need to Know About ‘Stand Your Ground’ Laws*, WASH. POST (July 15, 2013), [https://www.washingtonpost.com/news/the-fix/wp/2013/07/15/everything-you-need-to-know-about-stand-your-ground-laws/?utm\\_term=.62292f1efeb5](https://www.washingtonpost.com/news/the-fix/wp/2013/07/15/everything-you-need-to-know-about-stand-your-ground-laws/?utm_term=.62292f1efeb5) [<https://perma.cc/Y958-E4UU>] (“The acquittal of George Zimmerman in the shooting death of Trayvon Martin has cast a renewed spotlight on Florida’s ‘stand your ground’ law.”); *see generally* *George Zimmerman Not Guilty: Trials that Have Gripped America*, TELEGRAPH (July 14, 2013), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/10178364/George-Zimmerman-not-guilty-trials-that-have-gripped-America.html> [<https://perma.cc/HUA9-TB2F>] (“Millions of Americans followed the televised trial of George Zimmerman.”).

2. *See* Frances Robles, *A Look at What Happened the Night Trayvon Martin Died*, TAMPA BAY TIMES (Apr. 2, 2012), <https://www.tampabay.com/news/publicsafety/crime/a-look-at-what-happened-the-night-trayvon-martin-died/1223083> [<https://perma.cc/4SEM-P29M>].

3. *See id.*

4. *See id.*

5. *See id.*

6. Martin was witnessed as being on top of Zimmerman during the altercation, where he was said to be straddling and beating Zimmerman as he lay on the ground. *See id.*

a “threat” and eventually shot Martin with a black Kel Tek 9mm semi-automatic handgun “to save [his] own” life.<sup>7</sup> Zimmerman had a concealed weapons permit at the time of the incident.<sup>8</sup> When law enforcement arrived at the scene, they found Martin’s body lying face down on the grass about seventy yards from his father’s home; Martin was bleeding from a chest wound, with twenty-two dollars, Skittles, and a can of iced tea in his pockets.<sup>9</sup>

Despite Zimmerman’s disregard for the police orders, no arrest was initially made.<sup>10</sup> Additionally, while the Seminole County State Attorney’s Office “was consulted the night of Martin’s killing . . . no prosecutor ever visited the scene.”<sup>11</sup> In fact, Sanford Police Chief Bill Lee insisted, “[b]y Florida Statute, law enforcement was prohibited from making an arrest based of [sic] the facts and circumstances they had at the time.”<sup>12</sup> Lee further explained that police were precluded from making an arrest because “Zimmerman was able to articulate that he was in ‘reasonable fear’ of great bodily harm or death,” and that witness statements corroborated this version of the story when law enforcement arrived on scene.<sup>13</sup> The Florida law that “prohibited” Sanford police from making an arrest, and the statute that dissuaded the State Attorney’s Office from conducting an initial investigation, was the state’s SYG provisions — Sections 776.012 and 776.013, which provide immunity from criminal arrest and prosecution upon a finding that a shooter reasonably believed that the use of deadly force was necessary to prevent his imminent death or grave bodily harm.<sup>14</sup>

Sections 776.012 and 776.013 were in the spotlight yet again in July 2018, when a surveillance video captured the shooting of Markeis

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7. Martin, a 140-pound teen, was unarmed at the time. *See id.*; *see also* Peter Andrew Bosch, *A Teen Was Shot by a Watchman 5 Years Ago and the Trayvon Martin Case Became a Cause*, MIAMI HERALD (Feb. 28, 2017), <https://www.miamiherald.com/news/state/florida/article135413214.html#storylink=cpy> [<https://perma.cc/72KZ-WQ9Z>].

8. *See* Bosch, *supra* note 7.

9. Zimmerman also found with a bloody nose, wet grass stains on his red jacket, and he was bleeding from a head wound. *See id.*

10. *See* Frances Robles, *Sanford Cops Sought Warrant to Arrest George Zimmerman in Trayvon Martin Shooting*, TAMPA BAY TIMES (Mar. 28, 2012), <http://www.tampabay.com/news/publicsafety/crime/sanford-cops-sought-warrant-to-arrest-george-zimmerman-in-trayvon-martin/1222259> [<https://perma.cc/W66X-65CV>].

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* FLA. STAT. § 776.012 (2018); FLA. STAT. § 776.013 (2018).

McGlockton, a black male, in Clearwater, Florida.<sup>15</sup> A video camera from the parking lot of a convenience store captured Michael Drejka, a white male, approaching McGlockton's parked car and yelling at McGlockton's girlfriend and five-year-old child, who were temporarily parked in a handicap spot as McGlockton was shopping.<sup>16</sup> McGlockton emerged from the store, quickly shoved Drejka to the ground, and began to step away.<sup>17</sup> Despite McGlockton's clear retreat, as caught on tape, Drejka pulled out a concealed firearm and fatally shot McGlockton in the chest.<sup>18</sup>

Similar to the Zimmerman incident and before law enforcement was able to access the surveillance video, officials did not arrest Drejka because they believed that Florida's SYG statute precluded his arrest.<sup>19</sup> Pinellas County Sheriff Bob Gualtieri stated, "[t]o arrest, it must be so clear that, as a matter of law, 'stand your ground' does not apply in any way to the facts and circumstances that you're presented with."<sup>20</sup> When asked more specifically why SYG precluded his arrest, Gualtieri responded that the decision not to arrest Drejka was "merely doing what Florida law compels," as differing witness accounts obliged law enforcement to believe Drejka's own story of reasonable self-defense.<sup>21</sup>

15. See *Shoot-First-Think-Later Laws Aren't Ever Good. Rethink 'Stand Your Ground.'*, WASH. POST (Aug. 9, 2018), [https://www.washingtonpost.com/opinions/shoot-first-think-later-laws-arent-ever-good-rethink-stand-your-ground/2018/08/09/2d779936-9a4d-11e8-8d5e-c6c594024954\\_story.html?utm\\_term=.453199151695](https://www.washingtonpost.com/opinions/shoot-first-think-later-laws-arent-ever-good-rethink-stand-your-ground/2018/08/09/2d779936-9a4d-11e8-8d5e-c6c594024954_story.html?utm_term=.453199151695) [<https://perma.cc/A6ML-6ZKN>].

16. See *id.*

17. See *id.* Note that Jeb Bush, the former governor who signed the Florida SYG law in 2005, stated that, "Stand Your Ground means stand your ground. It doesn't mean chase after somebody who's turned their back." See Gromer Jeffers, Jr., *In Arlington, Jeb Bush Says 'Stand Your Ground' Invalid in Trayvon Martin Case*, DALL. MORNING NEWS (Mar. 23, 2012), <http://www.dallasnews.com/news/community-news/arlington/headlines/20120323-in-arlington-jeb-bush-says-stand-your-ground-invalid-in-trayvon-martin-case.ece> [<https://perma.cc/M4N8-UNKP>].

18. See *Shoot-First-Think-Later Laws Aren't Ever Good*, *supra* note 15; see also Eliot C. McLaughlin, *Florida Man Accused in Fatal 'Stand Your Ground' Shooting Posts \$100,000 Bail*, CNN (Sept. 25, 2018) ("Several people have said they've encountered an angry Drejka in traffic incidents. In two instances, witnesses say he pulled a gun.").

19. See Elliott C. McLaughlin, *Prosecutor Overrides Sheriff, Charges Florida Man in 'Stand Your Ground' Case*, CNN (Aug. 14, 2018), <https://www.cnn.com/2018/08/13/us/stand-your-ground-florida-shooting-charges/index.html> [<https://perma.cc/CQK4-9YBW>].

20. *Id.*

21. The Florida Attorney General eventually charged Drejka with manslaughter because he lacked a *reasonable* belief of an imminent threat, as surveillance videos

Part I of this Note describes the background of SYG laws in the United State as well as the unique aspects of SYG procedure, including criminal immunity determinations, a presumption of reasonable fear, and pretrial immunity hearings. Part II examines the demographics of national gun ownership, how legal justifiability of SYG shootings reflect an unequal application of the law, and how a stigma of violence surrounding young black males may play a discriminatory role in immunity determinations in SYG cases. Part II presents factors that currently work against black shooters wanting to utilize self-help in support of a change in current SYG legislation. This includes how implicit biases maintained by law enforcement may impact immunity determinations, how inconsistent applications of immunity determinations are most harmful to black shooters claiming SYG defenses, and how police discretion in determining initial immunity leads to a disparate level of arrest and prosecution of black shooters. Part III proposes to repeal provisions in the relevant SYG jurisdictions that provide immunity from criminal arrest and prosecution upon a finding of “reasonable” self-defense by police. Part III concludes by presenting some problems of, and limitations to, this proposal, due to the potentially detrimental effect the change may have for black shooters, and the possibility that the ideology behind SYG may still play a role in jury instructions and trial matters.

#### **I. THE HISTORY OF STAND YOUR GROUND DOCTRINE AND AN EXAMINATION OF THE LAW’S UNIQUE PROCEDURE**

Part I explores the development and advancement of SYG law in the United States, beginning with a discussion of the “Castle Doctrine,” a common law doctrine that allowed an individual to use deadly force in self-defense while in one’s “castle,” or home. Next, this Part discusses how lobbyists and special interest groups strategically pushed for the codification of SYG laws with a specific target on the southern states. This Part then examines both the criticisms of SYG law as well as arguments for its support, including a debate over fundamental rights, deterrence, and the role of financial interests in the law’s proliferation.

Part I continues with a discussion of SYG procedure and how it diverges from traditional criminal procedure. Primarily, this includes how SYG statutes in some jurisdictions allow local law enforcement to determine which shooters are criminally immune from arrest and

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showed McGlockton retreating at the time the shot was fired. *See id.*; *see also* FLA. STAT. ANN. § 776.012(1) (2018).

further prosecution, and how these determination rest solely on the discretion of individual officers. Next, this Part considers how these immunity provisions confer a presumption of reasonable fear for the shooters that act as an obstacle for police when trying to disprove the shooter's claim. Finally, this Part analyzes the function of a SYG pretrial immunity hearing and how it provides a second layer of protection to shooters.

## A. Evolution of Stand Your Ground Law in the United States

### 1. *Stand Your Ground Origins and the Castle Doctrine*

At their most basic level, SYG laws are legal justifications to use deadly force in the face of perceived threats, even when the individual faced with such threats has an opportunity to retreat.<sup>22</sup> While SYG statutes ultimately vary by jurisdiction, most state that a person is justified in the use of deadly force and does not have a duty to retreat if he or she *reasonably* believes that such force is *necessary* to prevent imminent death or great bodily harm to himself or herself or another.<sup>23</sup>

SYG law derives from the “Castle Doctrine,” a common law doctrine by which individuals could use deadly force in self-defense or to prevent a violent felony when in the safety of one's home.<sup>24</sup> The

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22. See generally NATIONAL TASK FORCE ON STAND YOUR GROUND LAWS, A.B.A., FINAL REPORT AND RECOMMENDATIONS (Sept. 2015), [https://www.americanbar.org/content/dam/aba/images/diversity/SYG\\_Report\\_Book.pdf](https://www.americanbar.org/content/dam/aba/images/diversity/SYG_Report_Book.pdf) [<https://perma.cc/JDX5-M9GV>].

23. See, e.g., ALA. CODE § 13A-3-23 (2018) (“A person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense or the defense of another person . . .”); FLA. STAT. § 776.012 (2018) (“A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself . . .”); MICH. COMP. LAWS § 780.972 (2018) (“An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.”)

24. See HENDRIK DEBOER & MARK RANDALL, OLR RESEARCH REPORT, THE CASTLE DOCTRINE AND STAND YOUR GROUND LAW, 2012-R-0172 (2012); Ahmad Abuznaid et al., “*Stand Your Ground*” Laws: *International Human Rights Law Implications*, 68 U. MIAMI L. REV. 1129, 1130 (2014); Daniel Sweeney, *Standing Up to “Stand Your Ground: Laws: How the Modern NRA-Inspired Self-Defense Statutes Destroy the Principle of Necessity, Disrupt the Criminal Justice System, and Increase Overall Violence*, 64 CLEV. ST. L. REV. 715, 722 (2016) (“The doctrine, expressed by the maxim that ‘every man’s house is his castle,’ provides that ‘a non-

Castle Doctrine had diverged from traditional English common law, where similarly situated individuals had a general duty to retreat.<sup>25</sup> The United States, however, has long-embraced this diversion. Since the country's development westward, "American ideals of bravery and honor suited themselves to frontier life in a way that the English duty to retreat could not."<sup>26</sup> Therefore, "as the United States developed, so did the concept of the right to defend one's honor, especially in the South and the Midwest."<sup>27</sup> Towards the end of the nineteenth century, the Supreme Court formally acknowledged and accepted the Castle Doctrine in *Beard v. United States*<sup>28</sup>:

Where an attack is made with murderous intent, there being sufficient overt act, the person attacked is under no duty to fly. He may stand his ground, and, if need be, kill his adversary. And it is the same where the attack is with a deadly weapon, for in this case a person attacked may well assume that the other intends murder, whether he does in fact or not.<sup>29</sup>

The Castle Doctrine became even more commonplace at the turn of the century. In 1914, during his tenure with the New York Court of Appeals, Benjamin Cardozo explained:

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.<sup>30</sup>

By the latter half of the twentieth century, urbanization and crime rates climbed, and as such, "the drive for a broad right to self-defense

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aggressor is not ordinarily required to retreat from his dwelling, even though he knows he could do so in complete safety, before using deadly force in self-defense.").

25. See Nadege Green, *Harvard Professor's Book Explores History of 'Stand Your Ground' Laws*, WLRN (May 28, 2018), <http://www.wlrn.org/post/harvard-professors-book-explores-history-stand-your-ground-laws> [https://perma.cc/7298-QEHM] ("All of our laws here in the United States are based pretty much on English common law doctrine. The king was the only one who could use lethal violence in the protection of citizens. So the Castle Doctrine essentially was an exception. As long as you were in your castle, you were allowed to defend yourself.").

26. Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504, 507 (2007); see also Richard Maxwell Brown, *Southern Violence—Regional Problem or National Nemesis?: Legal Attitudes Towards Southern Homicide in Historical Perspective*, 32 VAND. L. REV. 225, 232 (1979).

27. Catalfamo, *supra* note 26, at 507.

28. 158 U.S. 550, 563 (1895).

29. *Id.* (quoting Bishop's Criminal Law, Volume 1, § 850). The Court also cited Francis Wharton's Treatise on Criminal Law, which spoke of an allowance of the pursuit of the transgressor until all danger has passed. *Id.*

30. *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914).

increased proportionally.”<sup>31</sup> Consequently, a significant expansion of the Castle Doctrine began to take shape in the form of SYG laws, as SYG applies to public spaces outside the home and includes an individual’s vehicle, or even “a place where he or she has a right to be.”<sup>32</sup>

## 2. *The Proliferation and Codification of Stand Your Ground Legislation*

By the mid-2000s, there was a large push by the National Rifle Association (NRA) to codify SYG laws, with an emphasis on the South and on Florida in particular.<sup>33</sup> The NRA was reported to have contributed thousands to political campaigns of Republican lawmakers in Florida, in an effort to encourage these lawmakers to back the passage of the state SYG bill.<sup>34</sup> In fact, Senator Durell

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31. Catalfamo, *supra* note 26, at 510; see JAMES D. BREWER, THE DANGER FROM STRANGERS: CONFRONTING THE THREAT OF ASSAULT 119 (1994) (“The morgue is full of people who hoped for the best from their aggressors and were dead wrong . . . . The security that comes from knowing how to protect yourself cannot be equaled.”).

32. FLA. STAT. § 776.012 (2018); Abuznaid et al., *supra* note 24, at 1130.

33. Prior to 2005, “Florida broadly interpreted the Castle Doctrine to include not just the home and surrounding curtilage, but also the workplace” — this made the state of Florida an easy target for the NRA to begin their campaign, as it already had a broad self-defense doctrine. 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, 112 (2010) [hereinafter *Deadly Combinations*]; see, e.g., *Weiand v. State*, 732 So. 2d 1044, 1049 (Fla. 1999) (stating that “An individual is not required to retreat from the residence before resorting to deadly force in self-defense, so long as the deadly force is necessary to prevent death or great bodily harm”), *reh’g denied*; *Frazier v. State*, 681 So. 2d 824, 825 (Fla. Dist. Ct. App. 1996) (agreeing that the Castle Doctrine is an exception to the general duty to retreat, and it “extends to protect persons in their place of employment while they are lawfully engaged in their occupation”). See generally Susan Ferriss, *NRA Pushed ‘Stand Your Ground’ Laws Across the Nation*, CTR. FOR PUB. INTEGRITY (Mar. 26, 2012), <https://www.publicintegrity.org/2012/03/26/8508/nra-pushed-stand-your-ground-laws-across-nation> [<https://perma.cc/TFZ7-WLJB>]; Gina Jordan, *The Lobbyist Behind Florida’s Stand Your Ground Law*, NAT’L PUB. RADIO (Mar. 29, 2012), <https://www.npr.org/2012/03/29/149591067/the-lobbyist-behind-floridas-stand-your-ground-law> [<https://perma.cc/MV74-5S86>].

34. Andy Kroll, *The Money Trail Behind Florida’s Notorious Gun Law*, MOTHER JONES (Mar. 29, 2012), <http://www.motherjones.com/politics/2012/03/NRA-stand-your-ground-trayvon-martin> [<https://perma.cc/Y99Z-XDJ8>] (“The money trail leading to the watershed law in Florida—the first of the 24 across the nation—traces primarily to one source: the National Rifle Association. When Gov. Bush conducted the 2005 signing ceremony, standing alongside him was Marion Hammer, a leader and familiar face from the pro-gun lobbying powerhouse. But the NRA’s support for the Stand Your Ground law was far more than symbolic. An analysis by Mother Jones of election and lobbying records revealed that the NRA was instrumental in creating Stand Your Ground: over a nine-year period, the organization gave more

Peaden, the sponsor of Florida's SYG bill, was one of the senators who benefited from such contributions, receiving \$1,000 in direct donations from the NRA during the 2000 election cycle.<sup>35</sup> Overall, more than one third of the 114 Florida lawmakers who co-sponsored the passage of the SYG bill were recipients of NRA money.<sup>36</sup> Unsurprisingly, the Florida Senate ultimately approved its SYG law by a 39-0 vote, while the Florida House approved it by a 94-20 vote.<sup>37</sup>

When Florida proved successful and passed its first SYG statute in 2005, "the gun lobby wanted to spread Florida's law across the Nation" and soon joined forces with the American Legislative Exchange Council (ALEC).<sup>38</sup> ALEC, an organization that brings corporate lobbyists and state legislators together, drafted model bills and worked vigorously to get SYG legislation enacted throughout the rest of the United States.<sup>39</sup> Ironically, ALEC named the model law that served as a basis for SYG legislation the "Castle Doctrine Act" — a perhaps misleading name, as SYG "in effect destroys the castle concept[,] allowing individuals to use deadly force wherever they have a right to be, even if there is a clear cut, easy, and safe opportunity to retreat."<sup>40</sup> Following Florida's enactment of the law in 2005, at least twenty-four other states adopted laws that removed the

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than \$73,000 in campaign donations to the Florida legislators who backed the law. That money was buttressed by intense lobbying activity and additional funds spent by the NRA in support of the bill's introduction and passage."); *see generally* Dan Sweeney, *Florida's State Lawmakers Haven't Gotten a Dime from the NRA Since 2005*, S. FLA. SUN SENTINEL (Dec. 22, 2018), <https://www.sun-sentinel.com/news/politics/florida-politics-blog/fl-reg-florida-legislature-nra-money-20180409-story.html> [<https://perma.cc/92WZ-7N9N>].

35. Kroll, *supra* note 34. Note the state's legal limit per election cycle is only \$500. *Id.*

36. *Id.*

37. Sullivan, *supra* note 1.

38. "Stand Your Ground" Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary, 113th Cong. 2 (2013) (opening statement of Sen. Richard J. Durbin, Chairman, S. Comm. on Judiciary), <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg94124/pdf/CHRG-113shrg94124.pdf> [<https://perma.cc/BNZ6-U6F8>].

39. *Id.*; *see About Alec*, ALEC, <https://www.alec.org/about/> [<https://perma.cc/86SC-BSBP>] ("The American Legislative Exchange Council is America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism.").

40. LaKerri R. Mack & Kristie Roberts-Lewis, *The Dangerous Intersection Between Race, Class and Stand Your Ground*, 23 J. PUB. MGMT. & SOC. POL'Y 47, 48 (2016).

duty to retreat when an attacker is in any place in which one is lawfully present.<sup>41</sup>

### 3. *Criticisms of, and Arguments for, Stand Your Ground Laws*

It is necessary to situate SYG discourse in the context of the political spectrum, as those on both the Right and the Left argue that SYG debate is rooted in gun politics and political agendas.<sup>42</sup> Ted Cruz, the well-known and outspoken Republican Senator from Texas, asserted that there is a difference between efforts to control violent crime and efforts to advance a political agenda.<sup>43</sup> The NRA grounds its position in the purported desire to safeguard a fundamental right; after the Trayvon Martin shooting, Chris Cox, Executive Director of the NRA, asserted that self-defense is a fundamental right, which is therefore about “the people” and not political agendas.<sup>44</sup>

41. *Self Defense and “Stand Your Ground,”* NAT’L CONF. ST. LEGISLATURES (July 27, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/self-defense-and-stand-your-ground.aspx> [https://perma.cc/5WRS-RPE6]. These states include: Alabama, Alaska, Arizona, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia. At least ten of those states include language stating one may “stand his or her ground” (Alabama, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Oklahoma, Pennsylvania and South Carolina). *Id.* Some states still require an individual to retreat when possible, which include: Arkansas, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Missouri, Minnesota, Nebraska, New Jersey, New York, North Dakota, Ohio, Rhode Island, and Wyoming. Evelyn Reyes, *Florida’s Stand Your Ground Law: How to Get Away with Murder*, 12 INTERCULTURAL HUM. RTS. L. REV. 147, 167–68 (2017).

42. *See generally* Ferriss, *supra* note 33 (“Since Florida adopted its law in 2005, the NRA has aggressively pursued adoption of stand-your-ground laws elsewhere as part of a broader agenda to increase gun-carrying rights it believes are rightly due citizens under the 2nd Amendment.”); Jake Stofan, *Florida Republicans Dismissive of Stand Your Ground Special Session*, WFLA NEWS CHANNEL 8 (Aug. 2, 2018), <https://www.wfla.com/news/florida/republicans-dismissive-of-stand-your-ground-special-session/1349880214> [https://perma.cc/YHN9-UCRC] (“The NRA says Democrats are jumping the gun by blaming the law before the courts have a chance to weigh in.”).

43. “Stand Your Ground” Laws: *Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 4 (2013) (testimony of Sen. Ted Cruz), <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg94124/pdf/CHRG-113shrg94124.pdf> [https://perma.cc/EP57-6Y83].

44. Reyes, *supra* note 41, at 151–52; *see generally* E.J. Dionne Jr., *Why the NRA Pushes ‘Stand Your Ground’*, WASH. POST (Apr. 15, 2012), [https://www.washingtonpost.com/opinions/why-the-nra-pushes-stand-your-ground/2012/04/15/gIQAL458JT\\_story.html?utm\\_term=.7efcebb91ec2](https://www.washingtonpost.com/opinions/why-the-nra-pushes-stand-your-ground/2012/04/15/gIQAL458JT_story.html?utm_term=.7efcebb91ec2) [https://perma.cc/PWC5-TUN8]; Joshua Prince & Allen Thompson, *The Inalienable*

Many have criticized the proliferation of SYG laws and the process by which they have expanded. Some allege the laws' popularity is not a result of legislative deliberation or the traditional political process, but rather the result of interest groups and motivated by financial concerns.<sup>45</sup> For instance, Mother Jones reported that ALEC had obtained \$39 million in lobbying efforts from gun manufacturers while spreading SYG legislation.<sup>46</sup>

The law has also proven controversial due to claims that SYG promotes, rather than deters, crime.<sup>47</sup> In his address at the National Association for the Advancement of Colored People (NAACP) Annual Convention in 2013, former Attorney General Eric Holder argued that "such laws undermine public safety," because they "[allow] and perhaps encourag[e] violent situations to escalate in public."<sup>48</sup> Similarly, at a 2013 Senate Judiciary Committee hearing,

*Right to Stand Your Ground*, 27 ST. THOMAS L. REV. 32 (2015) [hereinafter *The Inalienable Right to Stand Your Ground*].

45. "Stand Your Ground" Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary, 113th Cong. 7 (2013) (statement of Prof. Ronald S. Sullivan Jr., Harvard Law School), <http://www.judiciary.senate.gov/imo/media/doc/10-29-13SullivanTestimony.pdf> [https://perma.cc/D9HT-MURV] [hereinafter *Sullivan Testimony*]; see generally Elspeth Reeve, *The Legislation Mill that Spread 'Stand Your Ground' Comes Under Scrutiny*, ATLANTIC (Apr. 5, 2012), <https://www.theatlantic.com/politics/archive/2012/04/legislation-mill-spread-stand-your-ground-coca-cola-ditched/329694/> [https://perma.cc/RQ2A-M54Z] ("ALEC not technically a lobbying group because it only "exchanges" legislation. But some of the things it does sounds like lobbying—business leaders and lawmakers sit in a room and write legislation, and then the lawmaker takes it home to his state capital"); Mike Spies, *The N.R.A. Lobbyist Behind Florida's Pro-Gun Policies*, NEW YORKER (Mar. 5, 2018), <https://www.newyorker.com/magazine/2018/03/05/the-nra-lobbyist-behind-floridas-pro-gun-policies> [https://perma.cc/54NY-RV2E] ("According to court documents filed by the N.R.A. in 2016, the group has roughly three hundred thousand members in Florida.").

46. Adam Weinstein, *How the NRA and Its Allies Helped Spread a Radical Gun Law Nationwide*, MOTHER JONES (June 7, 2012), <http://www.motherjones.com/politics/2012/06/nra-alec-stand-your-ground> [https://perma.cc/YW5E-FPFX].

47. See generally David Love, *'Stand Your Ground' Laws Encourage Racially Charged Violence*, CNN (Aug. 3, 2018), <https://www.cnn.com/2018/08/03/opinions/stand-your-ground-law-racial-violence-opinion-love/index.html> [https://perma.cc/3VHR-3N8S]; Edward L. Queen, *Florida's 'Stand Your Ground' Law Incentivizes Violence. Markeis McGlockton's Death Proves It*, NBC (July 25, 2018), <https://www.nbcnews.com/think/opinion/florida-s-stand-your-ground-law-incentivizes-violence-markeis-mcglockton-ncna894356> [https://perma.cc/GM37-GMCV].

48. Press Release, Eric Holder, Att'y Gen., Address at the NAACP Annual Convention (July 16, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-naacp-annual-convention> [https://perma.cc/R9LD-UUSY].

Congresswoman Marcia Fudge of Ohio declared that SYG law “fosters a Wild West environment in our communities where individuals play the role of judge, jury, and executioner.”<sup>49</sup> Representative Dennis K. Baxley, who sponsored Florida’s SYG legislation, offered his rebuttal of this claim, asserting that there is nothing written in SYG statutes that authorizes the provocation of another person.<sup>50</sup>

Those who claim that SYG laws deter crime argue that, because there is no way for an attacker to predict whether an individual who carries a gun will respond with deadly force or retreat, it is more likely for the attacker to ultimately choose not to commit the crime at all.<sup>51</sup> At the same 2013 Senate Judiciary Committee hearing, Texas Senator John Cornyn espoused this view, preaching self-defense laws are so popular because they both protect Second Amendment rights and help reduce violent crime.<sup>52</sup> Former NRA president Marion Hammer even gave SYG law “a feminist appeal” by linking gun ownership with protection against male violence.<sup>53</sup>

While many on the Right rely on deterrence arguments to support nationwide SYG legislation, statistics do not support the claim that SYG laws deter crime, as studies show that there has been a notable

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49. “Stand Your Ground” Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary, 113th Cong. 6 (2013) (testimony of Rep. Marcia Fudge, Member, S. Comm. on the Judiciary), <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg94124/pdf/CHRG-113shrg94124.pdf> [<https://perma.cc/4SBZ-W78W>] [*hereinafter* Testimony of Rep. Fudge, Member, S. Comm. on the Judiciary].

50. *Vanguard/ The Right to Kill: Stand Your Ground USA*, VIMEO (2013), <https://vimeo.com/58599291> [<https://perma.cc/UE2F-S9YG>].

51. Madison Fair, *Dare Defend: Standing for Stand Your Ground*, 38 LAW & PSYCHOL. REV. 153, 166 (2014).

52. “Stand Your Ground” Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary, 113th Cong. 40 (2013) (testimony of Sen. John Cornyn), <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg94124/pdf/CHRG-113shrg94124.pdf> [<https://perma.cc/4SBZ-W78W>].

53. Lydia Zbrzeznj, *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, 257 (2012); see Joshua Dressler, *Feminist (or “Feminist”) Reform of Self-Defense Law: Some Critical Reflections*, 93 MARQ. L. REV. 1475, 1483 (2010) (quoting Jeannie Suk, *The True Woman: Scenes From the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 266–67(2008)) (“A woman is walking down the street and is attacked by a rapist who tries to drag her into an alley. Under prior Florida law, the woman had a legal ‘duty to retreat . . .’ Today, that woman has no obligation to retreat. If she chooses, she may stand her ground and fight.”) (emphasis added).

increase in gun violence since the laws' proliferation. In fact, since the codification of SYG laws, the average number of legally "justifiable" homicides (where shooters used "reasonable" self-defense) increased 200 percent in Florida, fifty-four percent in Texas, eighty-three percent in Georgia, twenty-four percent in Arizona, and 725 percent in Kentucky between 2005 and 2007.<sup>54</sup> Additionally, sixty percent of those who had claimed SYG defenses had been arrested on at least one prior occasion, while more than thirty percent had previously threatened another individual with a deadly weapon.<sup>55</sup> Therefore, these statistics may indicate that SYG laws encourage individuals to use deadly force in altercations when they would normally not, or in the alternative, may provide a platform for violence-prone individuals.<sup>56</sup>

After Trayvon Martin's death and the public outcry that followed, ALEC issued a statement to defend SYG and its deterrence objectives.<sup>57</sup> ALEC claimed that its model law "is designed to protect people who defend themselves from imminent death and great bodily harm. It does not allow you to pursue another person. It does not allow you to seek confrontation. It does not allow you to attack someone who does not pose an imminent threat."<sup>58</sup> It is interesting

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54. Mayors Against Legal Guns, *'Stand Your Ground' Laws and Their Effect on Violent Crime and the Criminal Justice System*, EVERYTOWN FOR GUN SAFETY 7 (Sept. 2013), <https://everytownresearch.org/documents/2015/04/shoot-first.pdf> [<https://perma.cc/ND2B-LBJN>].

55. Connie Humburg & Kameel Stanley, *Many Killers Who Go Free with Florida 'Stand Your Ground' Law Have History of Violence*, TAMPA BAY TIMES (July 21, 2014), <http://www.tampabay.com/news/courts/criminal/many-killers-who-go-free-with-florida-stand-your-ground-law-have-history/1241378> [<https://perma.cc/RZ9R-KU2M>]. Past violent crimes committed by these reported SYG defendants include assault, battery, robbery, and drug offenses. *Id.* Additionally, more than a third of defendants had been in trouble with the law on several occasions prior to the self-defense incident where they were illegally carrying a concealed weapon. *Id.*

56. *Id.*; see also Larry Hannan, *Stand Your Ground Law Not Working as Intended Despite Changing Self Defense in Florida*, FLA. TIMES UNION (Nov. 21, 2015), <http://jacksonville.com/news/crime/2015-11-21/story/stand-your-ground-law-not-working-intended-despite-changing-self-defense#> [<https://perma.cc/QR5H-G3ML>] ("Records show that since the Stand Your Ground law was implemented, there have been [sixty-four] cases filed in Duval County in which defendants charged with felonies claimed self-defense and requested a Stand Your Ground hearing. Of those hearings, judges granted dismissals in just four. Eight defendants—twice as many—were acquitted after a trial. The other fifty-two reached plea deals, were convicted by juries, were committed to mental institutions or are still awaiting trial.") *Id.*

57. Press Release, *ALEC Statement on 'Stand Your Ground' Legislation*, ALEC (Mar. 26, 2012), <http://www.alec.org/alec-statement-on-stand-your-ground-legislation-32612/> [<https://perma.cc/9CMA-RN5G>].

58. *Id.*

to note, however, that some found this mission statement to largely resemble language in the Ku Klux Klan's founding documents.<sup>59</sup>

This was not the first time that ALEC had been accused of having racially motivated intentions for expanding and codifying SYG laws.<sup>60</sup> In addition to lobbying across the country in promotion of SYG, ALEC has also played a significant role in the advancement of restrictive voter ID legislation that makes it harder for ten million people across the country to vote, where mostly people of color and students do not have the state-issued identification cards that the laws require.<sup>61</sup> Due to ALEC's backing of both SYG legislation and these restrictive voter ID laws, more than 110 corporations and nineteen non-profits have severed ties with the lobbying group.<sup>62</sup> Most recently, Verizon parted ways with ALEC after the group hosted conservative activist David Horowitz as its speaker at an annual event where Horowitz made controversial and bigoted comments.<sup>63</sup>

## B. Stand Your Ground Procedure

### 1. Initial Determination of Criminal Immunity

All SYG statutes contain reference to a "standard of reasonableness," where a person is only justified in using deadly force when he or she *reasonably believes* that such force is "necessary to prevent imminent death or great bodily harm to himself or herself."<sup>64</sup> Additionally, in most states, SYG is an affirmative defense.

However, of the twenty-five total states that adopted some form of SYG, six states further provide immunity from criminal arrest with

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59. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1348 (2009) (citing *The Ku Klux Klan Organization and Principles* (1868), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 498–500 (Henry Steele Commager ed., 1973)). According to the Klan's founding documents, the very first object of the order was "[t]o protect the weak, the innocent, and the defenseless, from the indignities, wrongs, and outrages of the lawless, the violent, and the brutal." *Id.*

60. See Brandon Fischer, *Time to Repeal ALEC/NRA Stand Your Ground Laws*, CTR. FOR MEDIA & DEMOCRACY'S PR WATCH (July 15, 2013), <https://www.prwatch.org/news/2013/07/12180/time-repeal-alecnra-stand-your-ground-laws> [<https://perma.cc/MTW2-2KLW>].

61. *Id.*

62. David Armiak, *Verizon Dumps ALEC, Denounces Speaker as Racist*, CTR. FOR MEDIA & DEMOCRACY'S PR WATCH (Sept. 17, 2018), <https://www.prwatch.org/news/2018/09/13399/verizon-dumps-alec-denounces-speaker-racist> [<https://perma.cc/6EVY-L7CG>].

63. *Id.*

64. FLA. STAT. ANN. § 776.012 (West 2018).

such a showing of “reasonable” self-defense.<sup>65</sup> Therefore, unlike a traditional affirmative defense, which consists of a set of facts other than those alleged by a prosecutor that defeats or mitigates a charge to which the defendant must offer proof at trial,<sup>66</sup> SYG immunity applies at the outset of the case and provides the opportunity for an individual to avoid arrest altogether through an initial showing of reasonableness.<sup>67</sup> Some courts maintain that this unique procedural aspect of SYG was intentional: the Kentucky legislature, for example, “made unmistakably clear its intent to create a true immunity, not simply a defense to criminal charges.”<sup>68</sup> In fact, according to Representative Baxley of Florida, the purpose of granting criminal immunity “was to protect law-abiding citizens from uncertainty while they wait for the government to decide whether to prosecute them for shootings they claimed were in self-defense.”<sup>69</sup>

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65. ALA. CODE § 13A-3-23(d) (2018); FLA. STAT. ANN. § 776.032(2) (West 2018); KAN. STAT. ANN. § 21-5231(a) (West 2018); KY. REV. STAT. ANN. § 503.085(1) (West 2018); OKLA. STAT. ANN. tit. 21, § 1289.25(G) (West 2018); S.C. CODE ANN. § 16-11-450(B). Note that self-defense laws in at least twenty-two states (Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Michigan, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Ohio, Pennsylvania, South Carolina, Tennessee West Virginia and Wisconsin) also provide *civil* immunity under certain self-defense circumstances. *Self Defense and “Stand Your Ground”*, *supra* note 41. In a recent development, Florida just extended criminal immunity to police officers, where the Supreme Court of Florida held that officers can justify using deadly force and seek immunity under SYG just like anyone else. See Jason Hanna, ‘Stand Your Ground’ Immunity Also Applies to Florida Police, *Court Rules*, CNN (Dec. 18, 2018), <https://www.cnn.com/2018/12/16/us/florida-stand-your-ground-police-officers-immunity/index.html> [<https://perma.cc/DXY7-N9U6>]. The ruling was a result of a 2013 shooting “in which a Broward County sheriff’s deputy killed a black man he said pointed a weapon at him, a weapon that turned out to be an unloaded air rifle.” *Id.* Florida Supreme Court Justice Alan Lawson wrote that, “[p]ut simply, an officer is a ‘person,’ whether on duty or off, and irrespective of whether the officer is making an arrest,” in reference to whether the state’s SYG statutes pertains to law enforcement as well. *Id.*

66. Charlene Sabini, *Affirmative Defenses*, NALS (June 21, 2017), <https://www.nals.org/blogpost/1359892/279125/Affirmative-Defenses> [<https://perma.cc/SND8-PT2D>].

67. See *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010) (explaining that prior to the enactment of SYG laws, a defendant could raise self-defense as an affirmative defense at his criminal trial); *Zbrzezni*, *supra* note 53, at 245 (“A person charged with homicide or a crime involving force could raise the affirmative defense that his use of force was justified in self-defense. Even if the defendant’s actions were justified, this often saved him only from suffering a conviction, not from enduring a trial”). It is important to note that the Castle Doctrine also granted immunity from criminal prosecution for those who had exercised their rights and used deadly force lawfully. See *Mack & Roberts-Lewis*, *supra* note 40, at 48.

68. See, e.g., *Rodgers v. Commonwealth*, 285 S.W.3d 740, 753 (Ky. 2009).

69. *Mayors Against Guns*, *supra* note 54, at 5.

Consequently, in these six states — Alabama, Florida, Kansas, Kentucky, Oklahoma, and South Carolina — law enforcement is strictly prohibited from arresting individuals unless they have probable cause or evidence to believe that the shooter was not reasonable.<sup>70</sup> This is an inverse of the traditional doctrine, where the burden is on the shooter to prove the shooting was reasonable. Moreover, if police cannot establish probable cause “that the force used was unlawful because it was motivated by something other than reasonable fear,” then law enforcement is strictly forbidden from even arresting the person who used deadly force.<sup>71</sup>

## 2. *Presumption of Reasonable Fear*

In states with criminal immunity, SYG laws have a unique effect where a “presumption” of reasonable fear cannot be overcome unless police can disprove the shooter’s claim of reasonable self-defense.<sup>72</sup> Some states go as far as to explicitly include the word “presumption” in the title of its SYG statute itself, while others spell out this presumption with language in the body of the statute.<sup>73</sup> Again, in the majority of jurisdictions, shooters must present evidence of their reasonable fear to avoid arrest, as opposed to there being a presumption of reasonable fear.

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70. *Id.* at 10, 11.

71. Zachary L. Weaver, *Florida’s “Stand Your Ground” Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 418 (2008).

72. Mayors Against Legal Guns, *supra* note 54, at 4–5; see also FLORIDA SENATE, BILL ANALYSIS AND FISCAL IMPACT STATEMENT 2 (Feb. 7, 2017), <https://www.flsenate.gov/Session/Bill/2017/128/Analyses/2017s00128.rc.PDF> [<https://perma.cc/8P9Y-CD35>] (“First, the law extended the concept of a person’s “castle” to include a dwelling, residence, or occupied vehicle. Second, the law created a presumption that a person within a “castle” has a reasonable fear of imminent peril of death or great bodily harm if two conditions are met. First, the offender must have entered or be in the process of unlawfully and forcibly entering the dwelling, residence, or occupied vehicle or be attempting to forcibly remove a person. Second, the defender must know or had reason to believe that an unlawful and forcible entry had occurred or was occurring.”). Sweeney, *supra* note 24, at 730. SYG statutes have removed the duty to retreat but retains the necessity element. “In other words, the law requires necessity, but also refuses to take into consideration a fact that may rebut it.” *Id.*

73. See N.C. GEN. STAT. § 14-51.2 (2018). The title of the statute reads “Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm.” *Id.* FLA. STAT. § 776.013(1) (2018) (“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 force that is intended or likely to cause death or great bodily harm to another.”).

Now, law enforcement officials no longer have to make factual determinations as to whether an individual operated under reasonable fear; instead, they begin by presuming that the act was lawful and was the result of a reasonably perceived threat to the individual committing the act.<sup>74</sup> Additionally, this presumption forces police to search for evidence to disprove the reasonableness of the act, which is problematic, as the police are neither trained in, nor have experience with, legal analysis to competently weigh the evidence in light of the law.<sup>75</sup> Furthermore, once an individual claims self-defense in a SYG jurisdiction, the burden is on law enforcement to determine whether there was probable cause, or rather, evidence of a lack of reasonable force, which may not be a viable option if the victim was killed or the incident lacked witnesses.<sup>76</sup> Moreover, this heightened standard for making an arrest produces a significant obstacle for law enforcement, whose first step in collecting evidence is interviewing the shooter, who here has every incentive not to cooperate, as the shooter is already presumed to have acted reasonably.<sup>77</sup> Additionally, if a victim is dead after an altercation and there are no other witnesses to challenge the shooter's claims, the authorities are forced to believe the shooter's own version of events even though that version may be unlikely and unsubstantiated.<sup>78</sup> Therefore, the determination of reasonableness made by law enforcement will largely depend on the claim of the self-interested party — the shooter.<sup>79</sup>

Both the immunity provision and the presumption of reasonableness were used to justify law enforcement's initial decisions not to arrest George Zimmerman or Michael Drejka. Both men claimed to have reasonable self-defense claims with no evidence to the contrary, and thus police could not arrest them.<sup>80</sup> Unsurprisingly, the presumption of reasonable fear that provides an individual immunity from criminal prosecution is a heavily criticized aspect of

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74. *Deadly Combinations*, *supra* note 33, at 129.

75. *Id.* at 130.

76. *Mayors Against Legal Guns*, *supra* note 54, at 5.

77. *Id.*

78. *Id.*; see also Elizabeth B. Megale, *Disaster Unaverted: Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 AM. J. TRIAL ADVOC. 255, 267 (2013) [hereinafter *Disaster Unaverted*] (“Immunity creates a barrier to prosecution in numerous cases of violence, particularly homicides, because the deceased is unavailable to refute the defendant’s claim of reasonable fear, and other objective, verifiable evidence is rarely available.”).

79. *Weaver*, *supra* note 71, at 419.

80. See *supra* text accompanying notes 1–21.

SYG.<sup>81</sup> Traditionally, self-defense “required a level of consideration for human life,” and attackers had to think twice before pulling the trigger due to a potential investigation and charges that could follow.<sup>82</sup> However, in jurisdictions with SYG laws, a person now claiming self-defense is no longer required to identify the perceived threat triggering the defense, because the law automatically presumes reasonable fear.<sup>83</sup> Therefore, the presumption of reasonable fear, paired with immunity from criminal arrest and prosecution, provides broad and unbridled protection for individuals to use deadly force in many different settings, a radical departure from the Castle Doctrine.<sup>84</sup>

Supporters of current SYG legislation nevertheless argue that the notion of a presumption of reasonable fear is derived from fundamental self-defense law.<sup>85</sup> Primarily, advocates argue SYG laws actually “preserve[]the elements of necessity and proportionality” that were historically required in justified self-defense: the presumption of reasonable fear both merges and adopts these two requirements to better protect those who live in “modern, urban ‘castles.’”<sup>86</sup> To some, the absence of the duty to retreat reflects a *presumption* of necessity.<sup>87</sup>

### 3. *Pretrial Immunity Hearings*

SYG laws in eight states (Georgia, North Carolina, and the six states providing immunity from arrest) further protect a shooter from

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81. Sweeney, *supra* note 24, at 731 (“[C]onsider how difficult it would be, if not impossible, for a prosecutor to convict someone of using unlawful deadly force on his or her property.”); *Deadly Combinations*, *supra* note 33, at 108 (“[T]he 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.”).

82. *Disaster Unaverted*, *supra* note 78, at 286; *see generally Deadly Combinations*, *supra* note 33.

83. *Deadly Combinations*, *supra* note 33, at 118.

84. *See* FLA. STAT. § 776.012 (2018) (“[A] person who uses or threatens to use deadly force . . . does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she *has a right to be*.” (emphasis added)).

85. *But see* Weaver, *supra* note 71, at 397 (“Elizabeth Haile, an attorney for the Brady Campaign to Prevent Gun Violence, declared that the law was unnecessary because ‘[i]f you are protecting yourself or your family in self defense, that’s a basic legal right anyway.’”).

86. Catalfamo, *supra* note 26, at 505.

87. *Id.* at 530.

criminal prosecution even after an arrest is made.<sup>88</sup> In these states, an individual is entitled to a pretrial “immunity hearing” upon filing a SYG immunity motion, which acts similarly to a motion to dismiss criminal charges.<sup>89</sup> Once a defendant asserts immunity, a trial court must conduct an evidentiary hearing to examine the factual disputes raised by the parties.<sup>90</sup> After each party presents evidence to the judge, the judge determines if the shooter acted in reasonable self-defense; if the judge finds it more likely than not that the defendant acted in genuine self-defense, the case is dismissed.<sup>91</sup>

Normally, a pretrial motion to dismiss a criminal case is denied by the court when there are any factual disputes.<sup>92</sup> However, in *State v. Peterson*, a Florida court held that “when immunity under this law is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes. The court may not deny a motion simply because factual disputes exist.”<sup>93</sup> The court further concluded that even though a defendant’s pretrial motion to dismiss may be denied by a trial court, the same defendant is not precluded from using SYG as an affirmative defense at trial.<sup>94</sup> Therefore, this gives defendants “two bites at the apple” in raising the issue of self-defense in SYG jurisdictions: “one before the court in the form of a motion to dismiss and, if denied, a second bite before a jury in the form of an affirmative defense.”<sup>95</sup>

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88. ALA. CODE § 13A-3-23(e) (2018); FLA. STAT. § 776.032(1) (2018); GA. CODE § 16-3-24.2 (2018); KAN. STAT. § 21-5231(a) (2018); KY. REV. STAT. § 503.085(1) (2018); N.C. GEN. STAT. § 14-51.3(b) (2018); OKLA. STAT. tit. 21, § 1289.25(F) (2018); S.C. CODE ANN. § 16-11-450(B).

89. Mayors Against Legal Guns, *supra* note 54, at 11; *see generally* *What Is a Stand Your Ground Immunity Motion?*, KILFIN LAW FIRM, P.C. (June 9, 2016), <http://www.kilfinlaw.com/Blog/2016/June/What-is-a-Stand-Your-Ground-Immunity-Motion-.aspx> [<https://perma.cc/CB4U-EHQB>].

90. Jessica Travis & Jeffrey James, *Know the Ground You’re Standing on: Analyzing Stand Your Ground and Self-Defense in Florida’s Legal System*, 20 BARRY L. REV. 91, 100–01 (2014); *see, e.g.*, *Mederos v. State*, 102 So. 3d 7, 11 (Fla. Dist. Ct. App. 2012).

91. Mayors Against Legal Guns, *supra* note 54, at 5.

92. *What Is a Stand Your Ground Immunity Motion?*, *supra* note 89 at 2.

93. 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008). The Florida Supreme Court later adopted this view in *State v. Dennis*. *See* 51 So. 3d 456 (Fla. 2010).

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

95. *What Is a Stand Your Ground Immunity Motion?*, *supra* note 89, at 2–3.

## II. STAND YOUR GROUND LAW AND ITS DISCRIMINATORY IMPACT ON BLACK GUN OWNERS

Part II begins with an examination of how certain factors play a role in the way SYG laws are applied, starting with the discrepancy between black gun ownership rates and white gun ownership rates. Additionally, this Part discusses the correlation between the legal justifiability of a SYG shooting and race, with a focus on a presumption that black shooters are inherently unreasonable and therefore not justified. This Part also analyzes the stigma of violence surrounding young black males that contribute to the assumption that black shooters act unreasonably.

This Part concludes with a presentation of considerations that support the repeal of immunity determinations provided by SYG statutes, including a level of implicit bias demonstrated by the law enforcement responsible for such determinations and a lack of training in the legal nuances of SYG statutes that lead to an unequal application of the law.

### A. How Stand Your Ground Works in Practice

#### 1. Gun Ownership Demographics

The United States has had a longstanding love affair with firearms since its founding.<sup>96</sup> This fixation has historically been dominated by white ownership<sup>97</sup> — a pattern that remains true to this day.<sup>98</sup> As of 2017, African Americans were significantly more likely to be victims of gun homicides than white individuals, even though African Americans were only about half as likely to have firearms in their

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96. See James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1780 (2002) (“[W]e report high levels of gun ownership in every probate database we examined in early America.”). Even before 1776, many believed that self-defense was the “most self-evident of rights” that existed in natural law. Fair, *supra* note 51, at 157. See generally *District of Columbia v. Heller*, 554 U.S. 570, 581–93 (2008) (discussing how the right to keep and bear arms was considered a fundamental right in the early eighteenth century); *McDonald v. City of Chicago*, 561 U.S. 742, 769–78 (2010) (discussing how the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms as a fundamental right).

97. See U.S. CONST. amend. II (at the time the constitution was written, only white-property holding males were protected by the amendments, as slaves were considered property).

98. See Jeremy Adams Smith, *Why Are White Men Stockpiling Guns?*, SCI. AM. (Mar. 14, 2018), <https://blogs.scientificamerican.com/observations/why-are-white-men-stockpiling-guns/> [<https://perma.cc/K67S-7NGF>].

houses.<sup>99</sup> In fact, in 2017, thirty-six percent of white Americans owned guns, as opposed to only twenty-four percent of black Americans.<sup>100</sup> However, at a regional level, the gap between white and black ownership has widened. The South leads in adopting SYG statutes.<sup>101</sup> It is therefore unsurprising that white southerners in particular are “significantly more likely to have a gun at home (forty-seven percent) than whites in other regions.”<sup>102</sup> However, because African Americans disproportionately live in the South (and are only half as likely to have a firearm at home), “the overall rate for the southern region falls to 38 [percent].”<sup>103</sup> These demographics even take into account the stark rise in black gun ownership displayed after the 2016 presidential election, which rose to an all-time high in the era of Trump politics.<sup>104</sup>

The widespread adoption of SYG laws since 2005 has unquestionably contributed to a rise in gun ownership in those jurisdictions.<sup>105</sup> Black ownership, despite its rise since the 2016

99. Rich Morin, *The Demographics and Politics of Gun-Ownning Households*, PEW RES. CENTER (July 15, 2014), <http://www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households/> [https://perma.cc/K5TS-7DEE].

100. *Percentage of Population in the United States with at Least One Gun in the Household in 2017, by Ethnicity*, STATISTA, <https://www.statista.com/statistics/623356/gun-ownership-in-the-us-by-ethnicity/> [https://perma.cc/C7KD-NFEK].

101. Mayors Against Legal Guns, *supra* note 54, at 10. Fourteen out of the twenty-three states belong to the southern region of the United States.

102. Morin, *supra* note 99.

103. *Id.*

104. Julia Craven, *Why Black People Own Guns*, HUFFINGTON POST (Dec. 26, 2017), [https://www.huffingtonpost.com/entry/black-gun-ownership\\_us\\_5a33fc38e4b040881bea2f37](https://www.huffingtonpost.com/entry/black-gun-ownership_us_5a33fc38e4b040881bea2f37) [https://perma.cc/27E5-BE3E]. See Scott Simon and Emma Bowman, *African-American Gun Rights Group Grows in the Age of Trump*, NAT'L PUB. RADIO (Mar. 31, 2018), <https://www.npr.org/2018/03/31/598503554/african-americans-guns-and-trump> [https://perma.cc/MM7T-6YQ9]. While some black gun owners suggest that the spike in ownership was due to an interest in the standard right to bear arms, others point to a “national climate of racism that many see as an outgrowth of Trump’s election.” *Id.* Emell Derra Adolphus, *Exploring the Rise of African-American Gun Ownership*, BLACK LIFE, ARTS & CULTURE (June 2018), <http://www.blacdetroit.com/BLAC-Detroit/June-2018/Exploring-the-Rise-of-African-American-Gun-Ownership/> [https://perma.cc/GBP3-BTG4] (“Since the start of the 2016 presidential race, the National African-American Gun Association (NAAGA) reported a record swell of 20,000 members—a perceived cultural shift, or shudder, as people of color take up arms in an increasingly racially tense political climate.”).

105. See generally “Stand Your Ground” Laws, GIFFORDS LAW CENTER, <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/> [https://perma.cc/CM5K-JDH2] (“As of March, 2015, over 1.4 million people

election, has not seen as significant an increase in response to the passage of SYG legislation starting in 2005.<sup>106</sup> In fact, black individuals may be more hesitant to purchase and use firearms in SYG states. They face more severe penalties for using self-defense, especially self-defense against white aggressors, as they are often deemed inherently unreasonable and thus often not granted immunity in SYG altercations.<sup>107</sup>

## 2. *Justifiability and Race*

The presumption of reasonable fear and criminal immunity provision should theoretically work to the benefit all shooters in SYG jurisdictions, regardless of the color of their skin. However, in practice, the law does not treat black shooters the same when it comes to the use of “reasonable,” and therefore legally justified, deadly force. Moreover, when looking at individual SYG cases, there is a presumption that black shooters are inherently unreasonable.<sup>108</sup>

The inconsistency in legal justifiability — where the shooter was immune from arrest or determined to be reasonable in a pretrial immunity hearing — widens when assessing white-on-black shootings and black-on-white shootings, indicating that race plays a significant role in determining whether shooters are “reasonable” in their self-defense claims. A national study conducted by the Urban Institute in 2013 found that Caucasian shooters who killed African-American victims were legally justified thirty-eight percent of the time, while African-American shooters who killed Caucasian victims were only justified 3.3% of the time.<sup>109</sup> Additionally, between 2005 and 2011, the number of legally justifiable homicides of African Americans nearly doubled in states that adopted these laws, while it remained consistent for the rest of the country.<sup>110</sup> At the state level, a Tampa Bay Times analysis of nearly 200 Florida cases found that individuals who killed a black person walked free seventy-three percent of the

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held concealed weapons permits in Florida, greater than three times as many as in 2005 when the law was passed.”).

106. Kim Parker et al., *America’s Complex Relationship with Guns*, PEW RES. CTR. (June 22, 2017), <https://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/> [<https://perma.cc/5KVE-YD6W>].

107. *See infra* Section II.A.3.

108. *See infra* notes 115–25 and accompanying text.

109. Mack & Roberts-Lewis, *supra* note 40, at 55.

110. Mayors Against Legal Guns, *supra* note 54, at 7.

time, while those who killed a white person walked free fifty-nine percent of the time.<sup>111</sup>

Additionally, the type of relationship a shooter has with a victim, as well the race of a shooter or a victim, may also impact a finding of reasonableness. In fact,

when an older white man shoots a younger black man with whom he had no prior relationship, the shooting is determined justifiable forty-nine percent of the time. Yet when the situation is reversed, and an older black man shoots a younger white man with whom he had no previous relationship, the homicide is only judged justifiable eight percent of the time.<sup>112</sup>

The American Bar Association (ABA) formed a task force in 2015, which also found that race was a factor in findings of legal justifiability. The task force focused on two issues: “how the laws intersect with racial bias and whether their enforcement balances the rights of the accused with those of a victim.”<sup>113</sup> In turn, the data “showed that the laws aren’t consistently applied, which has resulted in racial disparities.”<sup>114</sup> Furthermore, Jack Middleton, co-chair of the task force, confirmed the ABA’s finding that, “[i]f you have a black perpetrator with a white victim, the chances of getting a conviction are much greater than in the reverse situation.”<sup>115</sup>

Black shooters have also been more heavily penalized than white gun owners in SYG altercations that involved no fatality at all. For example, Marissa Alexander, an African-American woman, was convicted of aggravated assault charges in 2012 for firing a warning shot into a wall next to where her abusive husband was standing.<sup>116</sup> While Florida’s appellate court ultimately remanded for retrial due to erroneous jury instructions regarding self-defense, the appellate court affirmed the decision to deny immunity to Alexander under the

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111. Susan Taylor Martin, *Race Plays Complex Role in Florida’s ‘Stand Your Ground’ Law*, TAMPA BAY TIMES (Feb. 17, 2013), <http://www.tampabay.com/news/courts/criminal/race-plays-complex-role-in-floridas-stand-your-ground-law/1233152> [<https://perma.cc/DYH7-9U7N>].

112. Mayors Against Legal Guns, *supra* note 54, at 7.

113. Rebecca Voelker, *Psychologists Laud ABA’s Move to Oppose Stand Your Ground Laws*, 46 MONITOR ON PSYCHOL. 5, May 2015, at 13.

114. *Id.*

115. *Id.*

116. Christine Hauser, *Florida Woman Whose ‘Stand Your Ground’ Defense Was Rejected Is Released*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/marissa-alexander-released-stand-your-ground.html> [<https://perma.cc/X4C4-3QG5>]; see *State v. Alexander*, No. 16-2010-CF-008579, 2012 WL 10738699 (Fla. Cir. Ct. May 11, 2012).

state's SYG law<sup>117</sup> – immunity that would have precluded any further prosecution. Similarly, Siwatu-Salama Ra, an African-American woman, was convicted of felonious assault and felony firearm convictions due to an altercation where she pointed her registered – and *unloaded* – gun at a woman who tried to hit her and her daughter with a car.<sup>118</sup> One of Ra's attorneys, Victoria Burton-Harris, had this to say:

You're allowed to behave differently when you're fearful based on the color of your skin. George Zimmerman was allowed to be fearful and to act on that fear. He was allowed to take the life of an unarmed black child. Juxtapose that next to my client who had a car coming at her mother, and that same car had just presented danger to her child. It was driven by the complaining witness, but Siwatu wasn't allowed to be fearful and rely on her government-licensed and sanctioned firearm to ward off her attacker.<sup>119</sup>

### 3. *Black Gun Owners and a Stigma of Violence*

While SYG statutes provide a presumption of reasonable fear for shooters in self-defense altercations, in actuality, there is a presumption that black shooters are inherently unreasonable. This presumption is rooted in the historical stigma of violence placed on young black males. This stigma is likely related to high rates of gun violence among young blacks living in poor, urban communities, and is at least partially responsible for whites perceiving African Americans to be inherently more dangerous.<sup>120</sup> While the stigma of a “dangerous” black male is nothing new, now, SYG laws provide a platform for race to be considered *de facto* “evidence” in a state's case for unjustified self-defense.<sup>121</sup> Moreover, a “victim's blackness”

117. *Alexander v. State*, 121 So. 3d 1185, 1186 (Fla. Dist. Ct. App. 2013).

118. Jane Coaston, *She Defended Herself with a Legally Owned (and Unloaded) Gun. Now She's Facing Two Years in Prison*, VOX (May 7, 2018), <https://www.vox.com/2018/5/4/17311452/gun-rights-black-lives-matter-michigan-siwatu-salama-ra> [<https://perma.cc/PA4M-43SL>].

119. Sarah Quinlan, *Pregnant Gun Owner Is Serving Two Years in Prison for Defending Herself—In A Stand-Your-Ground State*, REDSTATE (May 7, 2018), <https://www.redstate.com/sarahquinlan/2018/05/07/pregnant-gun-owner-is-serving-two-years-in-prison-for-defending-herself-in-a-stand-your-ground-state/> [<https://perma.cc/95LG-X6DE>].

120. Tanzina Vega, *Minority Gun Owners Face Balancing Act, Weighing Isolation and Stigma of Violence*, N.Y. TIMES (June 14, 2014), <https://www.nytimes.com/2014/06/15/us/minority-gun-owners-face-balancing-act-weighing-isolation-and-stigma-of-violence.html> [<https://perma.cc/R6P6-A2YR>].

121. Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2268 (2017).

itself can seem as if it were actual “evidence” that the victim was dangerous and that deadly force used on the victim was justified, while a defendant’s whiteness seems to be “character evidence” that he or she was justified in attacking the victim.”<sup>122</sup>

As a result, many members of the black population internalize this presupposition, and in turn, may feel hesitant to use self-help in fear that law enforcement will also espouse this stigma. For example, after the Trayvon Martin shooting, Geraldo Rivera, a Latino talk show host on Fox News, stated that “[t]he hoodie is as much responsible for Trayvon Martin’s death as George Zimmerman was” and warned “parents with black or Hispanic youths not to allow their sons to wear hooded sweatshirts.”<sup>123</sup> Additionally, in a Washington Post interview conducted in the wake of the Martin killing, one man from Maryland said that even individuals in “[his] own black community” react the same way when passing a group of black men, as a reaction not of fear, but of “suspicion.”<sup>124</sup> The local added that there are those “who raise these black men not to be like society expects, to be the anti-stereotype, and they can still get shot.”<sup>125</sup>

Therefore, racial profiling and the stigma of violence placed upon black males in SYG jurisdictions perpetuates a widespread problem: that there are communities of innocent individuals fearing a system “designed to protect them.”<sup>126</sup> Additionally, SYG laws act as an additional obstacle in debunking these presumptions, as immunity determinations that are unique to SYG continue to reinforce a stigma that black shooters are inherently more dangerous and less rational.

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122. *Id.*

123. Katherine Boyle, *Trayvon Martin’s Death Has Put Spotlight on Perceptions About Hoodies*, WASH. POST (Mar. 25, 2012), [https://www.washingtonpost.com/lifestyle/style/trayvon-martins-death-has-put-spotlight-on-perceptions-about-hoodies/2012/03/24/gIQAwQ6gaS\\_story.html?noredirect=on&utm\\_term=.d1e58aae4677](https://www.washingtonpost.com/lifestyle/style/trayvon-martins-death-has-put-spotlight-on-perceptions-about-hoodies/2012/03/24/gIQAwQ6gaS_story.html?noredirect=on&utm_term=.d1e58aae4677) [https://perma.cc/LWU7-VC8V].

124. Lonnae O’Neal Parker, *Area Parents React to Trayvon Martin Slaying: “This Could Have Been Our Kids”* WASH. POST (Mar. 23, 2012), [https://www.washingtonpost.com/lifestyle/style/area-parents-react-to-trayvon-martin-slaying-this-could-have-been-our-kids/2012/03/22/gIQAeCSXUS\\_story.html?utm\\_term=.8556279f6bf4](https://www.washingtonpost.com/lifestyle/style/area-parents-react-to-trayvon-martin-slaying-this-could-have-been-our-kids/2012/03/22/gIQAeCSXUS_story.html?utm_term=.8556279f6bf4) [https://perma.cc/C5FL-BGL3].

125. *Id.*

126. Testimony of Rep. Fudge, Member, S. Comm. on the Judiciary, *supra* note 49, at 7; see also Barbara R. Arnwine, *Minorities and “Stand Your Ground” Laws*, NBA NAT’L B. ASS’N MAG., Fall/Winter 2013–2014, at 8 (“Instead of providing added protection to potential victims as proponents of the law claim, ‘stand your ground’ laws give license to racial profiling, particularly of young black men.”).

## B. Factors that Support a Repeal of Immunity Provisions Due to Police Discretion

### 1. *Implicit Racial Bias Demonstrated by Local Police*

When investigating SYG cases, local police may exhibit explicit or implicit racial biases that contribute to biased immunity determinations and an overall unequal application of the law. In addition to other psychological factors, a lack of diversity in police academies and the force may foster a culture of exclusivity in law enforcement. As of 2005, blacks and Hispanics only accounted for thirteen percent of recruits in police academies.<sup>127</sup> This number increased from 2011 to 2013, but only slightly: one in three recruits for local and state law enforcement training academies were members of a racial or ethnic minority.<sup>128</sup>

A lack of diversity in the police force may reflect a proclivity of white officers to exert racial biases when investigating SYG cases, especially cases involving black shooters. In 2015, the *Washington Post* broke a story that a North Miami Beach Police Department was exclusively using mug shots of African Americans for sniper practice at a firing range.<sup>129</sup> In response, North Miami Police Chief J. Scott Dennis denied any racial profiling, alleging that the Department “usually” uses pictures of people of all races for target practice and that there would be no discipline for the individuals involved.<sup>130</sup> In regard to SYG cases in particular, Benjamin Crump, an attorney hired by Trayvon Martin’s family, questioned the impartiality of the investigation of the incident, noting that the police hastily jumped to run a background check on Trayvon Martin, the black male who was dead, but did not run one on George Zimmerman, the shooter.<sup>131</sup>

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127. BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2013 3 (July 2016), <https://www.bjs.gov/content/pub/pdf/slleta13.pdf> [<https://perma.cc/NUY5-FWJL>].

128. *Id.* at 1.

129. Fred Barbash, *Florida Police Department Caught Using African American Mug Shots for Target Practice*, WASH. POST (Jan. 16, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/01/16/florida-police-department-caught-using-african-american-mug-shots-for-target-practice/?utm\\_term=.7adc91f882af](https://www.washingtonpost.com/news/morning-mix/wp/2015/01/16/florida-police-department-caught-using-african-american-mug-shots-for-target-practice/?utm_term=.7adc91f882af) [<https://perma.cc/3WPB-7434>].

130. *Id.*

131. CNN Special Report with Soledad O’Brien, *Beyond Trayvon: Race and Justice in America* (CNN television broadcast Mar. 31, 2012), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1203/31/se.01.html> [<https://perma.cc/MK38-GHDB>]. Martin’s parents and their attorney also emphasized that the Sanford police force had a racially fraught history. Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68

Unfortunately, there is a strong belief that implicit bias will continue to exist regardless of any formal training programs or diversity inclusion.<sup>132</sup> In fact, “researchers have found that subjects can consciously embrace ideas of fairness and equality and yet, on tests that measure subconscious tendencies, still show a strong propensity to lean on stereotypes to fill in the blanks about people they don’t know.”<sup>133</sup> Additionally, even if biases were able to be overcome, formal implicit bias training courses would be hard to produce and run effectively, as “[f]ew specific guidelines exist for what courses should include, how the material should be taught, or how to measure its effects.”<sup>134</sup>

Guidelines for creating bias training courses are likely to be flawed because the creators of the guidelines have implicit biases of their own. Studies have found that both police officers and civilians are “consistently more likely to associate black faces with criminality, to misidentify common objects as weapons after being shown photos of black faces, and to label photos of black people as threatening.”<sup>135</sup> Patricia Devine, a psychology professor at the University of Wisconsin, believes that if police departments skip “key steps,” such as providing officers with tangible and practical strategies for monitoring their own biases, bias training will not be successful.<sup>136</sup> This is because by conducting bias training without having standards to measure its effectiveness, “you don’t know if somehow they left an ingredient out,” or how to replicate for real time situations.<sup>137</sup> Phillip

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U. MIAMI L. REV. 961, 964 (2014). See also John Rudolf & Trymaine Lee, *Trayvon Martin Case Spotlights Florida Town’s History of ‘Sloppy’ Police Work*, HUFFINGTON POST (Apr. 9, 2012), [http://www.huffingtonpost.com/2012/04/09/trayvon-martin-cops-botched-investigation\\_n\\_1409277.html](http://www.huffingtonpost.com/2012/04/09/trayvon-martin-cops-botched-investigation_n_1409277.html) [https://perma.cc/EV8A-W94U] (discussing past mistreatment of African Americans by the Sanford police).

132. See generally Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101 (2002) (discussing results of over 600,000 IAT tasks that demonstrate implicit preferences for white over black).

133. Tom James, *Can Cops Unlearn Their Unconscious Biases?*, ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/12/implicit-bias-training-salt-lake/548996/> [https://perma.cc/XD55-ARR8] [hereinafter *Can Cops Unlearn Their Unconscious Biases?*].

134. *Id.*

135. *Id.*; see generally *People See Black Men as Larger, More Threatening Than Same-Sized White Men*, AM. PSYCHOL. ASS’N (Mar. 13, 2017), <https://www.psypost.org/2017/03/people-see-black-men-larger-threatening-sized-white-men-48247> [https://perma.cc/6UB2-ES8E].

136. *Can Cops Unlearn Their Unconscious Biases?*, *supra* note 133.

137. *Id.*

Goff, a City University of New York professor and the head of the Center for Policing Equity, argued that assessments “need to go well beyond feedback from participants,” and instead should include further testing after training sessions are finished to “see if officers’ reactions, behavior, or perceptions were actually changed by the material.”<sup>138</sup>

2. *Lack of Legal Training and Biases Leads to an Unequal Application of Criminal Immunity for Black Shooters*

Prior to the implementation of SYG law, law enforcement in these jurisdictions only had to establish that an unlawful act had occurred in order to forward evidence to the state attorney, who determined whether to prosecute.<sup>139</sup> Now, law enforcement must conduct an on-the-spot evaluation of the facts at hand to determine whether or not a person will be accused of a crime.<sup>140</sup> SYG, therefore, places the determination of an individual’s guilt or innocence in the hands of police, a decision that is traditionally within the province of the court.<sup>141</sup> Moreover, law enforcement is now “called to make prosecutorial decisions without consulting the prosecutor” and thus, must make on-the-spot legal determinations.<sup>142</sup> Local police, however, are not aware of how their immunity determinations can lead to substantial and irrevocable legal implications under SYG law.

Law enforcement officers are simply “not trained to conduct the legal analysis required by such determinations of immunity,”<sup>143</sup> likely due to the insufficient legal education — such as interpreting statutes and applying legal concepts to facts — that police cadets receive before they join the force. In 2013, the U.S. Department of Justice (DOJ) found that, while police recruits receive on average 213 hours for operations and 168 hours for firearms self-defense and use of force, recruits receive only eighty-six hours of legal education.<sup>144</sup>

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138. *Id.*

139. *Deadly Combinations*, *supra* note 33, at 120; *see* Weaver, *supra* note 71, at 407–10.

140. *Deadly Combinations*, *supra* note 33, at 120–21; *see* Velasquez v. State, 9 So. 3d 22, 24 (Fla. Dist. Ct. App. 2009) (citation omitted) (“The statute [776.032] . . . provides for law enforcement to make an initial determination of whether there was probable cause that the force used was unlawful. This allows law enforcement officers to determine a suspect’s immunity prior to making an arrest.”), *reh’g denied*.

141. *Deadly Combinations*, *supra* note 33, at 121.

142. *Id.* at 119–20.

143. *Id.* at 120.

144. Reaves, *supra* note 127, at 1.

Additionally, the study did not confirm whether practicing attorneys or those with experience in the legal profession participated in this “legal” education.<sup>145</sup>

A lack of legal education may permit inconsistent and inaccurate applications of the law. For example, SYG statutes do not provide a defense that allows individuals who are engaged in criminal activity to use deadly force.<sup>146</sup> However, there have been documented altercations where drug dealers have successfully invoked a SYG defense even while in the middle of a deal — a clear misinterpretation of the statute made possible by police discretion and miseducation.<sup>147</sup> For example, Police Chief Mike Chitwood of Daytona Beach maintained that SYG law prevented him from filing charges in two drug deals that ended in deaths, as he claimed the shooters had permits to carry concealed weapons and they claimed they were defending themselves at the time.<sup>148</sup>

Similarly, although the SYG self-defense standard is objective — from the viewpoint of a “reasonable” person — police frequently and mistakenly use a subjective standard — what the individual shooter perceived at the time of the incident. The case of Michael Drejka highlighted this common error, as Pinellas County Sheriff Bob Gualtieri explicitly claimed that the standard for using lethal force under SYG law is “largely subjective.”<sup>149</sup> At a press conference, Gualtieri had “insisted that Florida’s law prevented him from making an arrest, because ‘Stand Your Ground allows for a subjective belief by the person that they are in harm’s way,’ and ‘we don’t get to substitute our judgment for Drejka’s judgment.’”<sup>150</sup> In response, several Florida Republicans, including three key legislators who personally contributed to writing the state’s statute, criticized

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145. *Id.* at 9.

146. *See, e.g.*, S.C. CODE ANN. § 16-11-440(B)(3) (2006) (“The presumption provided in subsection (A) does not apply if the person . . . who uses deadly force is engaged in an unlawful activity”).

147. *See* Susan Taylor Martin, *Florida ‘Stand Your Ground’ Law Yields Some Shocking Outcomes Depending on How Law Is Applied*, TAMPA BAY TIMES (June 1, 2012), <https://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133> [<https://perma.cc/9863-N6DA>].

148. *Id.*

149. Jacob Sullum, *Legislators Say Sheriff Who Declined to Arrest Michael Drejka for Killing Markeis McGlockton Is Misrepresenting Florida’s ‘Stand Your Ground’ Law*, REASON (July 30, 2018), <https://reason.com/blog/2018/07/30/authors-of-floridas-stand-your-ground-la> [<https://perma.cc/CRY5-WCQK>].

150. *Id.*

Gualtieri's statements<sup>151</sup> Dennis Baxley, who had sponsored the 2005 law, stated that SYG, like the majority of criminal law statutes, uses a reasonable-person, objective standard.<sup>152</sup>

Due to the fact that SYG statutes place case-by-case determinations of criminal immunity in the hands of police, the SYG legal process does not create the environment for consistent application of the law. In fact, evidence indicates that decisions left to police discretion reflect racial biases. While it is true that law enforcement is "limited in the investigation . . . because it must *presume* the individual acted out of a reasonable fear," there is substantial discretion when determining what *is* reasonable.<sup>153</sup> Many states prohibit law enforcement from arresting or detaining in custody any individual who uses deadly force until there is *probable cause* that the force used was unlawful.<sup>154</sup> However, individual officers "may have a different internal standard as to the requisite amount of information and evidence needed to show whether or not the defendant should be charged or even detained," and "[w]ithout any training . . . there is no sense of uniformity."<sup>155</sup> Therefore, because there are few guidelines for determining what "probable cause" means in a SYG setting, it is easy for racial bias to creep in and inform a finding of unreasonableness for black shooters.<sup>156</sup> Moreover, "[b]ecause cases are not handled uniformly, too much discretion may be vested in law enforcement" as this discretion "opens the door for personal bias, such as racial or gender animus, to play an improper role in the police's decisions."<sup>157</sup>

### III. LIMITING IMMUNITY DETERMINATIONS IN STAND YOUR GROUND STATES

Part III proposes to limit immunity determinations in the relevant SYG jurisdictions to pretrial hearings, thereby leaving immunity

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151. *Id.*

152. *Id.*

153. *Deadly Combinations*, *supra* note 33, at 118.

154. FLA. STAT. § 776.032(2) (2005) (emphasis added).

155. Hunter G. Cavell, *Reasonable Belief: A Call to Clarify Florida's Stand Your Ground Laws*, 50 CRIM. L. BULL., no. 1, Winter 2014.

156. A lack of guidelines concerning SYG laws could be due to "the lack of judicial interpretation of the law," as few cases have actually been brought to trial. Weaver, *supra* note 71, at 406. The "Stand Your Ground" law may act more as a bar to prosecution than a defense. *Id.*

157. *Id.* at 410.

decisions to judges who will make the determinations on the basis of the law rather than the discretion of local law enforcement officers.

This Part concludes by considering some potential problems and limitations of this proposal, including the risk that a change in the law may work to the detriment of black individuals as well as the reality that SYG immunity and overall ideology can play a role in jury instructions even in the absence of an explicit immunity provision.

#### A. Arguments for Limiting Immunity Determinations to Pretrial Hearings

Currently, SYG statutes of six states (Alabama, Florida, Kansas, Kentucky, Oklahoma, and South Carolina) give law enforcement the sole responsibility for initial determinations of criminal immunity.<sup>158</sup> These jurisdictions “essentially requir[e] law enforcement to make determinations of immunity without providing any guidelines on how to make this decision,”<sup>159</sup> and consequently, this results in a disparate arrest and prosecution rate for black shooters. Therefore, this Note calls for a repeal of initial criminal immunity determinations upon a finding of reasonableness by police and, instead, proposes that immunity determinations be made at pretrial immunity hearings only.<sup>160</sup>

Some courts have placed the burden of proof for reasonable self-defense on the defendant in pretrial immunity hearings.<sup>161</sup> These hearings create an equal obstacle for both white and black shooters — something police discretion in immunity determinations, tainted by

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158. *See, e.g.*, ALA. Code § 13A-3-23(d) (2018); FLA. STAT. ANN. § 776.032(2) (West 2018); KAN. STAT. ANN. § 21-5231(a) (West 2018); KY. REV. STAT. ANN. § 503.085(1) (West 2018); OKLA. STAT. ANN. tit. 21, § 1289.25(G) (2018); S.C. CODE ANN. § 16-11-450(B).

159. *Deadly Combinations*, *supra* note 33, at 108-09.

160. Proposals to rewrite SYG statutes have already garnered support, as some feel immunity should be decided by the courts, and not in “the secrecy of the police station.” *See* Kenneth Nunn, *Racism Is the Problem, Not the Stand Your Ground Laws*, N.Y. TIMES (Mar. 21, 2012), <https://www.nytimes.com/roomfordebate/2012/03/21/do-stand-your-ground-laws-encourage-vigilantes/racism-is-the-problem-not-the-stand-your-ground-laws> [<https://perma.cc/X2LG-UJHZ>].

161. *See, e.g.*, *State v. Jones*, 416 S.C. 283, 301 (2016) (“Therefore, the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence.”); *Peterson v. State*, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008) (“[W]e hold that a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches.”).

racial bias, did not afford. Limiting immunity discussions to pretrial hearings may work to the benefit of black shooters, as the defendant bears the burden of persuasion by only the “preponderance of the evidence” standard,<sup>162</sup> a standard that is generally used for affirmative defenses in other criminal proceedings. Furthermore,

a preponderance standard at the pretrial immunity stage provides a sensible, appealing, and escalating scale of proof in the context of a criminal prosecution: probable cause for the arrest and charging of the defendant; a preponderance of the evidence for pretrial immunity; and reasonable doubt for conviction of the crime.<sup>163</sup>

However, other states, like Florida, made the shift for the prosecution, not the defendant, to prove whether a self-defense claim is justified in a pretrial immunity hearing.<sup>164</sup> As such, the state now “bears the burden of disproving, by clear and convincing evidence, a facially sufficient claim of self-defense immunity in a criminal prosecution.”<sup>165</sup> The Supreme Court of Kentucky also held that the State, and not the defendant, bears the burden of proof.<sup>166</sup> However, the Kentucky court also stated that because probable cause is the only standard referred to by the statute, probable cause remains the burden of proof at pretrial immunity hearings.<sup>167</sup> The Supreme Court of Kansas similarly held that the State has the burden to establish that there is probable cause to show that the force used was unjustified.<sup>168</sup> This shift may reflect an even better outcome for black defendants,

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162. *What Is a Stand Your Ground Immunity Motion?*, *supra* note 89. Here, defendants simply have to prove that they were more likely than not acting in reasonable self-defense to have the case dismissed. *But see* Order Denying Defendant’s Motion for Determination of Immunity from Prosecution and Motion to Dismiss, *State v. Alexander*, No. 16-2010-CF-8579, 2011 WL 11709351, at \*3 (Fla. Cir. Ct. Aug. 17, 2011) (“After weighing the credibility of all witnesses and other evidence, this Court finds that the Defendant has not proved by a preponderance of the evidence that she was justified in using deadly force in the defense of self.”).

163. Benjamin M. Boylston, *Immune Disorder: Uncertainty Regarding the Application of “Stand Your Ground” Laws*, 20 BARRY L. REV. 25, 39 (2014).

164. *Appeals Court Ruling Could Help Florida Defendants in ‘Stand Your Ground’ Cases*, TAMPA BAY TIMES (May 7, 2018), [https://www.tampabay.com/news/courts/criminal/Appeals-court-ruling-could-help-florida-defendants-in-stand-your-ground-cases\\_168028316](https://www.tampabay.com/news/courts/criminal/Appeals-court-ruling-could-help-florida-defendants-in-stand-your-ground-cases_168028316) [<https://perma.cc/P9R2-ZZBQ>].

165. *Id.*

166. *Rodgers v. Commonwealth*, 285 S.W.3d 740, 755 (Ky. 2009).

167. *Id.*

168. *State v. Ultreras*, 296 Kan. 828, 845 (2013).

where the onus is on the State to disprove the black shooter's presumption of reasonability.<sup>169</sup>

This Note proposes to limit immunity determinations to pretrial hearings, because judges have proven to be inconsistent when interpreting SYG statutes. While inconsistency works to the detriment of black shooters during *initial* immunity determinations by police, here, inconsistent applications may actually work to the advantage of black shooters, as these discrepancies largely reflect disagreements about the substance of the law and not the race of the defendant.

For example, in 2009, the First District Court of Appeal for Florida in *Hair v. State* ordered the release of Jimmy Ray Hair, a man who shot and killed an individual who allegedly attacked him through the open window in a car.<sup>170</sup> At the time Hair shot his attacker, it was determined that the intruder was retreating from Hair's vehicle.<sup>171</sup> The First District nevertheless claimed that the SYG statute in question "makes no exception from the immunity when the victim is in retreat."<sup>172</sup> In a similar case, *State v. Heckman*, the Second District Court of Appeal ruled that David Heckman was not entitled to immunity after he shot an intruder that was leaving the garage attached to Heckman's home.<sup>173</sup> The Second District, however, claimed that "immunity does not apply [where] the victim was retreating."<sup>174</sup>

Therefore, by repealing initial immunity determinations made by police and instead limiting immunity discussion to pretrial hearings, SYG jurisdictions will be able to preserve the legislative intent to protect defendants while still allowing a judge to decide, as a matter of law, whether a defendant is entitled to immunity. Moreover, immunity determinations made during pretrial hearings are made on the basis of the underlying law, and therefore, are not subject to police discretion and its resulting bias.

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169. *But see* Boylston, *supra* note 163, at 38 ("[A] probable-cause standard is far too easily met by the State and merely replicates a determination of probable cause that will already have been made twice: first by the police in making an arrest or seeking an arrest warrant, and then by a judge or magistrate either in signing the arrest warrant or making a probable cause determination shortly after the defendant's warrantless arrest.").

170. *Hair v. State*, 17 So. 3d 804, 804–05 (Fla. Dist. Ct. App. 2009) (per curiam).

171. *Id.* at 806.

172. *Id.*

173. *State v. Heckman*, 993 So. 2d 1004, 1005–06 (Fla. Dist. Ct. App. 2007).

174. *Id.* at 1004.

## B. Problems and Limitations of the Suggested Proposal

### 1. *Changes to Stand Your Ground Law May Harm, Rather than Help, Black Shooters*

There is a difference between whether a law *should* change, and whether it *can* change.<sup>175</sup> For example, there is a concern that black gun owners may resist a current change to SYG law. One study shows that African Americans do not always disapprove of SYG legislation, as a Quinnipiac poll taken in 2013 showed that thirty-seven percent favored it, while fifty-seven percent opposed it.<sup>176</sup> The stronger argument, however, is that current SYG laws and its extra safeguards actually may benefit African Americans. Democratic South Carolina Representative Todd Rutherford, an African-American lawmaker, insists that the law may in fact even benefit

175. It is important to note the technical political realities that act as an obstacle to change. More specifically, because SYG laws are created and written by legislatures on a state-wide basis, the repeal would be up to each state to self-regulate and implement. However, those benefiting from the law, which include majority white voters in jurisdictions with SYG, are unlikely to seek change. For example, a Florida task force, put together by Florida Governor Rick Scott in response to the Trayvon Martin shooting, found that a “majority of Floridians favor an expansive right to self-defense.” Vivian Kuo, *Florida Task Force Recommends Keeping ‘Stand Your Ground’ Law*, CNN (Feb. 22, 2013), <https://www.cnn.com/2013/02/22/justice/florida-stand-your-ground-law/index.html> [https://perma.cc/S5HR-U2GH]. However, because the “majority of Floridians” are white, the majority of Floridians are not being affected by the state’s weak gun laws, and therefore, would obviously vote in favor of the law and the benefits it affords. See *U.S. Census Bureau QuickFacts: Florida*, U.S. CENSUS BUREAU (July 1, 2017), <https://www.census.gov/quickfacts/fl> [https://perma.cc/2AZG-P8QF]. Additionally, this likely will prove difficult because there is a lack of diversity in national and state-level politics that could evoke such a change. Across the country, African Americans make up less than ten percent of all state lawmakers. Mike Spies, *Black Politicians are Fighting a ‘Stand Your Ground’ Resurgence*, TRACE (Apr. 24, 2017), <https://www.thetrace.org/2017/04/stand-your-ground-black-politicians/> [https://perma.cc/NV27-NFXU]. Moreover, “[m]arginalized by political realities they cannot control, there is little they can do to stop the resurgence of ‘stand your ground.’” *Id.* In Iowa, for example, there are just five black state lawmakers out of 150; in Florida, there are twenty-seven out of 160; and last year, in Missouri, the figure was twenty-one out of 197. *Id.*

176. Tonyaa Weathersbee, *How ‘Stand Your Ground’ Is Killing Black People*, ROANOKE TIMES (Mar. 17, 2014), [https://www.roanoke.com/opinion/commentary/weathersbee-how-stand-your-ground-is-killing-black-people/article\\_d738013c-abcc-11e3-8640-0017a43b2370.html](https://www.roanoke.com/opinion/commentary/weathersbee-how-stand-your-ground-is-killing-black-people/article_d738013c-abcc-11e3-8640-0017a43b2370.html) [https://perma.cc/X8UT-HHGH]; see John Lott, *Opinion, Perspective: In Defense of Stand Your Ground Laws*, CHI. TRIB. (Oct. 28, 2013), <https://www.chicagotribune.com/opinion/ct-xpm-2013-10-28-ct-oped-1029-guns-20131029-story.html> (explaining that the black community might have once backed SYG, when in 2004, “then-state Sen. Obama co-sponsored and voted for a bill expanding the protection of Illinois’ 1961 stand your ground law.”).

black defendants, as it acts as an “extra hurdle” in the way of arrest.<sup>177</sup> In fact, after Martin’s death in 2012 and the media focus that followed, the Tampa Bay Times analyzed nearly 200 SYG cases and found that there to be no evident bias in how black defendants have been treated.<sup>178</sup>

Many individuals, particularly those on the Right, claim that SYG laws not only benefit black gun owners, but that they noticeably favor black gun owners more than white gun owners.<sup>179</sup> In one study, black Floridians were shown to make up about a third of the state’s total SYG claims in homicide cases, which is a rate that nearly doubles the black percentage of Florida’s population.<sup>180</sup> The same study showed that black shooters have successfully used Florida’s SYG defense fifty-five percent of the time, which is at a higher rate than white defendants.<sup>181</sup> Moreover, because poor blacks who live in high-crime areas are most likely to be the victims of crime, they also benefit the most from the protection SYG affords, as these laws make it easier for these individuals to protect themselves when law enforcement is not there to do so.<sup>182</sup> Additionally, while those opposed to SYG law cite the statistics that show a disproportionate rate in the penalties faced for killing a white individual over a black individual, many fail to acknowledge that many SYG defendants are, in fact, black.<sup>183</sup>

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177. *Stand-Your-Ground Gun Laws ‘Benefit Whites More Than Blacks’, Experts Say*, GUARDIAN (Oct. 17, 2014), <https://www.theguardian.com/us-news/2014/oct/17/stand-your-ground-white-black-gun-law-harm-fear> [<https://perma.cc/W7K5-2CLY>].

178. *Editorial: Jumping the Gun on Stand Your Ground*, GAINESVILLE SUN (July 31, 2018), <https://www.gainesville.com/opinion/20180731/editorial-jumping-gun-on-stand-your-ground> [<https://perma.cc/2S23-Y32R>]. It is important to note that the *Tampa Bay Times* is a Florida publication with perhaps a pecuniary or social motivation to maintain the status quo in the state.

179. See generally John R. Lott, *What Liberal Media Won’t Tell You—Blacks Benefit Most From Stand Your Ground Laws*, FOX NEWS (July 31, 2013), <https://www.foxnews.com/opinion/what-liberal-media-wont-tell-you-blacks-benefit-most-from-stand-your-ground-laws> [<https://perma.cc/USE3-KX9V>]; AWR Hawkins, “*Stand Your Ground*” Benefits the Vulnerable in Society, NRA (Apr. 18, 2017), <https://www.americas1stfreedom.org/articles/2017/4/18/stand-your-ground-benefits-the-vulnerable-in-society/> [<https://perma.cc/5LGQ-ZVZF>].

180. Patrick Howley, *Blacks Benefit from Florida ‘Stand Your Ground’ Law at Disproportionate Rate*, DAILY CALLER 2 (July 17, 2013), <https://www.professorwatchlist.org/wp-content/uploads/2018/07/Gloria-J.-Browne-Marshall.pdf> [<https://perma.cc/M42Q-UGRQ>].

181. *Id.* at 4.

182. Lott, *supra* note 176.

183. Prepared by Paul C. Kunst & Ken W. Davis, *Senate Bill 280: Crimes and Offenses: Justification and Excuse; Repeal Statute Relating to No Duty to Retreat Prior to Use of Force*, 7 J. MARSHALL L.J. 659, 664 (2014); see Lott, *supra* note 176.

Therefore, presumption of reasonable fear and criminal immunity may be beneficial — if these safeguards are removed, then black gun owners may be even more deterred to use self-help in SYG jurisdictions.<sup>184</sup> Moreover, some black gun owners may feel that these safeguards are necessary. The DOJ's Bureau of Statistics found that, for violent crimes, law enforcement only respond “within five minutes about twenty-eight percent of the time; within six to ten minutes around thirty percent of the time; and within eleven minutes to one hour only one-third of the time.”<sup>185</sup> Taking away criminal immunity may also hurt black and white shooters equally, as there are extra safeguards in SYG statutes for a reason. In fact, one study estimated that gun owners use a gun in a “defensive action” as many as 2.5 million times a year, where altercations involving armed homeowners confronting burglars specifically were up to half a million times a year.<sup>186</sup> For example, Rick Ector, a black firearm instructor and Second Amendment rights advocate, recalls buying a gun after he found two teenage boys waiting in the backyard of his Detroit home, pointing a handgun at him and asking for money.<sup>187</sup> Criminal immunity and a presumption of reasonable fear may have been necessary for Ector, as his actions would have been deemed reasonable, especially when defending himself within his “castle.” For Ector and every other black gun owner in SYG jurisdictions, black individuals want and deserve to be afforded the same rights and protections as everyone else.

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184. See Jason Wilson, *'It's a Matter of Survival': The Black Americans Fighting for Gun Rights*, GUARDIAN (July 27, 2016), <https://www.theguardian.com/us-news/2016/jul/27/african-american-black-gun-rights-second-amendment> [<https://perma.cc/DB3Z-TPLX>] (“We don’t have a lot of faith in the police department. We don’t have a lot of faith in our government right now. We believe our government and our police department has failed us. This is what leads us to take up arms in our own communities.”); Mark Engler & Paul Engler, *When Martin Luther King Gave Up His Guns*, GUARDIAN (Jan. 20, 2014), <https://www.theguardian.com/commentisfree/2014/jan/20/martin-luther-king-guns-pacifism> [<https://perma.cc/ZM59-NWW3>] (stating that it is a little-known fact that Martin Luther King Jr. applied for a gun permit and was denied in Alabama after his house was firebombed in 1956).

185. *The Inalienable Right to Stand Your Ground*, *supra* note 44.

186. Zbrzezni, *supra* note 53, at 271.

187. Emell Derra Adolphus, *Exploring the Rise of African-American Gun Ownership*, BLAC DETROIT (June 1, 2018), <https://www.blacdetroit.com/news-features/exploring-the-rise-of-african-american-gun-ownership> [<https://perma.cc/5XE8-VPD6>].

2. *Stand Your Ground Ideologies Can Still Creep into Jury Instructions, Despite a Lack of an Immunity Provision*

George Zimmerman was ultimately charged with second-degree murder after an overwhelming public outcry and investigation revealed questionable “reasonable” self-defense.<sup>188</sup> Zimmerman and his attorney, however, did not plead an affirmative SYG defense at the outset of the case, and thus waived the right of a pretrial immunity hearing.<sup>189</sup> Zimmerman’s defense attorney, Mark O’Mara, stated that the defense preferred to “have the jury address the issue of criminal liability or lack thereof.”<sup>190</sup> SYG nonetheless played a large role in Zimmerman’s acquittal.<sup>191</sup> In fact, when asked about the jury’s ultimate decision to acquit, one juror stated that the jury came

188. See *Sullivan Testimony*, *supra* note 45, at 6 (noting that, according to some, the “very existence” of SYG law “emboldened Mr. Zimmerman to disregard the command of the 911 dispatcher and follow Trayvon Martin, arrogating law enforcement — what should be a public function—to himself.”); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C.L. REV. 1555, 1566–67 (2013) (stating that there was “probable cause to believe that Zimmerman’s use of deadly force was unlawful,” as “Martin was at least twenty pounds lighter than Zimmerman,” and Zimmerman had “used a gun against Martin, who was unarmed.”); see generally *45 Days After Killing Trayvon Martin & Sparking National Outcry, George Zimmerman Finally Charged*, DEMOCRACY NOW (Apr. 12, 2012),

[https://www.democracynow.org/2012/4/12/45\\_days\\_after\\_killing\\_trayvon\\_martin](https://www.democracynow.org/2012/4/12/45_days_after_killing_trayvon_martin) [<https://perma.cc/CX7A-AGYH>].

189. CNN Staff, *Zimmerman to Argue Self-Defense, Will Not Seek ‘Stand Your Ground’ Hearing*, CNN (May 1, 2013), <https://www.cnn.com/2013/04/30/justice/florida-zimmerman-defense/index.html> [<https://perma.cc/Q2FS-8DJT>].

190. *Id.*; see Travis & James, *supra* note 90, at 101 (“[T]he defense attorney may strategically choose to wait to raise the “Stand Your Ground” statute as an affirmative defense, rather than initially raising it through an immunity hearing. Saving the defense to use as an affirmative defense will place the decision on the members of the jury, rather than the judge. The defense attorney may decide that a jury would be a more viable option to rule on the defense and may give the defense attorney more of an opportunity to present facts and evidence that can support the defense.”).

191. See generally Jordan Lauf, *George Zimmerman’s Defense Team Didn’t Use ‘Stand Your Ground,’ But It Impacted the Trial Anyway*, BUSTLE (July 24, 2017), <https://www.bustle.com/p/george-zimmermans-defense-team-didnt-use-stand-your-ground-but-it-impacted-the-trial-anyway-72271> [<https://perma.cc/2G8B-RFW9>] (“Despite [the] fact that Zimmerman’s defense team chose not to invoke ‘stand your ground’, the controversial law still had profound impact on the results of the trial. Jury instructions included a charge to consider ‘stand your ground,’ according to *The Washington Post*. And some jurors have since admitted that they considered the law when arriving at their not-guilty verdict. Maddy Rivera, the only non-white juror on the Zimmerman case, echoed this sentiment when speaking to Bustle at an event for *The Jury Speaks*.”).

to a verdict of not-guilty based on the evidence and a discussion about Florida's SYG law.<sup>192</sup> Additionally, other jurors seemed to have trouble differentiating SYG law from a traditional self-defense claim, which could have also led to the decision to acquit.<sup>193</sup>

This case illuminates the reality that SYG is implicated in every phase of a criminal trial and therefore can have a substantial impact on an outcome regardless of an initial immunity determination at the arrest phase. In Florida, for example,

[b]eyond the pre-trial setting, SYG can still play a role in whether the defendant is acquitted at trial. This is because the language of the SYG law modified the entire statute on self-defense, and thus the language in section 776.013(3) of the Florida Statute is still included in the jury instructions.<sup>194</sup>

Due to the fact that the statute alters jury instructions to include SYG language, the judge in the Trayvon Martin case withheld instructions that the jurors could have used to determine that Zimmerman was an "initial aggressor" — an error that many believed was the moment the State lost its case.<sup>195</sup>

## CONCLUSION

SYG statutes are problematic — especially those statutes in the six states that place the determination of immunity from criminal arrest and prosecution in the hands of law enforcement. As such, law enforcement is responsible for determining who is reasonable, and therefore legally "justified" in their defense — a determination that is made without a traditional investigation or insight from district attorneys' offices. As a result of the discretion exercised by police at this initial phase, SYG laws seem to unfairly prejudice black gun owners on the basis of biases and social stigmas that view black shooters as inherently unreasonable. Therefore, jurisdictions that

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192. Marc Caputo, *Juror: We Talked Stand Your Ground Before Not-Guilty Zimmerman Verdict*, MIAMI HERALD (July 16, 2013), <https://www.miamiherald.com/news/state/florida/trayvon-martin/article1953286.html> [<https://perma.cc/9GZ7-9P7H>].

193. Anderson Cooper 360 Degrees, *Exclusive Interview with Juror B-37; Defense Team Reacts to Juror Interview*, CNN (July 15, 2013), <http://transcripts.cnn.com/TRANSCRIPTS/130715/acd.01.html> [<https://perma.cc/86VH-LTK3>] (stating that juror B-37 voted to acquit "because of the heat of the moment and the stand your ground. He had a right to defend himself. If he felt threatened that his life was going to be taken away from him or he was going to have bodily harm, he had a right.").

194. Abuznaid et al., *supra* note 24, at 1134.

195. Caputo, *supra* note 192.

provide immunity from arrest should consider rewriting their SYG statutes to repeal these initial determinations, and instead limit immunity determinations to pretrial immunity hearings. While there is no genuine remedy to past discrimination, new legislation addressing these inconsistencies could improve racial inequality under SYG in the future.