

Failed Promises: Stand Your Ground's Removal of Imminence Leads to Inconsistent Application and Decreased Safety

Nichole Hamsher

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**FAILED PROMISES: STAND YOUR GROUND’S REMOVAL
OF IMMINENCE LEADS TO INCONSISTENT APPLICATION
AND DECREASED SAFETY**

*Nichole Hamsher**

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I. INTRODUCTION

Self-defense is a right recognized as ancient and innate, being as simple as commanding an aggressor to stop before they assault a person or as complex as firing a gun at an attacker.¹ Mostly associated with the defense of one’s home or person, self-defense is limited to meeting force

*J.D. 2021, University of Akron School of Law. Thank you to Randolph Baxter Professor of Law Martin H. Belsky for the mentorship, guidance, and expertise offered during the writing of this article. 1. Joseph H. Beale Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903).

with proportionate force.² Traditionally, self-defense imposes a duty to retreat when one uses deadly force against an aggressor.³ Over the centuries, the bounds of self-defense have expanded to eliminate the duty to retreat when defending a home or property, and more recently, even a vehicle.⁴ The most recent expansion, usually referred to as Stand Your Ground laws, permits deadly force in self-defense to be used in any place a person has a right to be.⁵

The expanded breadth of self-defense makes it particularly difficult to constrain to a small set of scenarios. Laws need to be flexible enough to allow for the natural defensive reflexes of people but also require responsibility and restraint when injuries or death may occur.⁶ Allowing the use of deadly force in any place a person has the legal right to be removes the constraints that conscientious people should use when reacting to threats and allows not just reaction, or even overreaction, but outright criminal homicide.⁷

Tracing the development of self-defense laws from their ancient roots through the present shows how the modern expansion of Stand Your Ground laws distorts the true purpose of the legal exception of inflicting bodily injury or death upon an aggressor in self-defense. Stand Your Ground laws unnecessarily augment self-defense by eliminating the element of imminence in using force against an aggressor. The laws promote violence and allow people to act on their biases and misjudgments. Other factors such as race, the presence or availability of a firearm, and cultural expectations contribute to heightened tension in such situations and escalate the potential for using deadly force where none is necessary. This article discusses the development of self-defense, the modern expansion into Stand Your Ground by removing imminence, and

2. V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1239 (2001).

3. *Allen v. United States*, 164 U.S. 492, 497 (1896) (stating that a person must “use all the means in his power . . . such as retreating as far as he can” to “save his own life or prevent the intended harm”).

4. See OHIO REV. CODE ANN. § 2901.05(B) (West 2021) (providing a presumption of self-defense when forced is used by a person against an assailant in the person’s vehicle); WIS. STAT. § 939.48 (2021) (allowing force to be used in a person’s motor vehicle); *Semayne’s Case* (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91 a, 91 a–b (establishing in English law, and later infusing into American law, the idea that a home is one’s castle and one’s safest refuge).

5. See, e.g., FLA. STAT. § 776.012 (2020).

6. See F. Patrick Hubbard, *The Value of Life: Constitutional Limits on Citizen’s Use of Deadly Force*, 21 GEO. MASON L. REV. 623, 623 (2014) (discussing society’s imperative to value preserving life).

7. Denise M. Drake, Comment, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 ST. MARY’S L.J. 573, 612 (2008) (arguing the dangers of reactionary self-defense, stating that “people should be more conscientious of whether their lives are in real, imminent danger”).

therefore accountability, and the inherent dangers that still exist in self-defense cases that Stand Your Ground has at best, exacerbated, or at worst, created anew.

II. FROM SELF-DEFENSE TO STAND YOUR GROUND

A. *Origins of Self-Defense in the United States*

Self-defense seems to be a “natural law”: one that has existed for all of human history.⁸ Mosaic Law of the Bible permitted defending one’s home if a thief broke in during the night—the person striking him bore no “bloodguilt” if the thief died from the blow.⁹ During the late Roman Republic, Cicero asserted that self-defense is “a law which we were not taught, but to which we were made,” and that “every means of securing our safety is honorable.”¹⁰ The English incorporated self-defense into the common law.¹¹ William Blackstone ennobled “a man’s limbs,” or at least “those members which may be useful to him fight,” as “the gift of the wise creator.”¹² An injury to these exalted limbs constituted a “manifest breach of civil liberty.”¹³ Protection of life and limb therefore became the ultimate protection of liberty itself.¹⁴

In the United States, self-defense first came through common law, then state statutes. The U.S. Constitution does not recognize or grant such a right, neither in its body nor in the Amendments. Such right has been read in implicitly.¹⁵ For instance, in *District of Columbia v. Heller*, Justice Scalia wrote, “the inherent right of self-defense has been central to the Second Amendment right.”¹⁶ Scalia’s extensive recount of the historical basis for bearing arms demonstrates that without the natural law of self-defense on which to rest, the Second Amendment would be near toothless in today’s world of organized military and police forces.¹⁷

8. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 126 (Wilfrid Prest, ed., Oxford Univ. Press 2016) (1765).

9. *Exodus* 22:2 (English Standard Version).

10. MARCUS TULLIUS CICERO, SELECT ORATIONS OF CICERO 178 (C.D. Yonge, trans., New York, Harper & Bros., 1883).

11. For a thorough history on the development of self-defense, see CAROLINE E. LIGHT, STAND YOUR GROUND (2017).

12. BLACKSTONE, *supra* note 8, at 126.

13. *Id.*

14. *Id.* Blackstone brings into his analysis of self-defense the element of imminence by requiring duress, describing it as “the constraint a man is under in these circumstances,” and stating that “a fear of battery, or being beaten, though never so well grounded is no duress.” *Id.* at 126–27.

15. See Hubbard, *supra* note 6, at 628–33 (discussing the constitutionality of the right to life).

16. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

17. *Id.* at 628, 636.

The breadth of self-defense has not been entirely static. Common law self-defense requires a person to retreat if possible before fending off an attacker with deadly force.¹⁸ When no safe retreat exists (retreat is not required when an *unsafe* retreat exists) and the person has “retreated to the wall,” force, including deadly force, may then be used to prevent imminent death or great bodily harm.¹⁹

The Castle Doctrine augmented common law self-defense, removing any duty to retreat when someone is attacked in their home.²⁰ The doctrine did not just allow a person to respond with force if being attacked in their home, but it also allowed a person to use force, including deadly force, to protect the property itself.²¹ That idea seeped into American law through cases like *Erwin v. Ohio*,²² which chided the old English “cowardice” of retreat and coalesced into the more formal version of the Castle Doctrine as recognized in *Beard*.²³ In *Beard*, the Supreme Court reversed a manslaughter conviction because the jury was improperly instructed that a defendant had a duty to retreat from the advancement of an aggressor on

18. See *Beard v. United States*, 158 U.S. 550, 560 (1895). In *Beard*, the court explained common law self-defense:

If the defendant was in the lawful pursuit of his business at the time the fatal shot was fired, and was attacked by the deceased under circumstances denoting an intention to take life or to do great bodily harm, he could lawfully kill his assailant provided he used all means ‘in his power’ otherwise to save his own life or prevent the intended harm, ‘such as retreating as far as he can, or disabling his adversary, without killing him, if it be in his power;’ that if the attack was so sudden, fierce, and violent that a retreat would not diminish but increase the defendant’s danger, he might kill his adversary without retreating; and further, that if from the character of the attack there was reasonable ground for defendant to believe, and he did honestly believe, that his life was about to be taken, or he was to suffer great bodily harm, and that he believed honestly that he would be in equal danger by retreating, then, if he took the life of the assailant, he was excused.

Id. at 560–61.

19. *Erwin v. State*, 29 Ohio St. 186 (1876) (“if A be assaulted by B, and they fight together, and before any mortal blow be given, A giveth back until he cometh to a hedge, wall, or other strait, beyond which he can not passe, and then, in his own defense and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony . . .” (quoting 3 SIR EDWARD COKE, *THE INSTITUTES OF THE LAWS OF ENGLAND* 55 (London, M. Flesher 1644)).

20. “Castle Doctrine” is so named after an infamous quote by Sir Edward Coke stating that, “The house of every one is his castle.” *Semayne’s Case* (1604) 77 Eng. Rep. 194, 194; 5 Co. Rep. 91 a, 91 a. Because the home is the castle, the duty to “retreat to the wall” has been satisfied as a man can retreat no farther than that. Robert Hall Smith, “*The Retreat to the Wall Doctrine of Self-Defense*,” 39 KY. L. J. 353, 354 (1951).

21. *Id.* at 195, 5 Co. Rep. at 91 b. The case’s example for the breadth of the rule described a scenario in which “one may assemble his friends and neighbours [] to defend his house against violence,” but limited the rule, stating one cannot do so “to go with him to the market, [] or elsewhere for his safeguard.” *Id.*

22. *Erwin*, 29 Ohio St. at 186.

23. *Beard*, 158 U.S. at 559.

his property.²⁴ The Court stated that not only does a defendant have no duty to retreat, he has no duty even “to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon.”²⁵

In *People v. Tomlins*, New York Court of Appeals Judge Benjamin Cardozo eloquently encapsulated the Castle Doctrine, revealing the universality and timelessness of the law while highlighting the ridiculousness of supposing a from-home retreat:

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.²⁶

The *Tomlins* court cited *Beard* as the standard for the settled law of self-defense and Castle Doctrine in the U.S.²⁷

Castle Doctrine’s protections started bleeding into other places outside the home, including the larger confines of a home’s property and into the workplace.²⁸ The boundary of requiring a duty to retreat stayed in circumstances where the alleged assailant also has a legal right to be.²⁹ Castle Doctrine gets messy quickly when situations of conflicting rights to be in a location overlap. This is especially evident in domestic violence situations.³⁰

24. *Id.*

25. *Id.* at 564.

26. *People v. Tomlins*, 213 N.Y. 240, 243 (1914).

27. *Id.*

28. *See, e.g., Askew v. State*, 10 So. 657, 658 (Ala. 1892) (stating that “if the defendant was in his own place of business, he was under no obligation or duty to retreat therefrom to avoid a difficulty”); *State v. Dickey*, 716 S.E.2d 97 (S.C. 2011) (recognizing that self-defense applies to a person’s place of business and the curtilage of a home, which includes outbuildings, the yard, a garden, or the parking lots of a business); *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 722 (W. Va. 2001) (recognizing that “the right to self-defense extends to one’s place of employment: in defending himself, his family or his property from the assault of an intruder, one is not limited to his immediate home or castle; his right to stand his ground in defense thereof without retreating extends to his place of business also and where it is necessary he may take the life of his assailant or intruder”).

29. *See Frazier v. State*, 681 So. 2d 824 (Fla. Dist. Ct. App. 1996) (agreeing that Florida’s Castle Doctrine protects persons at work, but could not apply it because the co-worker that was threatening defendant whom defendant stabbed also had a legal right to be at the workplace); *Hall v. Commonwealth*, 22 S.W. 326 (1893) (rejecting defendant’s claim that he did not need to retreat when he shot his brother in the defendant’s grocery store because the brother was a business invitee and had the legal right to be in the store).

30. This issue is too great to include here, other than to bring awareness to this nuance of self-defense law. For a discussion on domestic abuse victims and the imminence element, *see infra* Section IV.C. For a thorough discussion of domestic violence and self-defense, *see Mary Ann Franks, Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women’s Syndrome, and Violence as Male Privilege*, 68 U. MIA. L. REV. 1099 (2014).

B. *Stand Your Ground's Expansion of Self-Defense*

Self-defense generally stayed within the confines of its traditional and Castle Doctrine definitions until 1994, when Utah passed the very first law removing the duty to retreat in *any place* a person has a legal right to be.³¹ Now, the defense of home was not the only sacred space in which one could stand their ground, but *anywhere*—the street, the park, the grocery store—became a sacred space where a person did not have to retreat, even if completely possible. Utah's law remained relatively unnoticed and did not provide for broader protections against criminal prosecution or civil liability.³² It was simply an affirmative defense, like any other self-defense law.³³

In 2005, Florida passed its “Stand Your Ground”³⁴ law, expanding self-defense and the Castle Doctrine in a radically new way: it eliminated the duty to retreat and presumes a person using force had a reasonable fear of imminent death or great bodily harm when in a dwelling, residence, or vehicle and the would-be assailant unlawfully and forcibly enters.³⁵ Additionally, instead of asserting an affirmative defense at trial, Florida law provides immunity from criminal prosecution proceedings, including arrest, custody, and charging.³⁶ In any place a person has a legal right to

31. 1994 Utah Laws 26.

32. Robert Gehrke, *Utah's Stand Your Ground Law Dates to 1994*, SALT LAKE TRIB. (Mar. 27, 2012 1:43 PM), <https://archive.sltrib.com/article.php?id=53796323&ittype=CMSID#:~:text=Utah%20passed%20its%20initial%20stand,themselves%20without%20fearing%20criminal%20charges> [https://perma.cc/QH22-6HFX]. The intention of passing this law was to give domestic violence victims a legal defense when defending themselves against their abusers. *Id.* An attorney interviewed could not recall an instance where the law was used as a defense. *Id.*

33. States that do not provide immunity from prosecution from criminal and/or civil liability for self-defense actions require the Stand Your Ground statute to be asserted as a defense in any action. See *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (discussing the constitutionality of the burden of affirmative defenses on the defendant); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457 (1989) (discussing affirmative defenses, including self-defense).

34. Stand Your Ground laws eliminate the duty to retreat in any place a person has a legal right to be, differentiating from traditional self-defense where the duty to retreat is imposed in any place outside the person's home, domicile, or residence. Some statutes affirmatively state the person “has a right to stand his or her ground,” while others do not contain the explicit phrase. Compare FLA. STAT. § 776.012 (2020) (“A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground”), with N.C. GEN. STAT. § 14-51.3 (containing no such phrase, but does have similar meaning and application). “Self-defense” laws, as used in this article, refer to traditional duty-to-retreat laws and “Castle Doctrine” laws that eliminate the duty to retreat in the home or residence, while reference to “Stand Your Ground” laws refers to those laws that eliminate such duty in places other than the home.

35. FLA. STAT. § 776.013 (2020). A person can be “in a dwelling or residence in which the person has a right to be”; the statute does not state it must be the *person's* dwelling or residence.

36. FLA. STAT. § 776.032(1) (2020).

be, no duty to retreat exists, and force can be met with force.³⁷ Within a few short years, twenty-seven more states passed similar laws, and eight other states have case law or jury instructions that grant similar “no retreat” rights.³⁸ On January 4, 2021, Ohio passed Stand Your Ground legislation, becoming the twenty-eighth state with the expansive law.³⁹ Florida’s passage ushered in a new era of self-defense that continues to spread both in the number of jurisdictions that now adopt it and the ways in which it is used.⁴⁰

Florida’s law, the first of its kind, was a joint effort of the National Rifle Association (NRA), the ubiquitous pro-gun lobby organization, and the American Legislation Exchange Council (ALEC), a group made up of conservative state legislators and corporate sponsors.⁴¹ However, several police chiefs and sheriffs did not support the law, decrying the law as “encouraging people to possibly use deadly physical force where it shouldn’t be used” by letting people “assume they have ‘total immunity.’”⁴² In 2005, Wayne LaPierre, the NRA’s executive vice-president and CEO, rightly “predicted [Stand Your Ground laws] would win broad national support.”⁴³

Florida’s law also immunizes a successful Stand Your Ground claimant from civil liability.⁴⁴ The criminal immunity criterion requires law enforcement to have probable cause that any force used was unlawful

37. FLA. STAT. § 776.012 (2020).

38. *Stand Your Ground*, GIFFORDS L. CENTER, <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/> [<https://perma.cc/QP42-AFDQ>].

39. Marc Kovac, *Dayton Mayor Unhappy as Gov. Mike Dewine Signs ‘Stand Your Ground’ Legislation into Law*, COLUMBUS DISPATCH (Jan. 5, 2021 11:09 AM), <https://www.dispatch.com/story/news/politics/state/2021/01/04/ohio-gov-mike-dewine-acts-on-stand-your-ground-bill/4008228001/> [<https://perma.cc/GAB4-W5YJ>]. The bill was signed by Governor Mike DeWine on January 4, 2021, and will go into effect in ninety days. *Id.* Arkansas’ attempted Stand Your Ground legislation passed in the state’s Senate but failed to make it out of the House Judiciary Committee, stalling it for now. Austin Bailey, *Unlikely Coalition Defeats Arkansas Stand Your Ground Bill (for Now)*, ARK. TIMES (Feb. 2, 2021 9:42 PM), <https://arktimes.com/arkansas-blog/2021/02/02/unlikely-coalition-defeats-arkansas-stand-your-ground-bill-for-now> [<https://perma.cc/Q5AJ-U495>].

40. See Laura Cassels & Michael Moline, *Is Gov. DeSantis’ “Law-and-Order” Agenda Happening or Not? Floridians Would like to Know What’s Going on*, FLA. PHOENIX (Dec. 4, 2020), <https://www.floridaphoenix.com/2020/12/04/is-gov-desantis-law-and-order-agenda-happening-or-not-floridians-would-like-to-know-whats-going-on/> [<https://perma.cc/P7EZ-XGAD>] (discussing the expansion of Stand Your Ground laws proposed by Florida’s Governor Ron DeSantis that would provide immunity for people that use force to protect property threatened by protesters).

41. Libby Lewis, *NRA Expands Its Role from Fight for Gun Rights to Conservative Causes*, CNN (Apr. 6, 2012 6:05 PM), <https://www.cnn.com/2012/04/06/politics/nra-alec/index.html> [<https://perma.cc/34WM-5938>].

42. Abby Goodnough, *Florida Expands Right to Use Deadly Force in Self-Defense*, N.Y. TIMES, Apr. 27, 2005, at A18.

43. *Id.*

44. FLA. STAT. § 776.032(1) (2020).

before arrest.⁴⁵ Further, if a person is in criminal prosecution proceedings to defend their actions and is found to be immune from such prosecution, the state must pay all expenses related to the action, including attorney's fees, court costs, and lost income.⁴⁶ A handful of states have followed Florida in granting such immunity, but not all are quite so clear or go quite so far.⁴⁷ This article will focus primarily on Florida's Stand Your Ground law as it is the oldest, has the most expansive protections for self-defense, and is frequently at the forefront of discussion on this topic, with some additional emerging cases from other states.

III. THE SUPERFLUITY OF STAND YOUR GROUND

Stand Your Ground laws unnecessarily twist self-defense into an entirely new creature.⁴⁸ Injecting immunity and the presumption of a reasonable, imminent threat into the law removes the line between self-protection and vigilantism, allowing anyone to *assume* that harm is about to befall them and they should take the first shot.⁴⁹ The law promises to deter would-be murderers and thieves by putting them on notice and giving the intended victims the right to defend themselves against such

45. FLA. STAT. § 776.032(2) (2020).

46. FLA. STAT. § 776.032(3) (2020). The statute defines "criminal prosecution" as arresting, detaining in custody, charging, or prosecuting the defendant. *Id.* § 776.032(1).

47. Alabama, Florida, Kansas, Kentucky, Oklahoma, and South Carolina provide complete criminal and civil pretrial immunity from prosecution, including arrest. *See* ALA. CODE § 13A-3-23(d) (2016); FLA. STAT. § 776.032 (2020); KAN. STAT. ANN. § 21-5231 (2011); KY. REV. STAT. ANN. § 503.085 (2006); OKLA. STAT. tit. 21, § 1289.25 (2018); S.C. CODE ANN. § 16-11-450 (2006). Alaska, Arizona, Michigan, Mississippi, Montana, New Hampshire, Pennsylvania, Tennessee, and West Virginia provide for civil liability immunity. *See* ALASKA STAT. § 09.65.330 (2006), ARIZ. REV. STAT. ANN. § 13-413 (1978); MICH. COMP. LAWS § 600.2922b (2006); MISS. CODE ANN. § 97-3-15 (2016); MONT. CODE ANN. § 27-1-722 (2001); N.H. REV. STAT. ANN. § 627:1-a (2011); 42 PA. CONS. STAT. § 8340.2 (2011); TENN. CODE ANN. § 39-11-622; W. VA. CODE § 55-7-22 (2008). Iowa and North Carolina provide for civil and criminal immunity, but not immunity from criminal prosecution. *See* IOWA CODE § 704.13 (2017); N.C. GEN. STAT. § 14-51.3 (2011); *State v. Wilson*, 941 N.W.2d 579 (Iowa 2020). Georgia provides for immunity from criminal liability, not prosecution (including arrest). *See* GA. CODE ANN. § 16-3-24.2 (2006). Wyoming provides for immunity from criminal prosecution, but suspect can be arrested. *See* WYO. STAT. ANN. § 6-2-602 (2018). Idaho and Indiana provide that a person shall not "be placed in legal jeopardy," but do not specify the limitations or specific immunities. *See* IDAHO CODE § 19-202A (2018); IND. CODE § 35-41-3-2 (2019).

48. *See* Mary Anne Franks, *How Stand-Your-Ground Laws Hijacked Self-Defense*, in 3 GUNS & CONTEMP. SOC'Y: THE PAST, PRESENT & FUTURE OF FIREARMS & FIREARM POL'Y 141 (Glenn H. Utter, ed., 2016) (discussing the changes in self-defense law and the impact on different groups); 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 (2013) (discussing how Stand Your Ground laws have changed societal norms about self-defense).

49. Katryna Santa Cruz, Comment, *The Distraction That Is Stand Your Ground*, 14 FIU L. REV. 149, 150 (2020).

marauders.⁵⁰ In reality, increased homicide rates and inconsistent application of the statute allow murderers to get away with, well, murder.⁵¹ At best, the law incentivizes killing unnecessarily, justifying a culture of kill-or-be-killed vigilantism where the last man standing gets the benefit, regardless of actual circumstances.⁵² Stand Your Ground adds nothing to existing self-defense laws.⁵³ Justification for homicide exists in all jurisdictions already, and people have the right to fend off an attack when no retreat exists.⁵⁴ Removing retreat to justify using force begs for aggression to run unchecked.⁵⁵

IV. REMOVING IMMINENCE COLLAPSES THE STRUCTURE

A. Race

Imminence is the foundation of self-defense.⁵⁶ Without it, defensive reactions become crimes.⁵⁷ Removing it allows space for other components to slip in, filling in the factual gaps to make a situation look like self-defense and not something more sinister.⁵⁸ These elements

50. Victoria Bell, Note, *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*, 46 FORDHAM URB. L.J. 902, 914–15 (2019) (discussing the deterrence argument and the lack of statistical evidence for its effect).

51. 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, 134 (2010); see also Annmarie Cavazos, *Unintended Lawlessness of Stand Your Ground: Justitia Fiat Coelum Ruat*, 61 WAYNE L. REV. 221, 250 (2016).

52. *Id.* at 129 (discussing the culture of “shoot first, ask later” that Stand Your Ground laws promote).

53. See Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors’ Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL’Y 271, 306 (2012) (discussing immunity as an unnecessary addition to self-defense); Zachary L. Weaver, Note, *Florida’s “Stand Your Ground” Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 397, 402 (2008) (discussing statements that the laws are unnecessary by opponents of Stand Your Ground laws).

54. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 211 (8th ed. 2018).

55. See Franks, *supra* note 48, at 3 (discussing how Stand Your Ground laws “encourage vigilantism and violent escalation, and exploit delusional hero fantasies”).

56. Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 217 (2004) (stating that “when one seeks to pull at the thread of imminence, the fabric of self-defense itself unravels”).

57. DRESSLER, *supra* note 54, at 222 (discussing that, at common law, self-defense is only available if all the elements are present, and that any missing element renders it “wholly unavailable to a defendant”).

58. Rene Perez, Note, *From Threat to Victim: Why Stand Your Ground Laws Are Inherently Prejudiced and Do Nothing to Further Justice*, 18 HASTINGS RACE & POVERTY L.J. 67, 83 (2021) (discussing the way a subjective belief that may be racist in origin, can imbed itself into the reasonableness standard for assessing imminence).

include racism, the presence of a gun, or even the chemicals flowing in our brains. When not properly accountable to imminence, the justification for force disintegrates.⁵⁹

As a component of Stand Your Ground legislation, race cannot be overstated and must be analyzed as both a separate component and as a facet of the other factors.⁶⁰ Racial stereotypes affect how the human brain subconsciously perceives a threat and determines what reaction to take.⁶¹ Our minds form implicit biases⁶² by processing information “quickly and automatically” using mental shortcuts.⁶³ It is something we do that we simply cannot *not* do.⁶⁴ That process is not infallible.⁶⁵ Racial stereotypes, especially those reinforced by media coverage that overrepresents Black and Latino people as criminals, embed themselves into the collective consciousness, making our subconscious decisions subject to these inaccuracies.⁶⁶ In fact, the Black-as-criminal stereotype is so ubiquitous that “science long ago confirmed the existence of a pervasive, unconscious, and largely automatic bias against dark-skinned individuals as more hostile, criminal, and prone to violence.”⁶⁷ These built-in biases permeate the minds of police, prosecutors, defense attorneys, judges, and

59. DRESSLER, *supra* note 54, at 220 (discussing the definition of “imminent” and distinguishing it even from “inevitability”).

60. Race is enmeshed in nearly every facet of American culture and politics, and Stand Your Ground laws are no exception. This section is not an exhaustive discussion of race nor is it the focus of this article, but the topic does need attention in any discussion of Stand Your Ground. For a more detailed discussion see Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) (discussing race, prejudice, and self-defense), and L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012) (discussing race and prejudice in criminality judgments).

61. Richardson & Goff, *supra* note 60, at 296. “Suspicion heuristic,” a concept developed by the authors, refers to a mental shortcut (heuristic) that “allow[s] us to understand our social worlds quickly and accurately” but may “also lead to systematic errors in judgment.” *Id.* at 297.

62. *Id.* at 296 (explaining implicit biases as non-conscious assumptions that our brains use for making quick judgments and decisions). Implicit biases are mostly associated with social groups. *Id.* at 301.

63. *Id.* at 296, 309.

64. *Id.* at 300.

65. *Id.* at 301. When we meet something that does not fit our expectations based on that process, our brains have another system that takes over and thinks those things through, but more slowly and consciously. *Id.*

66. Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 L. & CONTEMP. PROBS. 93, 97 (2008); see also Richardson & Goff, *supra* note 60, at 332 (discussing the importance of the duty to retreat to balance the racial bias that presumes criminality in Black and Brown people).

67. Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 934 (2019); see also L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013).

juries, as well as the minds of the public consuming the cases through media coverage.⁶⁸

Statistically, homicides in states with Stand Your Ground laws are 65% more likely to be ruled justified than in non-Stand Your Ground states.⁶⁹ When analyzed by race, homicides with a white perpetrator and a Black victim are ruled justified over 16%, while only just over 1% are justified when a Black perpetrator shoots a white victim.⁷⁰ Statistics cannot paint the entire picture because many incidents do not make it past the call to the police.⁷¹ In Florida, law enforcement is charged with determining whether a perpetrator is immune from criminal proceedings, including arrest, at the scene of the incident.⁷²

The mention of race and Stand Your Ground laws almost automatically bring to mind George Zimmerman infamously shooting Trayvon Martin.⁷³ In that case, Zimmerman, a white man who was patrolling his Sanford, Florida, neighborhood as a part of a voluntary local watch group, shot and killed Trayvon Martin, a Black teenager, while Martin was walking back to his father's house from a convenience store.⁷⁴ In cases similar to this one, with one shooter and one victim, both male and strangers, the number of homicides justified by Stand Your Ground is 44.71% when the shooter is white and the victim Black.⁷⁵ In contrast, when the Black male is the shooter and the victim white, the total falls to just 11%.⁷⁶ The *Tampa Bay Times* conducted a broad study on Stand Your

68. See Fields, *supra* note 67 (discussing racial bias at all levels of the criminal justice system).

69. John K. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data*, URB. INST. 1, 9–10 (2013).

70. *Id.* at 7.

71. Weaver, *supra* note 53, at 407 (stating that statistics on self-defense claims in Florida are not kept, either before or after the Stand Your Ground law was enacted).

72. FLA. STAT. § 776.032(2) (2020); *Velasquez v. State*, 9 So. 3d 22, 24 (Fla. Dist. Ct. App. 2009).

73. Joanna Walters, *George Zimmerman Wounded in Florida Shooting Incident*, GUARDIAN (May 12, 2015 3:09 PM), <https://www.theguardian.com/us-news/2015/may/11/george-zimmerman-injured-florida-shooting> [<https://perma.cc/G7AD-FNR9>]; see generally *Timeline of Events in Trayvon Martin Case*, CNN (April 23, 2012, 5:24 PM), <https://www.cnn.com/2012/04/23/justice/florida-zimmerman-timeline/index.html> [<https://perma.cc/F6JN-U8ZJ>].

74. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html> [<https://perma.cc/3YZ8-H33T>]. Zimmerman was eventually acquitted of second-degree murder and manslaughter charges, but police initially did not arrest him because the Stand Your Ground law's requirement for probable cause. Madison Gray, *Report: Police Initially Wanted to Make Arrest in Trayvon Martin Case*, TIME (Mar. 29, 2012), <https://newsfeed.time.com/2012/03/29/report-police-initially-wanted-to-make-arrest-in-trayvon-martin-case/> [<https://perma.cc/KU8K-RSKX>].

75. Roman, *supra* note 69, at 9.

76. *Id.*

Ground cases in Florida and found that Stand Your Ground cases that had a Black victim were more likely to result in dismissal than if the victim was white.⁷⁷ These racial disparities cannot merely be explained away by coincidence.⁷⁸ High rates of justified homicides where the victim was Black demonstrate the devaluation of Black people, a side effect of the criminal stereotype.⁷⁹ The lower rate of justified homicides when a perpetrator is Black points to the entrenched belief that to be Black is to be guilty.⁸⁰

B. Ensuring Self-Defense is Necessary

Each element of self-defense ensures that whatever force is used against a threat is necessary and that no violence is committed without respect for life.⁸¹ Anticipating a future harm or acting after the threat has dissolved eliminates imminence which is the linchpin that keeps the idea of inflicting harm in rational check.⁸²

Self-defense, including both Stand Your Ground and Castle Doctrine, does not permit a fear of future harm.⁸³ Harm must be imminent, and the person must reasonably believe the force is necessary to prevent that imminent harm.⁸⁴ Imminence and necessity are separate requirements: the former asserts that an attack is presently going to happen and the latter declares the force used is indeed the force required.⁸⁵ Imminence tangles with necessity, requiring an analysis using the subjective belief and objective reasonable person standard.⁸⁶ Essentially, the analysis requires that a reasonable person (objective) in the same

77. Susan Taylor Martin, *Florida 'Stand Your Ground' Law Yields Some Shocking Outcomes Depending on How Law Is Applied*, TAMPA BAY TIMES (Feb. 17, 2013), <https://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133/> [<https://perma.cc/PU5X-GFFK>].

78. For a thorough discussion on racial bias and the criminal justice system, see Fields, *supra* note 67.

79. Lawson, *supra* note 53, at 280 n.30.

80. Fields, *supra* note 67, at 934.

81. Megale, *supra* note 51, at 116 (discussing the removal of respect for life by Stand Your Ground laws).

82. Drake, *supra* note 7, at 600 (arguing that a factual analysis of each case should determine imminent danger, rather than presuming it statutorily).

83. *In re Christian S.*, 872 P.2d 574, 583 (1994).

84. *Id.*

85. Fritz Allhoff, *Self-Defense Without Imminence*, 56 AM. CRIM. L. REV. 1527, 1531 (2019).

86. See, e.g., *Bouie v. State*, 292 So. 3d 471, 481 (Fla. Dist. Ct. App. 2020); *People v. Humphrey*, 921 P.2d 1, 6 (1996).

position as the defendant would believe (subjective) that the force used was *necessary* to prevent *imminent* death or great bodily harm.⁸⁷

Not only do imminence and necessity get muddled, but the objective and subjective components make analysis confusing.⁸⁸ In *People v. Goetz*, the 1986 New York case where a white man, Bernard Goetz, was approached on the subway by a group of four young Black men who asked him for five dollars; Goetz pulled out a handgun and fired, injuring all four.⁸⁹

Goetz, after sustaining an injury while being mugged several years prior, carried a firearm with him, anticipating the need for defending himself.⁹⁰ Merely displaying the weapon successfully deterred other attackers since the first incident.⁹¹ That fateful day in the subway, Goetz instead chose not to *display* the gun but to *fire* the gun.⁹²

The charges against Goetz were dismissed because of an instruction to the grand jury to consider whether Goetz's behavior was that of a reasonable man, which, Goetz argued, erroneously "introduced an objective element" to a standard that "should be wholly subjective."⁹³ The confusion nearly brought down the case.⁹⁴ However, the New York Court of Appeals reversed and reinstated the charges based on the extensive case law and legislative history's indication that reasonable was an objective standard.⁹⁵

Unfortunately for Goetz and many others, carrying (and using) a weapon in anticipation of self-defense is not a discrete doctrine identified by courts.⁹⁶ Anticipatory self-defense is mostly expressed in connection with Battered Women's Syndrome in domestic violence cases and international military conflicts.⁹⁷ Its use in self-defense cases is generally unsuccessful.⁹⁸

87. See, e.g., *Bouie*, 292 So. 3d at 481; *Humphrey*, 921 P.2d at 6.

88. Seth D. DuCharme, Note, *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 *FORDHAM L. REV.* 2515, 2521–22 (2002) (discussing the subjective and objective elements of reasonableness).

89. *People v. Goetz*, 497 N.E.2d 41, 43 (1986). While Goetz initially fired four shots, injuring three of them men, he then fired a fifth time, severely injuring the fourth. *Id.*

90. *Id.* at 44.

91. *Id.*

92. *Id.*

93. *People v. Goetz*, 502 N.Y.S.2d 577, 581 (N.Y. Sup. Ct. 1968); *Goetz*, 497 N.E.2d at 46.

94. *Goetz*, 497 N.E.2d at 51.

95. *Id.* at 50–51.

96. Brooks Holland, *Anticipatory Self-Defense Claims as a Lens for Reexamining Zealous Advocacy and Anti-Bias Disciplinary Norms*, 49 *TEX. TECH L. REV.* 89, 96 (2016).

97. Noura S. Erakat, *New Imminence in the Time of Obama: The Impact of Targeted Killings on the Law of Self-Defense*, 56 *ARIZ. L. REV.* 195, 230–31 (2014).

98. Holland, *supra* note 96, at 95.

The concept of anticipatory self-defense, however, threads through the analysis of imminence: at what point does the anticipation of an attack become an imminent attack? As viewed within a traditional self-defense definition, *imminence* depends upon the ability to retreat: if one can retreat, imminence dissipates as one gains distance from the attacker.⁹⁹ But when that duty to retreat no longer exists, imminence becomes more significant and more subjective. When one stands their ground, personal judgment on when to meet force becomes the only factor in determining imminence.¹⁰⁰

The imminence element in self-defense cases usually operates as the objectively reasonable portion of the determination that the defendant had a subjective belief that deadly force was necessary.¹⁰¹ The threat must be both *imminent* and the force countering it must be *necessary*.¹⁰² The would-be victim must possess an objectively reasonable belief in the imminence of such threat,¹⁰³ whether the threat is actually present or only perceived as present.¹⁰⁴ Imminence and necessity often present as two sides of the same coin and may seem difficult to separate.¹⁰⁵ They can be unwound but still do interact.¹⁰⁶ The defensive use of force cannot be anticipatory.¹⁰⁷ Imminence and necessity act as restraints to ensure that self-defense stays within the bounds of justification.¹⁰⁸

Imminence also interacts with the duty to retreat. If a person safely retreats from a threat then it ceases to be imminent, and the person sustains no injury and inflicts no harm. Removing the duty to retreat changes the whole idea of self-defense because “anytime one claims to perceive a

99. See DuCharme, *supra* note 88, at 2546–50 (discussing reaction time and the ability of a victim to retreat from an attacker).

100. “Personal judgment” contains many factors and varies between individuals. For a discussion on the physical and mental processes that contribute to a person’s individual calculations in judging imminence, *see id.*

101. See, e.g., FLA. STAT. § 776.012(2) (2020) (“A person is justified in using or threatening to use force . . . if he or she reasonably believes that using . . . such force is necessary to prevent imminent death or great bodily harm.”).

102. Santa Cruz, *supra* note 49, at 154, 155.

103. Cynthia Ward, *Stand Your Ground and Self Defense*, 42 AM. J. CRIM. L. 89, 94–95 (2015).

104. *Id.* at 95.

105. See Allhoff, *supra* note 85, at 1529–31.

106. *Id.* at 1535; *see also* Ferzan, *supra* note 56, at 262 (discussing the need for both imminence and necessity as separate and distinct elements of self-defense).

107. See Ferzan, *supra* note 56, at 262 (“[T]he right to self-defense is not the right to act as early as is necessary to defend oneself effectively. The right to self-defense is the right to respond to aggression.”); Holland, *supra* note 96, at 94 n.27 (accepting that anticipatory self-defense is not recognized, but is rather an application of existing self-defense laws that also requires “situations of immediate and imminent danger” (quoting *State v. Davis*, No. A-4513-13T4, 2015 WL 8213991, at *2 (N.J. Super Ct. App. Div., Dec. 9, 2015))).

108. Holland, *supra* note 96, at 96.

threat, that individual would be justified in reacting violently; they would have little incentive to diffuse the situation by retreating.”¹⁰⁹ In a situation where no safe retreat exists the person is justified in using the force necessary, even deadly force in certain circumstances, because the threat remains imminent and the only way out is to defend.¹¹⁰ But in eliminating the duty to retreat, imminence becomes a legal apparition, only remaining because the person refused to abandon their position.

The 2006 Florida case, *State v. Smiley*, demonstrates how the duty to retreat interacted with imminence prior to Florida’s enactment of their Stand Your Ground statute.¹¹¹ Robert Smiley, a taxi driver, shot a drunk passenger after Smiley drove him home from a bar.¹¹² After dragging the man out of the cab, using a stun gun on him, and shooting two warning shots at his feet, Smiley then shot the man twice in the chest.¹¹³ Although Smiley testified that the man came at him with a knife, no knife was found at the scene.¹¹⁴ Smiley could have gotten in his cab and driven away.¹¹⁵

The shooting took place nearly a year before the Stand Your Ground law’s enactment, but Smiley’s trial occurred after the law took effect.¹¹⁶ Smiley argued the Stand Your Ground law applied retroactively to his case by moving for the jury instructions to include it, the trial court’s granted the motion, but the court of appeals reversed it.¹¹⁷ The court of appeals acknowledged that under the change, Smiley would have had no duty to retreat, and his legal consequences would “change substantially.”¹¹⁸ If Smiley had a clear, safe retreat by driving away,

109. Megale, *supra* note 51, at 105, 115.

110. Holland, *supra* note 96, at 94.

111. *State v. Smiley*, 927 So. 2d 1000 (Fla. Dist. Ct. App. 2006).

112. *Id.*; Adam Liptak, *15 States Expand Right to Shoot in Self-Defense*, N.Y. TIMES (Aug. 7, 2006), <https://www.nytimes.com/2006/08/07/us/07shoot.html> [<https://perma.cc/SHP5-SPZY>].

113. Nancy L. Othon, *Trial Focuses on Victim’s Mood*, S. FLA. SUN-SENTINEL (Dec. 9, 2006), <https://www.sun-sentinel.com/news/fl-xpm-2006-12-09-0612090055-story.html> [<https://perma.cc/9M6P-VH6E>].

114. Liptak, *supra* note 112.

115. *Id.* Witnesses stated that Smiley told Momingstar to get out and that Smiley could not drive him around all night as he needed money. *Police: Florida Cabbie Kills Unruly Passenger*, HERALD-TRIBUNE (Nov. 8, 2004 5:47 PM), <https://www.heraldtribune.com/article/LK/20041108/News/605234672/SH> [<https://perma.cc/RK6F-GK8J>]. When Momingstar did not immediately get out of the cab, Smiley then yelled, “Do you want me to kill you? Do you want to die?” *Id.* After the shooting, Smiley got back in his cab and drove off, threw his gun into the Intracoastal Waterway, and continued to work. Missy Diaz, *Plea Deal Averts Trial for Taxi Driver*, S. FLA. SUN-SENTINEL (Feb. 23, 2007), <https://www.sun-sentinel.com/news/fl-xpm-2007-02-23-0702230082-story.html> [<https://perma.cc/VWF8-SLMG>].

116. *Smiley*, 927 So. 2d at 1000.

117. *Id.*

118. *Id.* at 1003.

imminence would not have existed and neither would the threat.¹¹⁹ Standing his ground (although not legal at the time) created a thin, vaporous imminence of danger. Depending on the jury, that may have been enough for him to claim self-defense under the Stand Your Ground statute.

The court of appeal's acknowledgement that Smiley would not have had to retreat under the language of the Stand Your Ground law allows that law to operate without imminence by permitting someone to use force, even deadly force, when retreat is possible.¹²⁰ Simply put, if Smiley could have safely retreated, then the threat would not be imminent no force would be needed, and no one would be hurt. Imminence only exists because the refusal to retreat falsely creates it.

Since the Stand Your Ground law's enactment, the court's speculation has proved to be an accurate application of the law. In a 2009 Florida case similar to *Smiley*, Jimmy Hair, a passenger in a parked car, shot and killed Charles Harper, who had unlawfully entered the vehicle but was being pulled out by his friend.¹²¹ Dismissing the charges based on Hair's writ of prohibition invoking Stand Your Ground immunity, the court stated that, even though Harper was retreating, "the statute makes no exception from the immunity when the victim is in retreat at the time the defensive force is employed."¹²² An imminent threat no longer existed, yet Hair successfully used the Stand Your Ground law to kill.¹²³ Imminence, according to the court, is not required, even though it is explicit in the law.¹²⁴

In another case clearly lacking imminence, a judge dismissed charges against Greyston Garcia, who claimed a Stand Your Ground defense when Garcia, armed with a knife, chased a thief, Pedro Roteta, who was attempting to steal the radio from Garcia's truck, for a block before

119. Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 Rutgers J.L. & Pub. Pol'y 504, 521 n.85 (2007); Diaz, *supra* note 1155.

120. *Smiley*, 927 So. 2d at 1001; Christine Catalfamo, *supra* note 119, at 521 n.85, 527 n.107. Catalfamo compares Florida's previous statute enacted prior to the Stand Your Ground legislation and case law and suggests that "as vehicles provide a means of escape, a defendant who used deadly force while in a car might never hold a reasonable fear of death or great bodily harm." *Id.* at 527 n.107. With Florida's current approach to self-defense incorporating the Stand Your Ground language, vehicles are no longer considered a place requiring retreat, and the statute explicitly grants a presumption of imminence, thus effectively removing the requirement for imminence. *Id.* at 524.

121. *Hair v. State*, 17 So. 3d 804 (Fla. Dist. Ct. App. 2009).

122. *Id.*

123. *Id.*

124. FLA. STAT. § 776.013(1) (2020).

catching and stabbing him to death.¹²⁵ There was no imminent threat to Garcia because he was asleep inside his apartment when Roteta stole the radio from Garcia's vehicle.¹²⁶ Garcia had the time to grab a knife before going outside to confront Roteta.¹²⁷ Garcia could have stayed safely inside, called the police, and let them handle it.¹²⁸ However, he chose to dispense vigilante justice, and a man paid for the radio with his life.¹²⁹

Imminence was not considered in the *Hair* and *Garcia* cases, nor is it considered in many other Stand Your Ground cases where a clear, safe retreat exists.¹³⁰ The only difference between those cases and *Smiley* was that the law justified *Hair* and *Garcia*'s behavior and not *Smiley*'s.¹³¹ Because of that justification, two men lost their lives without price and without a real reason.¹³² Both *Hair* and *Garcia* left their eventual victim to get a weapon with the intent to cause them harm and even possibly with the intent to kill them.¹³³ And the law protected them.

Removing the duty to retreat effectively removes imminence, leaving only the subjective belief of the person using force to ground the claim for self-defense.¹³⁴ Imminence acts as a check on that belief, giving an objective, reasonable structure on which to build the self-defense claim. In the *Hair* and *Garcia* cases, requiring imminence would have protected Harper and Roteta, or at least required payment for their lives. Without contemplating imminence in those cases, the law devalued the lives of those who died..

125. Ben Montgomery, 'Stand Your Ground' Law Protects Those Who Go Far Beyond That Point, TAMPA BAY TIMES (June 17, 2012), <https://www.tampabay.com/news/publicsafety/stand-your-ground-law-protects-those-who-go-far-beyond-that-point/1222930/> [<https://perma.cc/29W5-7EPC>].

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 122. Roteta had a sack of stolen radios on him, which he swung at Garcia in order to stave off the attack. *Id.* Garcia kept the radios and later sold them. *Id.*

130. See, e.g., Sunde Farquhar, *Stand Your Ground Shooter Seth Browning Releases Statement*, PATCH (Sept. 25, 2012, 2:39 PM), <https://patch.com/florida/palmharbor/stand-your-ground-shooter-seth-browning-releases-statement> [<https://perma.cc/4QV5-ST9Q>] (describing the case of Seth Browning, a man who shot and killed another man after arguing over an erratic driving incident, even though Browning was in his vehicle and could have easily driven away).

131. See *State v. Smiley*, 927 So. 2d 1000, 1001 (Fla. Dist. Ct. App. 2006); *Hair v. State*, 17 So. 3d 804, 804 (Fla. Dist. Ct. App. 2009); Montgomery, *supra* note 125.

132. See *Hair*, 17 So. 3d at 804; Montgomery, *supra* note 125.

133. See *Hair*, 17 So. 3d at 804; Montgomery, *supra* note 125.

134. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (asserting that reasonableness is a subjective requirement of imminence, necessity, and proportionality). The objective presence of imminence and necessity is not required. *Id.* However, without a duty to retreat, there is no foundation for these elements. *Id.*

C. *Room to Protect Battered Women*

Requiring only imminence, as important as that element is, minimizes *necessity*, the subjective belief that the force used is the force required.¹³⁵ The application of self-defense and Stand Your Ground laws in domestic violence situations demonstrates the fickle nature of imminence and its interaction with necessity.¹³⁶ In confrontations with noncohabitants or strangers, imminence and necessity become the most important elements. As demonstrated above, removing the duty to retreat from those situations reduces and even eliminates imminence and, therefore, necessity. But in situations involving cohabitants or intimate partners the elements of imminence and necessity change, requiring an almost entirely different standard for such circumstances.¹³⁷ When the two actors in a struggle are physically similar in size and strength, evaluating elements is simple and easy.¹³⁸ Evaluating proportionate force is easy, too.¹³⁹ But for a woman, who is less likely to be the physically match of a male abuser, proportionate force becomes less clear, and imminence and necessity often must stretch to compensate for the differences. Reasonableness, too, is not looked at the same.¹⁴⁰ To appease equality and attempt a fair application of the law, many judges, juries, and even the law enforcement at the scene ignore these differences.¹⁴¹ This can be seen in cases involving Battered Women's Syndrome. Battered Women's Syndrome is the psychological condition of learned helplessness wherein female domestic violence victims cannot leave their abusive partners and eventually kill them in self-defense to stop the abuse.¹⁴² These cases require a psychological evaluation to establish the reasonableness of her actions in the circumstances.¹⁴³

Proponents of Stand Your Ground laws argue that they give domestic violence victims broader protection in defending themselves by

135. Daniel Sweeney, Note, *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, 719–20 (2016).

136. See Franks, *supra* note 30, at 1123.

137. Katelyn E. Keegan, Note, *The True Man & the Battered Woman: Prospects for Gender-Neutral Narratives in Self-Defense Doctrines*, 65 HASTINGS L.J. 259, 267 (2013).

138. *Id.* at 269.

139. *Id.*

140. *Id.*

141. *Id.* at 277.

142. *Id.* at 268.

143. *Id.* at 270.

eliminating the duty to retreat.¹⁴⁴ This is spurious at best. The complexities of domestic violence leave out domestic violence victims in many cases.¹⁴⁵ Florida's statute, for example, grants similar Stand Your Ground protection, including the presumption of a reasonable fear of imminent death or bodily harm, to a person defending themselves against a cohabitant.¹⁴⁶ While this seems to give greater protection for domestic violence victims, the presumption only applies if a protective order is in place and an imminent attack is underway.¹⁴⁷

Practically speaking, this grants no more protection than traditional self-defense statutes, which did not do much for domestic violence victims anyway.¹⁴⁸ Donna Coker, a domestic violence law expert, “do[es] not think that Stand Your Ground benefits women facing intimate partner violence in any way that they wouldn’t have had under the prior law.”¹⁴⁹ Simply put, Stand Your Ground laws were not written for domestic violence victims.¹⁵⁰ That reason has been back-filled to get more people on board.¹⁵¹ Justification for homicides committed by women, especially in Stand Your Ground states, is more likely to be found if the person killed was a stranger than if the person killed was an abuser.¹⁵² Interpreting Stand Your Ground laws should produce unbiased, equal results for all homicides, whether they involve a stranger or a known person. Stand Your Ground laws, as written regarding domestic violence victims, combine with the hesitancy of law enforcement to take reports of domestic

144. *Id.* at 273. Castle doctrine usually applies to those fighting off an intruder in their own home, but domestic violence circumstances where a (usually) woman retaliates against her abuser do not always allow for the woman to claim self-defense. *Id.* at 268.

145. *See id.*

146. FLA. STAT. § 776.013 (2020).

147. FLA. STAT. § 776.013(3)(a) (2020).

148. While men experience intimate partner violence at a rate of approximately 1 in 10, women experience it at a much higher rate—1 in 4. *Intimate Partner Violence, Sexual Violence, and Stalking Among Men*, CTR. DISEASE CONTROL, (June 1, 2020) <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/men-ipvsvandstalking.html> [<https://perma.cc/JRA5-GKCR>]. Additionally, males commit 79.8% of intimate partner homicides. Emma E. Fridel & James Alan Fox, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2017*, 6 *VIOLENCE & GENDER* 27, 29 (2019).

149. Irin Carmon, *Can Women Stand Their Ground? Depends on the Target*, MSNBC (Mar. 20, 2014 10:50 AM), <https://www.msnbc.com/msnbc/can-women-stand-their-ground-msna288011> [<https://perma.cc/BK78-GB6T>].

150. Shelley Flannery, *Do Stand Your Ground Laws Apply to DV Survivors?*, DOMESTIC SHELTERS (Sept. 7, 2020), <https://www.domesticshelters.org/articles/legal/do-stand-your-ground-laws-apply-to-dv-survivors> [<https://perma.cc/U7FL-XMLV>].

151. *Id.*

152. *Id.*

violence seriously, and even the victims assume they will not be taken seriously.¹⁵³

If Stand Your Ground laws work for female domestic violence victims as well as they work for men, then women like Deven Grey would not face murder charges.¹⁵⁴ In 2017, Alabama resident Grey shot and killed her boyfriend during a domestic dispute.¹⁵⁵ Although she was bleeding from a head wound, had broken bones in her face, and had other injuries when police arrived on the scene, her Stand Your Ground claim was denied because the judge did not believe her life had been in immediate danger.¹⁵⁶ Her boyfriend had pistol-whipped her and fired multiple shots in the home, but that was not enough to demonstrate an immediate threat.¹⁵⁷

In another Alabama case, Brittany Smith was brutally raped and threatened with death and the death of her family members when a friend she let stay in her house overnight attacked her.¹⁵⁸ When her attacker, Todd Smith (no relation), wanted to get cigarettes, her brother, Chris, drove her and Todd to a local store where Brittany was able to write down Todd's name on a piece of paper and give it to the cashier, who happened to be Todd's ex-wife and knew Brittany.¹⁵⁹ When they got back to Brittany's house, she told Chris to talk to the cashier, and when he did, he returned to the house with a gun.¹⁶⁰ A fight broke out, and Todd, fueled by alcohol, meth, and a few other drugs, overpowered Chris.¹⁶¹ Brittany, fearing for both of their lives, shot and killed Todd.¹⁶² In October 2020, after her Stand Your Ground claim was denied earlier in the year, Brittany pled guilty in a deal that reduced her sentence from twenty years to only eighteen months.¹⁶³

153. Elizabeth Flock, *How Far Can Abused Women Go to Protect Themselves?*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/how-far-can-abused-women-g-o-to-protect-themselves> [<https://perma.cc/7F6A-ZQWY>].

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Alberto Luperon, *After Losing 'Stand Your Ground' Argument, Woman Pleads Guilty to Murdering Man She Said Raped Her*, LAW & CRIME (Oct. 11, 2020 10:08 AM), <https://lawandcrime.com/high-profile/after-losing-stand-your-ground-argument-woman-pleads-guilty-to-murdering-man-she-said-raped-her/> [<https://perma.cc/WG9B-N932>].

Contrast those cases with the 2019 Wyoming case of Jason John. John shot unarmed Wesley Willow Jr. a total of nine times, including multiple rounds in his back and one in the back of his head, with an AR-15 rifle.¹⁶⁴ Willow came to John's home with two other people, and John met them on the porch, holding the rifle.¹⁶⁵ The details become unclear at that point, and despite missing and inconsistent facts, John won his Stand Your Ground pretrial hearing.¹⁶⁶ As this was the first case to invoke the Stand Your Ground law in Wyoming after its passage in 2018, controversy was so heavy that the judge advised both the prosecution and defense that whatever the outcome of her ruling, they should immediately appeal it to the state's Supreme Court.¹⁶⁷ She ruled that the law compelled her to presume John had a reasonable belief that deadly force was necessary, and she had to let him walk free.¹⁶⁸ The Wyoming Supreme Court agreed.¹⁶⁹

V. APPLYING THE LAW: INCONSISTENCIES AND CONFLICTS

Stand Your Ground laws do not supply the clear-cut self-defense regime envisioned.¹⁷⁰ The erratic application of Stand Your Ground laws increases the risk people take in using force to fend off an aggressor, leading to wildly different determinations of what actions qualify for Stand Your Ground immunity.¹⁷¹ For example, in Florida, inconsistencies do not occur just in different parts of the state, but also within the same city.¹⁷² In one case, Demarro Battle shot Omar Bonilla after the two men argued and Bonilla fired a shot into the ground.¹⁷³ Bonilla went inside the house where the two men were at a party.¹⁷⁴ Battle, however, walked to his car to retrieve a gun and returned, shooting Bonilla three times.¹⁷⁵

164. State v. John, 460 P.3d 1122, 1129 (Wyo. 2020); Kerry Drake, Opinion, *Casper Shooting Confirms Worst Aspects of Stand-Your-Ground Law*, WYOFILE (Feb. 12, 2019), <https://www.wyofile.com/casper-shooting-confirms-worst-aspects-of-stand-your-ground-law/> [<https://perma.cc/TZN6-QQVS>].

165. Drake, *supra* note 164.

166. *Id.*

167. *Id.*

168. *Id.*

169. *John*, 460 P.3d at 1138.

170. For a thorough discussion on the inconsistencies of Stand Your Ground see Megale, *supra* note 51.

171. *Id.* at 119.

172. Martin, *supra* note 77.

173. *Id.*

174. *Id.*

175. *Id.*

Battle claimed Stand Your Ground immunity and was never charged.¹⁷⁶ In the same city, Reginald Etienne was sentenced to life in prison when he stabbed and killed Joshua Sands after leaving the scene to retrieve a knife.¹⁷⁷

Inconsistently applying the law furthers its inefficacy.¹⁷⁸ If Stand Your Ground protects would-be victims from threats of attack, then it should be applied consistently to embolden people to use it for such self-defense purposes. After all, Florida State House Representative Dennis K. Baxley, a sponsor of the Stand Your Ground law, stated that the point of the law is to assure citizens that, when “attacked, the presumption will be with them.”¹⁷⁹ However, the law was never against citizens protecting themselves; it only required that taking a life was necessary and the use of force justified.¹⁸⁰ When the law is applied inconsistently, people are faced with two unsafe choices: refrain from self-defensive action and risk harm, or use self-defensive action and risk punishment.¹⁸¹

Because of these inconsistencies, lawyers often shy away from using a Stand Your Ground claim, stating that a sure bet is almost necessary when deciding to do so.¹⁸² The pretrial hearing requires the defendant to testify, essentially tipping the defense’s hand, making it strategically

176. *Id.*

177. *Id.*

178. Megale, *supra* note 51, at 119 (discussing the abuses that occur with the inconsistent application of Stand Your Ground).

179. Ben Montgomery, *Florida’s ‘Stand Your Ground’ Law Was Born of 2004 Case, but Story Has Been Distorted*, TAMPA BAY TIMES (Feb. 17, 2013), <https://www.tampabay.com/news/publicsafety/floridas-stand-your-ground-law-was-born-of-2004-case-but-story-has-been/1225164/> [<https://perma.cc/VV7Y-W74V>]. Baxley cites the 2004 Florida case of James Workman, who fatally shot Rodney Cox when he wandered onto the Workmans’ property and was trying to get into the trailer Workman and his wife were staying in. *Id.* Mr. Workman fatally shot Cox. *Id.* Although Workman was never arrested and the State Attorney’s Office ruled the homicide justified within a few weeks of the shooting, Baxley stated that being in such “legal limbo” is unacceptable and introduced the Stand Your Ground legislation shortly after. *Id.* However, Florida’s law already protected Workman and others under the Castle Law. *Id.* Stand Your Ground would not have changed anything. *Id.*

180. Megale, *supra* note 48, at 272 (discussing the effect of encouraging violent reactions by Stand Your Ground laws).

181. This is traditionally associated with common law self-defense, in which the defendant asserts it as a justification defense against homicide. *Id.* at 286. Part of the promise of Stand Your Ground was to eliminate this risk, but that has not materialized. *Id.* at 260.

182. Larry Hannan, *Stand Your Ground Law Not Working as Intended Despite Changing Self Defense in Florida*, FLA. TIMES-UNION (Nov. 21, 2015, 8:25 PM), <https://www.jacksonville.com/article/20151121/NEWS/801257645> [<https://perma.cc/QE9U-4D7W>]. Arguably, any self-defense claim in Florida is a “Stand Your Ground” claim, as there is only one statute that embodies self-defense. *See* FLA. STAT. § 776.012 (2020). However, what is meant here is more likely the fact that Zimmerman did not pursue immunity, a separate statutory provision that applies to self-defense. *See* FLA. STAT. § 776.032 (2020).

risky.¹⁸³ George Zimmerman, eventually acquitted in the shooting death of Trayvon Martin in Sanford, Florida, in 2012, did not pursue a Stand Your Ground claim, even though this case is most often associated with the law.¹⁸⁴ His attorney, Mark O'Mara, weighed the risk and decided to go with a standard self-defense claim decided in trial by a jury, where Zimmerman would not be forced to testify.¹⁸⁵ If the law were clear and consistently applied, such risks, both by the defendants claiming self-defense and the prosecutors charging the defendants, would dissipate.¹⁸⁶

A. Shoot First: The Overuse of Force in Stand Your Ground States

States with Stand Your Ground laws have demonstrated increased homicide rates, even when homicide rates in the United States had been declining for more than a decade prior to Florida's law.¹⁸⁷ On the extreme end, Florida's monthly homicide rate increased 24.4% from 2005, when the state enacted the Stand Your Ground law, through 2014.¹⁸⁸ Firearm-related homicide increased 31.6% in the same period.¹⁸⁹ In general, states with Stand Your Ground laws noted an 8% increase in overall homicides,¹⁹⁰ while states without Stand Your Ground laws saw little or no increase in rates of homicide or firearm-related homicide.¹⁹¹ The increase in rates can be because Stand Your Ground laws "lower the

183. Hannan, *supra* note 183.

184. *Id.*

185. *Id.*

186. *Id.* Prior to 2017, the burden of proof for Stand Your Ground hearings was on the defendants, making it riskier for them. The Florida legislature passed a law shifting that burden to prosecutors. See FLA. STAT. § 776.032(4) (2020).

187. David K. Humphreys, Antonio Gasparini & Douglas J. Wiebe, *Evaluating the Impact of Florida's "Stand Your Ground" Self-Defense Law on Homicide and Suicide by Firearm*, 177 J.A.M.A. INTERNAL MED. 44, 49 (2017).

188. *Id.*

189. *Id.*

190. Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence?: Evidence from Expansions to Castle Doctrine*, 48 J. HUM. RES. 821, 823 (2013).

191. Humphreys, Gasparini & Wiebe, *supra* note 187, at 49. *But see* Mark Gius, *The Relationship Between Stand-Your-Ground Laws and Crime: A State-Level Analysis*, 53 SOC. SCI. J. 329, 338 (2016) ("Three prior studies found that, in certain cases, Stand Your Ground laws caused crime rates to increase. . . . States with Stand Your Ground laws either have higher crime rates than non-Stand Your Ground states, or they have crime rates that are not statistically different from those of non-Stand Your Ground states. . . . Finally, the data and models used in the present study *differ so significantly from prior research in this area* that these results should be considered to be both novel and robust.") (emphasis added). A 2020 study reviewing and synthesizing data conducted on Stand Your Ground Laws supports these findings. Alexa R. Yakubovich, Michelle Degli Esposti, Brittany C.L. Lange, G.J. Melendez-Torres, Alpa Parmar, Douglas J. Wiebe & David K. Humphreys, *Effects of Laws Expanding Civilian Rights to Use Deadly Force in Self-Defense on Violence and Crime: A Systematic Review*, 111 AM. J. PUB. HEALTH (Apr. 2021).

expected legal costs associated” with self-defense: if one no has to calculate retreat and risk miscalculating it, returning force no longer poses as much of a risk to the victim defending themselves.¹⁹² Legal consequences no longer outweigh prioritizing the life of the person being attacked over the aggressor. But if this is so, the crime challenged by those standing their ground would decrease, as the expected costs of committing a crime that is likely to provoke defensive behavior increases due to the increased risk of force—justifiable, of course—that may be used to stop such crime.¹⁹³ LaPierre, former head of the NRA, stated that “the one thing a violent rapist deserves to face is a good woman with a gun.”¹⁹⁴ Such deterrence does not bear out: Stand Your Ground laws increase homicide while not decreasing those crimes that the law would likely deter—namely, burglary, robbery, and aggravated assault.¹⁹⁵

This deterrence-based theory of Stand Your Ground laws is one of the main reasons they were passed in the first place.¹⁹⁶ Florida State Representative Baxley declared that the law would “curb violent crime and make the citizens of Florida safer.”¹⁹⁷ This notion is not new. The court in *Erwin* asserted the same thing by pronouncing “that the rule announced is, at least, the surest to prevent the occurrence of occasions for taking life,” which “let[s] the would-be robber, murderer, ravisher, and such like, know that their lives are . . . in the hands of their intended victims.”¹⁹⁸

The increased homicide rates and stable rate of other crimes demonstrate the emptiness of this noble promise.¹⁹⁹ Additionally, the possession of firearms, the most popular tool for deadly force in self-defense situations, does little to deter crime generally.²⁰⁰ In fact, the lower cost of using deadly force by an intended crime victim has increased the use of deadly force in situations where none may have been necessary.²⁰¹

192. Cheng & Hoekstra, *supra* note 190, at 848.

193. *Id.*

194. Aaron Blake, *NRA Head: A ‘Violent Rapist Deserves to Face . . . a Good Woman with a Gun,’* WASH. POST (Mar. 15, 2013 11:37 AM), <https://www.washingtonpost.com/news/post-politics/wp/2013/03/15/nra-head-a-violent-rapist-deserves-to-face-a-good-woman-with-a-gun/> [<https://perma.cc/MUK3-CQD6>].

195. Cheng & Hoekstra, *supra* note 190, at 823.

196. See Bell, *supra* note 50, at 913–15 (highlighting the deterrence debate surrounding Stand Your Ground laws).

197. Goodnough, *supra* note 41.

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

199. Humphreys, Gasparini & Wiebe, *supra* note 187, at 49.

200. DAVID HEMENWAY, *PRIVATE GUNS, PUBLIC HEALTH* 65 (new ed. 2017).

201. Chandler McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries*, 52 J. HUM. RESOURCES 651 (2017).

A study of over 200 Florida cases revealed that in 79% of Stand Your Ground cases, safe retreat was possible, and in 68%, the person killed was unarmed.²⁰²

*B. What About My Ground?*²⁰³

Stand Your Ground laws force a conflict between competing individual rights, such as the right to be in a public place.²⁰⁴ Allowing persons to defend themselves in any place they have a legal right to be, as Stand Your Ground laws expressly do, assumes that only one person in the scenario possesses the right to be where they are. While this is more likely true in situations where one is attacked in their own home, it is less likely in other places. Because of the nature of self-defense when deadly force is used, the survivor usually tells the story, making their perspective sympathetic, even when they may have been the aggressor.²⁰⁵ This is another way the law permits inconsistent application.²⁰⁶

Consider the Zimmerman case.²⁰⁷ George Zimmerman had a legal right to be where he was.²⁰⁸ Trayvon Martin also had a legal right to be where he was.²⁰⁹ Zimmerman perceived Martin as a threat, but Martin may have perceived Zimmerman as a threat.²¹⁰ Each possessed the legal right to be where they were, and each potentially possessed a fear of harm of the other.²¹¹ In these situations, the law fails. By allowing *any* place to

202. Robert J. Spitzer, *Stand Your Ground Makes No Sense*, N.Y. TIMES, May 4, 2015, at A23.

203. Ted Soqui, Photograph of Sign Held by Protester, in *A Black Woman Shot and Killed Her Abusive Husband in a "Stand Your Ground State." Now She Faces Murder Charges*, VOX (Aug. 25, 2018, 10:00 AM), <https://www.vox.com/2018/8/25/17778712/stand-your-ground-alabama-black-woman-guns> [<https://perma.cc/KV8B-UF39>].

204. The "right of the people peaceably to assemble" grants the right to be in public places. U.S. CONST. amend. I.

205. Ta-Nehisi Coates, *Trayvon Martin and the Irony of American Justice*, ATLANTIC (July 15, 2013), <https://www.theatlantic.com/national/archive/2013/07/trayvon-martin-and-the-irony-of-american-justice/277782/> [<https://perma.cc/88V3-ZACP>]; see also R. Christopher Campbell, *Unlawful/Criminal Activity: The Ill-Defined and Inadequate Provision for a "Stand-Your-Ground" Defense*, 20 BARRY L. REV. 43, 57 (2014) (discussing the ability of seasoned criminals to effectively manipulate a Stand Your Ground defense).

206. Coates, *supra* note 206. Coates proffers the situation wherein one can manipulate the statute and, as the survivor in the conflict, have no conflicting witnesses to reveal the truth. See Bell, *supra* note 50, at 919 (discussing how police must believe the shooter regardless of the likelihood of truth).

207. *Timeline of Events in Trayvon Martin Case*, *supra* note 73.

208. *Id.*

209. *Id.*

210. Megale, *supra* note 48, at 305.

211. *Id.*

be a lawful territory worthy of defending, overlapping territories promote one person's rights over another's, with potentially deadly results.²¹²

Racism rears its ugly head in all types of self-defense scenarios. The 2020 murder of Ahmaud Arbery demonstrates the worst iteration of Stand Your Ground defenses in cases of deadly force: the vigilante.²¹³ Jogging in a coastal Georgia neighborhood during the afternoon of February 23, 2020, Arbery encountered Gregory "Greg" and Travis McMichael, a father and son, along with William "Roddie" Bryan, who saw Arbery and decided he looked like someone they suspected of committing burglaries in the area.²¹⁴ The McMichaels started chasing Arbery, pulling up alongside him in their truck, yelling that they wanted to talk to him while Bryan filmed it.²¹⁵ Arbery tried to escape, but Travis cut him off, armed with a shotgun.²¹⁶ In Bryan's video, the two struggle, and Travis shoots Arbery three times.²¹⁷ As he lay dying on the street, Bryan says Travis called Arbery a racial slur.²¹⁸

The McMichaels were charged with murder and aggravated assault, and Bryan was charged with felony murder and criminal attempt to commit false imprisonment.²¹⁹ The McMichaels claimed self-defense.²²⁰ One of Greg's lawyers tried to play him off as a neighborly do-gooder, saying that he was just "trying to intercept someone he believed may have been sneaking into a nearby home under construction."²²¹ But, even as

212. See Hubbard, *supra* note 6, at 645–46 (discussing the forfeiture theory when conflicting rights present in self-defense circumstances).

213. Fields, *supra* note 67, at 984–85.

214. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/R7Q2-ZNNB>]. No burglaries were reported, according to Georgia Bureau of Investigation Special Agent in Charge Charlie Richard Dial. Christian Boone, *Race Takes Major Role as Arbery Prosecution Moves Forward*, ATLANTA J.-CONST. (June 5, 2020) <https://www.ajc.com/news/crime/hate-crimes-trial-date-set-in-ahmaud-arbery-case/VYHI7GNXLBFCRQMMKZ6MTE64/> [<https://perma.cc/F9QK-DJME>].

215. *Id.*

216. Bill Rankin & Alexis Stevens, *All 3 Suspects Indicted in Ahmaud Arbery Shooting Death*, ATLANTA J.-CONST. (June 25, 2020), <https://www.ajc.com/news/crime-law/cobb-holmes-speak-ahmaud-arbery-case-this-afternoon/bpZsA2wW9tegn20iFwg1AL/> [<https://perma.cc/S9NC-GR2L>].

217. *Id.*

218. *Id.*

219. Janell Ross, *Arbery Case Exemplifies Abuse of 'Stand Your Ground,' But the Damage Is Broad and Systemic*, NBC NEWS (May 26, 2020, 12:33 PM), <https://www.nbcnews.com/news/nbcblk/arbery-case-exemplifies-abuse-stand-your-ground-damage-broad-systemic-n1212816> [<https://perma.cc/2KWV-7KRF>].

220. Nicholas Bogel-Burroughs, *Judge Denies Bond to Father and Son Charged with Killing Ahmaud Arbery*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/ahmaud-arbery-mcmichael-bond-bail-hearing.html> [<https://perma.cc/4HGV-EMK9>].

221. Rankin & Stevens, *supra* note 217. Video released of the home being built shows many people going in and out, and even the owner acknowledged nothing has been vandalized or stolen.

Stand Your Ground laws try hard to allow vigilantes to exact justice, this case shows that people cannot arm themselves and murder someone based on a hunch.²²² Greg insists they were entitled to make a citizen's arrest and use deadly force to do it.²²³ Investigators in the case think it is more likely Arbery was trying to defend himself.²²⁴ Greg, in a recording of a phone call from jail, seems concerned not with taking a man's life, but that his good deed has invited punishment.²²⁵

Stand Your Ground allows racism's insidious nature to cloak itself in righteousness, giving aggressors a pretense for their malignancy.²²⁶ Traditional self-defense *at least* requires a moment's thought, a double-take to ensure that force *is* necessary and not just the justification needed for overt malice.²²⁷ Cases like Ahmaud Arbery's reveal that Stand Your Ground can indeed provide that malevolent cover.

C. *Firearms and the Brain: Does the finger pull the trigger, or does the trigger pull the finger?*²²⁸

District of Columbia v. Heller braided self-defense and firearms in such a way that those strands likely will remain eternally interwoven.²²⁹ Writing for the majority, Justice Scalia asserts that self-defense is "the central component"²³⁰ of the Second Amendment's right to bear arms.²³¹ He goes back to Blackstone to strengthen this claim, stating that Blackstone "conceived of the . . . arms right as necessary for self-

Jason Morris & Lindsay Benson, *Attorneys for Gregory McMichael Say Ahmaud Arbery Killing 'Not Just Another Act of Violent Racism,'* CNN (May 15, 2020, 10:24 PM), <https://www.cnn.com/2020/05/15/us/ahmaud-arbery-suspects/index.html> [<https://perma.cc/8G4A-ZS5V>]. It appears that Arbery ducked into the home to get a drink of water from a source near the front of the structure. *Id.*

222. Bill Torpy, Opinion, *Justifiable Horror Over Arbery Case as Justifiable Homicide*, ATLANTA J.-CONST. (Nov. 16, 2020), <https://www.ajc.com/opinion/columnists/opinion-justifiable-horror-over-arbery-case-as-justifiable-homicide/43YVD5R6AZEIDMYDQPYDQDTWNM/> [<https://perma.cc/US3X-HJE4>].

223. *Id.*

224. *Id.*

225. *Id.*

226. See Fields, *supra* note 67, at 959–68 (discussing the abuse of 911 systems in reporting racial minorities for actions that are not criminal).

227. See, e.g., Armour, *supra* note 134 (discussing race as a component of reasonableness in assessing danger in self-defense situations).

228. Arlin J. Benjamin Jr., Sven Kepes & Brad J. Bushman, *Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-Analytic Review of the Weapons Effect Literature*, 22 PERSONALITY & SOC. PSYCH. REV. 347, 347 (2018) (quoting Leonard Berkowitz, *Impulse, Aggression, and the Gun*, 2 PSYCH. TODAY, 19–22 (1968)).

229. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (stating that "the inherent right of self-defense has been central to the Second Amendment right").

230. *Id.* at 662.

231. *Id.* at 666.

defense.”²³² Handguns, Scalia proclaims, are the “quintessential self-defense weapon,” which cements firearms as the preferred weapon of both self-defense and the Second Amendment.²³³

Although nearly two-thirds of households with guns say they feel safer with it in the house and most people that bought a gun did so for protection,²³⁴ using a gun in self-defense occurs in less than 1% of crimes, and most self-defense gun-use by men occurs away from home.²³⁵ Using a gun in self-defense also makes little difference in whether victims sustained injury.²³⁶ In fact, most injuries to victims occur before taking any action against an aggressor, with or without a gun.²³⁷ Given that many people who own a gun are not properly trained to use it, it is a long shot that anyone can successfully thwart a threat with a gun.²³⁸ Guns, however, still remain associated with safety, especially at home.²³⁹ The relative ease of acquiring a gun makes it easy to have one “just in case.”²⁴⁰

The presence of a weapon induces a person to perceive others as hostile and presume they will also act aggressively.²⁴¹ In a heated confrontation, when one person is primed to think and act more aggressively because they know a weapon is present and perceive the

232. *Id.*

233. *Id.* at 629; See also Wolfgang Stroebe, N. Pontus Leander & Arie W. Kruglanski, *Is It a Dangerous World Out There?: The Motivational Bases of American Gun Ownership*, 43 PERSONALITY & SOC. PSYCH. BULL. 1071, 1074 (2017) (stating that “handguns are generally perceived as the most utilitarian weapon for self-defense”).

234. *Why Own a Gun? Protection Is Now Top Reason*, PEW RSCH. CTR. (Mar. 12, 2013), <https://www.pewresearch.org/politics/2013/03/12/why-own-a-gun-protection-is-now-top-reason/> [<https://perma.cc/3ASC-LNDT>].

235. David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 PREVENTIVE MED. 22, 25 (2015).

236. *Id.*

237. *Id.*

238. Samantha Raphelson, *How Often Do People Use Guns in Self-Defense?*, NPR (Apr. 13, 2018, 3:51 PM), <https://www.npr.org/2018/04/13/602143823/how-often-do-people-use-guns-in-self-defense> [<https://perma.cc/B22J-NRG3>].

239. *Why Own a Gun? Protection Is Now Top Reason*, *supra* note 235.

240. See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 158 (1995) (discussing the reasons many people carry firearms).

241. Presence of a gun can increase aggressive thoughts, called the “weapons effect.” Brad J. Bushman, *Guns Automatically Prime Aggressive Thoughts, Regardless of Whether a “Good Guy” or “Bad Guy” Holds the Gun*, 9 SOC. PSYCH. & PERSONALITY SCI. 727, 727 (2018). Aggression priming can ratchet up an already charged confrontation. *Id.* It is based on cognitive neoassociation theory, which states an associative network forms when aggressive thoughts bond with memory, and then that aggressive thought activates other associated thoughts. *Id.* (citing Leonard Berkowitz, *On the Formation and Regulation of Anger and Aggression: A Cognitive-Neoassociationistic Analysis*, 45 AM. PSYCH. 494 (1990)). Because weapons are linked with aggression, seeing one primes aggressive memories, stimulating more aggressive thoughts. *Id.*

other person as thinking and acting aggressively, the situation turns violent easily, based on nothing more than an inaccurate perception.²⁴² Other factors, such as race, contribute to the perception that a person is an aggressive threat.²⁴³ In *Goetz*, race, although carefully avoided in the trial, almost certainly played a part in Goetz's perception of the four men on the subway.²⁴⁴ Goetz's attorney conjured up the "Black-as-criminal" stereotype by calling them "savages," "predators," and the "gang of four."²⁴⁵ Layered upon Goetz's knowledge of his gun and his prior experience of being mugged, Goetz's explosively violent behavior seems inevitable.²⁴⁶ Liberal gun-carry laws and Stand Your Ground laws combine in some states to galvanize those already primed to fight by the weapons effect and implicit bias.

Firing a weapon also produces a neurological response in the form of a dopamine release, just like most behaviors that are new or involve some sort of risk.²⁴⁷ Dopamine can also be released in anticipation of and during stressful events.²⁴⁸ Studies show that dopamine may play a role in aggressive behavior.²⁴⁹ The brain's response to violence is not static, nor

242. See *id.* at 242.

243. See Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 L. & CONTEMP. PROBS. 93 (2008) (discussing racial bias in the media and its effects on society at large).

244. Lee, *supra* note 60, at 422.

245. *Id.*

246. D. Marvin Jones, "He's a Black Male . . . Something Is Wrong with Him!" *The Role of Race in the Stand Your Ground Debate*, 68 U. MIA. L. REV. 1025, 1030 (2014) (discussing the Goetz case and the statement that Goetz "knew from the smile on Canty's [one of the victims] face they wanted to 'play with me'").

247. Steven Kotler, *Addicted to Bang: The Neuroscience of the Gun*, FORBES (Dec. 18, 2012, 6:29 PM), <https://www.forbes.com/sites/stevenkotler/2012/12/18/addicted-to-bang-the-neuroscience-of-the-gun/#98506867eedd> [<https://perma.cc/U6DJ-4MC3>]. Dopamine is a neurotransmitter that releases in the brain in anticipation of a reward of pleasure. Renee Garfinkel, *America's Gun Addiction*, PSYCH. TODAY (Mar. 26, 2018), <https://www.psychologytoday.com/us/blog/time-out/201803/americas-gun-addiction> [<https://perma.cc/3LVK-3LG5>]. Endorphins, the pleasure chemicals, release after the action is completed, or in the case of firing a gun, after the trigger is pulled and punctuated by the "bang." *Id.* When that behavior is repeated, a reward loop forms, creating a desire for more. Marcello Solinas, Pauline Belujon, Pierre Olivier Fernagut, Mohamed Jaber & Nathalie Thiriet, *Dopamine and Addiction: What Have We Learned from 40 Years of Research*, 126 J. NEURAL TRANSMISSION 481, 486 (2019); see also, e.g., George F. Koob & Nora D. Volkow, *Neurobiology of Addiction: A Neurocircuitry Analysis*, LANCET PSYCHIATRY 760 (Aug. 2016) (discussing the science of addiction).

248. Annemoon M. M. van Erp & Klaus A. Miczek, *Aggressive Behavior, Increased Accumbal Dopamine, and Decreased Cortical Serotonin in Rats*, 20 J. NEUROSCIENCE 9320, 9323 (2000).

249. Rodrigo Narvaes & Rosa Maria Martins de Almeida, *Aggressive Behavior and Three Neurotransmitters: Dopamine, GABA, and Serotonin—A Review of the Last 10 Years*, 7 PSYCH. & NEUROSCIENCE 601, 604 (2017).

is it clear-cut.²⁵⁰ Using violence or aggressive actions in reaction to a stressor may also increase an appetite for instigating violence as well.²⁵¹

Another psychological layer contributing to an unpredictable and dangerous self-defense scenario is the superiority with which one views their own beliefs. Belief superiority goes beyond “I’m right, you’re wrong.”²⁵² A high level of general belief superiority exists when a person overvalues their beliefs and “are averse to new experiences and tend to be dogmatic, intolerant of ambiguity, and self-righteous” to the extent that their thinking can be rigid.²⁵³ Combine this with lax gun laws and Stand Your Ground’s invitation for vigilante justice, and the results could only be death.

In the Arbery case, Greg McMichael seems to demonstrate how combining personal biases, brain science, and firearms leads to a situation that can be reverse engineered to fit a Stand Your Ground defense.²⁵⁴ In the body camera video, Greg is heard saying that “to be perfectly honest with you [the police officer], if I could’ve got a shot at the guy, I’d have shot him myself.”²⁵⁵ He also consoles Travis, his son and the shooter, telling him, “It’s going to be OK. You had no choice.”²⁵⁶ Greg’s insistence that he had to protect his son and that they were just trying to keep their neighborhood safe from “attack,” even after faced with evidence that shows Arbery was not likely responsible for the “burglaries” the McMichaels say were happening, is a carefully crafted narrative that fills in the facts necessary to assert self-defense.²⁵⁷ This “filling in” is a result of nearly all the factors presented here: the lack of imminence as the McMichaels and Bryan created the confrontation; racism as a built-in flaw that allows for more whites to successfully claim Stand Your Ground, especially when the victims are Black; the competing rights of two people

250. Thomas Elbert, Roland Weierstall & Maggie Schauer, *Fascination Violence: On Mind and Brain of Man Hunters*, 260 EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE (SUPP. 2) S100, S104 (2010).

251. *Id.*

252. See Michael P. Hall & Kaitlin T. Raimi, *Is Belief Superiority Justified by Superior Knowledge?*, 76 J. EXPERIMENTAL SOC. PSYCH. 290 (2018) (discussing general belief superiority and the differences between people’s general perception of their own beliefs and thinking their beliefs are superior).

253. Kaitlin T. Raimi & Katrina P. Jongman-Sereno, *General Belief Superiority (GBS): Personality, Motivation, and Interpersonal Relations*, 19 SELF & IDENTITY 546 (2019).

254. Russ Bynum, *New Body Camera Video Shows Moments After Arbery Shooting*, ABC NEWS (Dec. 16, 2020, 9:41 AM), <https://abcnews.go.com/US/wireStory/body-camera-video-shows-moments-arbery-shooting-74746366> [<https://perma.cc/D3CV-95WD>].

255. *Id.*

256. *Id.*

257. *Id.*

that have equal claim to a space (Arbery was accosted in the street); the overuse of force (Arbery was unarmed and each of the McMichaels had a gun); and the presence of weapons priming the aggression.²⁵⁸ Stand Your Ground is the ideal law to meld all these disparate pieces into one awful, deadly situation.²⁵⁹

VI. CONCLUSION

Stand Your Ground laws promised to lower crime rates, increase neighborhood safety, and allow domestic violence victims terrorized by abuse to defend themselves. Instead, they allowed racism to infect people's actions in new and entirely legal ways, increased homicide, decreased safety, and failed domestic violence victims by creating more barriers to safety. The hastily prepared legislation was pushed through without any real determinations on how it would be interpreted, applied to real circumstances, or abused.

The ancillary effects that create ripples through people's lives and their communities went unconsidered in hopes of a fast, easy solution to problems that either did not exist or would not be fixed by these laws. Self-defense remained a justification defense, not to make lives more difficult for those who needed it, but to make sure it was needed when used. Stand Your Ground removes that legal stigma, and with it the restraint that limited it to only those unusual circumstances where other means could not reach, while failing to solve any problems it had so raucously promised to fix. From the conversation around anticipatory self-defense after the massacre in *Goetz* to the cry for justice following the senseless Arbery murder, Stand Your Ground laws have shown that they are no fix for the shortcomings of self-defense.

The issues emanating from the natural human impulse of self-preservation have existed from humanity's inception. No gun lobby more focused on protecting gun rights than actual self-defense can possibly craft the nuanced legislation required to allow the angels of our better nature to overcome our deeply-rooted biases and misinterpretations that occur under deadly stress. Repealing these laws and replacing them with studied, carefully thought-out laws that protect domestic violence victims and ensure people use deadly force when truly necessary will restore the safety and security Stand Your Ground laws promised but could not possibly deliver.

258. See Ross, *supra* note 219.

259. *Id.* (discussing the combination of factors that lead to the Arbery murder).