## Statement of Commissioner Gail Heriot

This report should not have been published in this form. When the results of an empirical study don't come out the way Commission members hoped and expected that they would, the right thing to do is usually to publish those results anyway. Why hide useful information?[1]

Instead, the Commission sat on the report for years. Then it decided to discard the draft written by our staff and publish instead a transcript of the witness testimony received at our briefing that took place on October 17, 2014 in Orlando, Florida (along with Commissioner Statements like this one). In that way, the staff's empirical findings could be buried forever.

No one would claim that the results of the staff's empirical study conclusively resolve all the controversy over "Stand Your Ground" laws or even over Florida's "Stand Your Ground" law in particular. But they are useful for what they don't show. The most passionate opponents of "Stand Your Ground" laws appear to have believed that the empirical evidence would show clearly that African Americans are harmed by these laws. But it turns out things are not so clear; the evidence of discrimination against African Americans or even real disparate impact is absent. Yes, it is true that a disproportionate number of those killed in Florida in cases in which, correctly or incorrectly, the "Stand Your Ground" law has been invoked were African American. But it is also true that a similarly disproportionate number of those *for* whom that law has been invoked were African American.[2] African Americans are disproportionately on both sides of the issue.

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[1] This is not the first time in recent years that the U.S. Commission on Civil Rights has conducted an empirical study, only to downplay its results. In Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898 (2016), the Commission apparently hoped to prove that coal ash dumps were more likely to be located near neighborhoods with disproportionate numbers of African Americans. But the data came back showing the opposite. Although the Commission had originally intended this study to be a centerpiece of the report, instead it was barely mentioned. See Dissenting Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898 (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897775.

Another example is the Commission's 2015 civil rights enforcement report, With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities (2015). For that project, a delegation from the Commission toured two immigration detention centers. Yet barely any information about that visit made it into the staff-generated section of the report. As I described at some length in my Statement in that report (pp. 198-210), our visit suggested that these particular centers appeared to be generally well-maintained and that detainees appeared to be treated appropriately at the time. See Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897732.

[2] Statement of John Lott, Draft Report at 76 (stating that 34% of those for whom the law was invoked were African American).

The Commission embarked on this project in May 2013, at a time when public interest and public passions about "Stand Your Ground" laws were running high.[3] The immediate trigger of that interest was the Trayvon Martin case[4]—although, oddly enough, that case was not really a "Stand Your Ground Case."[5]

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[3] See, e.g., Gary Yonge, *Open Season on Black Boys After a Verdict Like This: Calls for Calm After George Zimmerman Was Acquitted of Murdering Trayvon Martin are Empty Words for Black Families*, The Guardian (July 14, 2013), available at https://www.theguardian.com/commentisfree/2013/jul/14/open-season-black-boys-verdict. One way in which these laws have been impugned is to associate them with the National Rifle Association. See E.J. Dionne, Jr., *Why the NRA Pushes "Stand Your Ground*," Washington Post (April 15, 2012)(claiming that such laws exists because state legislators were afraid to oppose the NRA) available at https://www.washingtonpost.com/opinions/why-the-nra-pushes-stand-your-ground/2012/04/15/gIQAL458JT_story.html?utm_term=.c25da969e2df; Carl Hiaasen, *Welcome to Florida, Where the NRA Rules, and We Proudly Stand Our Ground*, Miami Herald BLOG (February 22, 2014, 7:00 pm)(arguing that Florida's "Stand Your Ground" law will likely never be repealed, since the NRA "owns too many Republican lawmakers"), available at https://www.miamiherald.com/opinion/opn-columns-blogs/carl-hiaasen/article1960643.html; Andy Kroll, *The Money Trail Behind Florida's Notorious Gun Law*, Mother Jones (March 29, 2012)("the money trail leading to the watershed law in Florida—the first of 24 across the nation—traces primarily to one source: the National Rifle Association"), available at https://www.motherjones.com/politics/2012/03/nra-stand-your-ground-trayvon-martin/. For more examples, see Cynthia Ward, *"Stand Your Ground" and Self Defense*, 42 Am. J. Crim. L. 89, 96 n.19 (2015).

[4] Commissioner Michael Yaki, who proposed the project, said that he wanted to take up the issue in part because of the Trayvon Martin case. U.S. Commission on Civil Rights, Transcript of May 31, 2013 Business Meeting at 6. Commissioner Yaki also discusses the Trayvon Martin case several times in his Commissioner's statement.

[5] See infra at 54-55. See also, e.g., Scott Lemieux, *The Zimmerman Acquittal Isn't About Stand Your Ground*, The American Prospect, July 14, 2013, available at http://prospect.org/article/zimmerman-acquittal-isnt-about-stand-your-ground (wherein the progressive-leaning political science professor author notes that "Zimmerman's defense involved just standard self-defense," while nonetheless claiming that the case highlights serious racial issues); Jacob Sullum, *The New York Times Admits That Its Reporting on the Trayvon Martin Case Has Been Fundamentally Wrong*, reason.com June 20, 2013, available at http://reason.com/blog/2013/06/20/the-new-york-times-admits-its-reporting: "Zimmerman's defense does not hinge on the right to stand your ground when you are attacked in a public place because he claims he shot Trayvon Martin during a violent struggle in which there was no opportunity to retreat."

Commissioner Yaki also discusses at some length the Jordan Davis case as a supposed illustration of the problems with "Stand Your Ground" laws. But this also is a case that ultimately did not turn on the existence of such a law. Instead, it illustrates the point I have tried to make *infra* at 52-55 that "Stand Your Ground" laws do not authorize an individual to use force simply because "he feels threatened."

The day after Thanksgiving, Davis and three of his friends pulled up to a convenience store. Michael Dunn and his girlfriend parked in the adjacent space, and Dunn began complaining about the music coming from Davis's car. An argument erupted between Dunn and Davis and his friends. Dunn, who had a concealed weapons permit, reached for his gun from his glove compartment and began shooting into the other car, and continued shooting into the other car until it drove away. Davis was killed. Dunn drove away with his girlfriend and did not report the matter to the police.

At trial, Dunn claimed that he had acted in self-defense because he thought he saw Davis armed with a gun. But the police found no gun in Davis's car or near the scene, and Dunn also never told his girlfriend at the time of the incident about the gun. See Kristal Brent Zook, The Lessons of Jordan Davis's Murder, Revisited, The Nation November 13, 2015, available at https://www.thenation.com/article/the-lessons-of-jordan-daviss-murder-revisited/.

The jury convicted Dunn of first-degree murder. He won't be out on the streets anytime soon. We cannot know for sure what the jury's reasons were. But it seems overwhelmingly likely that they thought either (1) he was lying about believing that he saw a gun; or (2) if he believed he saw a gun, he was being unreasonable in doing so. In the unlikely event that it had come to the opposite conclusions on those issues, Florida's Stand Your Ground law could have come into play in the sense that it would obviate the need for the jury to resolve whether Dunn could have safely withdrawn.

The concept paper proposing the project defined "Stand Your Ground" laws for the purposes of the project as "any state statutory enactment in the past decade that extends the common law right to use deadly force, without a duty to retreat, beyond an individual's home." See, e.g., Fla. Stat. § 776.041 (2014) (attached hereto as Exhibit A).

Much of the passion over "Stand Your Ground" laws was misplaced—a product of an imperfect understanding of their content and their impact. And that passion and its accompanying misunderstanding have not entirely subsided.[6] Florida gubernatorial candidate Andrew Gillum commented in 2018, with more dramatic flair than was warranted by the actual facts, that "you can't have a conversation about Stand Your Ground without understanding what the racial elements are" and "[Florida's "Stand Your Ground" law] is dangerous, which is why I ask the Governor to declare ***a state of emergency***, because in the State of Florida, as long as that law exists, the state is not safe for all kids, it's not safe for all people."[7]

Alas, the Commission has not been immune to that misplaced passion. When the controversy first arose, it made a hasty decision to undertake a study of the racial effects of those laws.[8] At the time

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But it is unlikely that even in that event Florida's "Stand Your Ground" law would have affected the outcome. If the jury had found that Davis was indeed threatening Dunn with a gun, they probably would have also found that Dunn could not have safely backed up his car and left the parking lot (thus leaving his girlfriend, who was in the convenience store when the fight erupted).

[6] Editorial: *"Stand Your Ground" Doesn't Stand Common Sense Test*, York Dispatch (October 24, 2018), available at https://www.yorkdispatch.com/story/opinion/editorials/2018/10/24/editorial-stand-your-ground-doesnt-stand-common-sense-test/1737906002/.

[7] Ashley Velez, The Root Video: Andrew Gillum Says Florida Is Not Safe for All While "Stand Your Ground" Law Exists, (November 2, 2018)(emphasis added), available at https://www.theroot.com/andrew-gillum-says-florida-is-not-safe-for-all-while-st-1830188947.

[8] The project was proposed by Commissioner Michael Yaki. At the time, he said that he thought that already-existing data on the application of "Stand Your Ground" laws indicated a racially biased effect against African Americans. He stated:

> By racial bias, I'm talking about the fact that just on some statistics out there alone there are questions about whether or not if you are a - if you are a black victim, in other words, the person who was shot by someone asserting the SYG, that there seems to be a disproportionate number of those victims are African-American or are a minority versus homicide victims generally for that.
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> I know there's some people talking about crime rate, this, that when you're just looking at the homicide rate alone. But when you cut it out for this type of homicide and this type of defense, the number of people who happen to be of minority background seems to be a little bit higher.

U.S. Commission on Civil Rights, Transcript of May 31, 2013 Business Meeting at 7.

I warned the members of the Commission who favored such a study that "Stand Your Ground" laws effect only a fairly minor change to the law in the states that have adopted them and that enough data to draw firm conclusions will be lacking.[9] There are about 15,000 homicides each

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Commissioner Yaki later told MSNBC News that "All of the data shows it [Stand Your Ground] makes people kill people more often, and it makes black people die more often." Zachary Roth, *Is Stand Your Ground Racially Biased?: George Zimmerman vs. Marissa Alexander*, MSNBC News (July 23, 2013), available at http://www.msnbc.com/msnbc/stand-your-ground-racially-biased-george. The project won Commissioner Yaki accolades in the national media. See, e.g., Emma Allen, *Customer Relations*, The New Yorker, November 11, 2013, available at https://www.newyorker.com/magazine/2013/11/11/customer-relations (generally favorable profile of Commissioner Yaki, mainly focused on his job as a consultant for the department store Barneys, that also mentions his work on Stand Your Ground at the Commission); Editorial, *When "Self-Defense" Violates Civil Rights*, N.Y. Times (June 19, 2012)(" Michael Yaki, a member of the civil rights commission, has properly asked that the cases involving Stand Your Ground laws be analyzed to see if there is racial bias in accepting a claim of justifiable homicide when the victim is a minority"), available at https://www.nytimes.com/2012/06/20/opinion/when-self-defense-violates-civil-rights.html. Like Commissioner Yaki, the media appear to have expected our study to come out a particular way. The *New York Times* wrote that "There can be no justifying the public mayhem legalized by Stand Your Ground. These laws should be repealed, and the [Commission's] civil rights inquiry should help make that point." Id.

When the Commission held a briefing on the topic, even though we hadn't yet crunched any data, a number of witnesses confidently asserted to the Commission that Stand Your Ground laws had an unfair effect on racial and ethnic minorities. See, e.g., Statement of Ahmad Nabil Abuznaid, Dream Defenders at 1 ("These SYG laws have, in a sense, legalized the devaluing and dehumanizing of minority lives in a very real way… Since we understand that the system itself has had to be constantly revised to deal with its inadequacies related to minorities, it should come as no shock that a law allowing vigilantes to use fatal force on the streets would disproportionately affect minorities.").

Nor is Commissioner Yaki's Draft Commissioner Statement's free of that misplaced passion. In it, he calls "Stand Your Ground" laws "the legal equivalent of carte blanche for the exerciser of a Stand Your Ground right" and quotes the Brady Center to Prevent Gun Violence calling Stand Your Ground a "Shoot First" law. He also writes that "And if we are to truly honor Trayvon, and Jordan, and countless others of ever[y] color and creed and orientation, we would enact sweeping, comprehensive, and strong gun control. Stand Your Ground and concealed carry are the societal equivalent of matches and gasoline, but the lack of any semblance or reasonable gun control is like constructing that society from dried tinder."

Gun control laws are far beyond the scope of this report, so I will refrain from commenting to them except to say that when guns allow an innocent person to protect himself against an individual who is slamming his head against concrete, that would seem to me to be one of the best arguments in favor of guns. The odd thing here is that the Trayvon Martin case is one in which the only gun involved (Zimmerman's) was used in what the jury clearly found was legitimate (and traditional as opposed to Stand Your Ground) self defense. Strict gun control laws would not have made things better in the case. There is every reason to believe that they would have led to Zimmerman's death.

[9] My remarks at the meeting at which we officially accepted Commissioner Yaki's concept paper included the following:

> Okay. I believe that what's being proposed here is much, much too complicated for our commission to be able to undertake. This is a big issue, plus there's not much in the way of data.
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> We're talking about with regard to some of these states, you know, with South Carolina we've got almost 700 homicides, but only a very small number of those will have had any kind of a self-defense issue.

year in the United States. That may be a tragically high number by the standards of the developed world, but it is not a lot by the standards needed to draw statistical conclusions from the data. According to the FBI statistics, less than 3% (i.e. less than 450) are deemed to have been justifiable self-defense.[10] Of those, a similarly tiny, but undetermined proportion turn on whether a state has a "Stand Your Ground" law or not.[11] Add to that the problems that every murder has unique facts, accessing those unique facts from FBI statistics or even police reports is difficult, state "Stand Your Ground" laws differ from one another, and the states that have adopted "Stand Your Ground" laws differ culturally and demographically from those that have not. One must also add that it is impossible to estimate the number of occasions when "Stand Your Ground" laws have allowed an

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> And the number that would have a self-defense issue that turns on the difference between Stand Your Ground and ordinary common law on self-defense, that's going to get down to like Bob and Suzy … a couple of homicides in each state.

U.S. Commission on Civil Rights, Transcript of May 31, 2013 Business Meeting at 18-19.

[10] Even if that is a serious undercount, it is never going to be the case that a substantial proportion of the 15,000 or so homicides each year are cases of legally justifiable self-defense.

[11] Some of those justifiable homicides occur in the course of a burglary (and hence, ordinarily in the defendant's home and subject to the Castle doctrine). Even limiting myself to news stories running in 2018, it was not hard to uncover such cases. I think it is safe to state that the number of burglary/home invasion justifiable homicide cases is not insignificant. *Homeowners Tell 11 News They Shot Intruder in Self-Defense*, KKTV.com (October 10, 2018), available at https://www.kktv.com/content/news/Shooting-Investigation-in-Colorado-Springs-495374221.html; *Richmond Homeowner Shoots Intruder in Self-Defense: Police*, NBCbayarea.com (July 6, 2018), available at https://www.nbcbayarea.com/news/local/Richmond-Homeowner-Shoots-Intruder-in-Self-Defense-Police-487512971.html; Thomas, Leavy, *Memphis Homeowner Grabs His AK-47, Kills Two Burglars*, CBSnews.com (June 4, 2018), available at https://www.cbsnews.com/news/memphis-homeowner-kills-two-burglars-with-ak-47/; Thomas Plank, *Helena Man Who Fatally Shot Burglar Defends Gun Rights at Young Republicans Event*, Helenair.com (May 9, 2018), available at https://helenair.com/news/local/helena-man-who-fatally-shot-burglar-defends-gun-rights-at/article_9b429d41-b70e-5843-a137-df0b93988b13.html.

According to FBI statistics, in 2017, 90 persons were murdered in the course of a burglary (not including justifiable homicides). Presumably, then, all or nearly all of these were cases of the burglar murdering an innocent person. It is understandable why homeowners are thought to be reasonable for believing themselves to be in danger.

Many other cases occurred in the home, but not in the course of a burglary. *Police: Grandfather Fatally Shoots Grandson in Self Defense*, The Columbian (November 13, 2018) available at https://www.columbian.com/news/2018/nov/13/police-grandfather-fatally-shoots-grandson-in-self-defense/; Ken Curtis, *Dothan Police Believe Deadly Shooting Self-Defense*, WTVY.com (November 9, 2018), available at https://www.wtvy.com/content/news/Dothan-police-deadly-shooting-self-defense--500162481.html; Lynn Moore, *Sister's Fatal Stabbing of Brother Rules Justified Self Defense*, Muskegon News (November 7, 2018), available at https://www.mlive.com/news/muskegon/index.ssf/2018/11/sisters_fatal_stabbing_of_brot.html.

In addition, there are cases that occur outside the home, but for which it is obvious retreat would have been impossible. See Jon Wilcox, *Prosecutor: 13 Bullet Holes Showed Self-Defense for Man Cleared of Murder Charge*, The Victoria Advocate (October 22, 2018), available at https://www.victoriaadvocate.com/counties/dewitt/prosecutor-bullet-holes-showed-self-defense-for-man-cleared-of/article_def55934-d637-11e8-9546-637075a1ed02.html.

individual to threaten self-defense in a way that prevented further violence. That is simply not a lot to work with, especially if one's task is to tease out the law's racial effects.[12]

As a result, it was always highly unlikely that we could obtain the necessary data to decide whether these laws had a *racial* effect or not, which is the issue we arguably have jurisdiction over.[13] It was not that I was against undertaking challenging empirical studies. Like Commissioner Yaki, I believe that the Commission should focus more of its energies on its own empirical studies and less on simply giving its opinion on policy issues. But I feared this particular exercise would not generate enough useful information to be worth the effort.

Our staff undertook the study and did the best that could be done with the data available. I have no reason to doubt either the competence or the integrity of the statistician in our Office of Civil Rights Evaluation ("OCRE") who undertook the analysis.[14] On the other hand, OCRE was not able to find data allowing it to make a comparison between jurisdictions with "Stand Your Ground" laws and those without them or between a jurisdiction before it adopted a "Stand Your Ground" law and after it did so. Thus even if a mammoth multi-factored analysis was desirable to determine whether "Stand Your Ground" laws disproportionately increase the number of homicides of African Americans, OCRE was in no position to conduct that analysis.

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[12] Of course, economists sometimes rush in where angels fear to tread. Two complex empirical studies have now been done on the effects of "Stand Your Ground" laws. Commissioner Yaki relies significantly on them to mount his critique, yet each has significant limitations that I discuss infra at p. 48, n. 50. For example, one of these studies—Chandler McClellan & Erdal Tekin, *Stand Your Ground Laws and Homicides*, 52 J. Human Resources 621 (2017)—suggests that states that have passed "Stand Your Ground" statutes that allow individuals to stand their ground if they are in a place they are legally entitled to be had an *increase* in total homicides per 100,000 in population in the 17 months following the laws' passage relative to other states *for whites, but not for African Americans*. (Indeed, for African Americans, the rate of total homicides was found to decrease slightly, but not significantly). Paradoxically, more limited "Stand Your Ground" statutes—such as those that extend the right to stand one's ground only to one's business or car—were associated with a decrease in the rate of total homicides (relative to states with no such changes in the law). Given these odd results, it is very hard to come away with the conclusion that the associations noted by the authors are causal in nature.

The other such study did not deal with racial effects at all. See Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence?: Evidence for Castle Doctrine*, 48 J. Human Resources 821 (2013). But given that it finds that laws of this kind increase homicide rates, it does itself rule out the possibility (as McClellan & Tekin purport to) that "Stand Your Ground" laws increase the number of African-American homicides. See infra at n. 50.

[13] Here is another way to give readers an idea of how small the pool of relevant cases is: In a study for PBS's Frontline, John Roman of the Urban Institute's Justice Policy Center looked at SYG racial disparities using FBI homicide data from 2005 to 2009. Out of 45,300 incidents of homicide from all 50 states in the database, there were only 25 white-on-black justifiable homicides during the period of Roman's study. See Sarah Childress, *Is There Racial Bias in "Stand Your Ground" Laws?* Frontline, July 31, 2012, available at https://www.pbs.org/wgbh/frontline/article/is-there-racial-bias-in-stand-your-ground-laws/.

[14] That individual head holds a Ph.D. in sociology from Howard University. Before coming to the Commission, he was a Senior Statistician at the Criminal Justice Coordinating Council for the District of Columbia.

Instead, the staff had a database, put together initially by the Tampa Bay Times, consisting of 192 Florida cases. The original list was supplemented by a list of cases compiled by the researcher Albert McCormick for his paper on Florida's "Stand Your Ground" law.[15] In the end, there were 305 cases in total. OCRE focused on whether success in invoking "Stand Your Ground" laws varies by the race of the parties.

Alas, these cases are not what they appear. They are not cases for which Florida's "Stand Your Ground" law made a difference in the outcome. Rather ***some*** are cases for which Florida's law ***might*** have made a difference depending upon whether it was ultimately determined that the shooter could have safely avoided the need for self-defense by retreating. (Of course, the point of "Stand Your Ground" laws is that they take that issue out of consideration.)[16]

Others cases in the database involved situations in which the defendant or the defendant's lawyer invoked "Stand Your Ground" law, but the facts did not fit "Stand Your Ground" (though in some cases, real issues of self-defense may have fit the facts). In some cases, the term "Stand Your Ground" was simply mentioned by somebody quoted in a news story account of the case. Sometimes that person had no idea what he or she was talking about.

Moreover, the cases were a hodgepodge. No two contained facts that were alike. For example:

> (1) Seventy-year-old Ralph Wald woke up at midnight to find a younger man having sexual intercourse with his 41-year-old wife in the living room. According to Wald, he believed his wife was being raped. He went to his bedroom, got his gun and shot the man in the head and stomach. It turned out to be one Walter Conley, with whom Wald's wife had once lived in a house next door to Wald's. Police believed instead that Wald shot Conley in a fit of rage. Whatever this case is, it does not turn on the application of Florida's "Stand Your Ground Law." While the defense cited that law, under the pre-existing Castle Doctrine, Wald had no duty to retreat in his own home anyway. Moreover, this was a case of defending a third party. He could not have successfully defended his wife (assuming she needed defending) by retreating. The case turns on a question of fact: Wald either reasonably believed that he was defending his wife from a rapist or he did not. Wald was charged

[15] McCormick, Albert E. Jr., *The Enforcement of Florida's "Stand Your Ground" Law: Preliminary Findings*, 6 J. OF PUB.& PROF. SOCIO. 1 (2014), available at https://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1072&context=jpps.

[16] That is an aspect of "Stand Your Ground" laws that must always be kept in mind. Under a "Stand Your Ground" law, it is unnecessary to determine whether the individual claiming the right to self-defense could have retreated in safety. It doesn't matter if he has the right to stand his ground. By contrast, in a jurisdiction with a duty to retreat, it becomes necessary, when an individual fails to retreat and instead acts in self-defense, to determine whether he should have retreated instead. The upshot of this is that law enforcement investigators may classify a case as falling under a "Stand Your Ground" law when they mean only that the individual did not retreat.

with second-degree murder. Rightly or wrongly, the jury acquitted him. Florida's "Stand Your Ground Law' had nothing to do with it.

(2) Andrew Smith and Keith Quakenbush got into an argument while in Smith's car. Smith requested that Quackenbush get out of his car, but Quackenbush refused. Smith was able to remove him from the car and *attempted to drive away*, but Quakenbush re-entered it. Smith removed him again. At that point, Quakenbush jumped onto the car and a physical fight began. When Quakenbush cut Smith with a box cutter, Smith took out a knife and stabbed Quakenbush, but did not kill him. The police arrested Smith. There does not appear to have been an opportunity for Smith to retreat once the physical fight began. Indeed, the Tampa Bay Times database specifically notes that retreat was not an option. Florida's "Stand Your Ground Law" is thus, again, superfluous.[17]

(3) Gregory Gayle had been staying with his pregnant sister and her fiancé, Jakob Penrod, for three weeks when an argument turned violent. Penrod told Gayle to move out. Fearing Gayle, Penrod and Gayle's sister locked themselves in the bathroom (with Penrod's gun). When Gayle forced his way into the bathroom and struck Penrod, Penrod shot him. This was a routine self-defense case and not one that turned on Florida's "Stand Your Ground" law. Penrod was in his own home and had no opportunity to retreat anyway. According to the Tampa Bay Times website, "Witnesses, including some of Gayle's relatives, agreed with Penrod's description of the events and he was not arrested."[18] The only connection to "Stand Your Ground" law that I am aware of was the fact that Gayle's father told the local television station that the "Stand Your Ground Law" needs a second look.[19]

These cases were not difficult to find. There are certainly many more in the database that did not turn on the existence of the "Stand Your Ground" law. Indeed, while I did not look at them all, I did not run across a single case that really turned on the existence of a "Stand Your Ground" law, although I assume that some do.

Both the fact that every case has different facts and the fact that large numbers of cases in the database are not true "Stand Your Ground" cases make drawing conclusions very difficult. Add to that the database does not include cases where an individual who stood her ground was

[17] Florida Stand Your Ground Cases (Tampa Bay Times) http://stand-your-ground-law.s3-website-us-east-1.amazonaws.com/cases/case_262.

[18] Florida Stand Your Ground Cases (Tampa Bay Times) http://stand-your-ground-law.s3-website-us-east-1.amazonaws.com/cases/case_269.

[19] Lisa McDonald, *"Stand Your Ground" Put to Test in Leesburg Shooting*, ClickOrlando.com (April 9, 2012) https://www.clickorlando.com/news/florida/lake-county/stand-your-ground-put-to-test-in-leesburg-shooting.

successful in scaring off her assailant just by brandishing a weapon (rather than running away) or cases where an individual retreated anyway, despite a legal right to stand his ground.[20]

The first draft of the report found that none of the attributes of those who claim the Stand Your Ground defense, including race/ethnicity, was significantly associated with the probability of a successful claim.[21] I would quote the draft and give the specific figures, but some of my fellow Commissioners have taken the position that for the Commission to publish this Statement quoting those figures might be interpreted to waive the Commission's deliberative process privilege. To address their concerns I have edited this statement. Suffice it to say that insofar as there was evidence, it suggested that African Americans and Hispanics were more likely to successfully assert the defense than whites, but the difference was not statistically significant.[22] The report also found that the probability of a successful Stand Your Ground claim was greater if the initial attacker was Hispanic than if he or she was black or white. But the differences were insignificant at the conventional 0.5 level.[23] The draft ultimately concluded that there was no significant difference in the probability that a Stand Your Ground claim would be successful based on the race or ethnicity of the claimant or the race of the initial attacker.

But Commissioner Michael Yaki, who spearheaded the project, was unhappy with the results and protested them. To the credit of our statistician in the Office of Civil Rights Evaluation, while he listened to and considered Commissioner Yaki's complaints, he *stood his ground* and declined to alter his results to follow a particular narrative.

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[20] In the absence of a "Stand Your Ground" law, brandishing a weapon in a case in which one has a duty to retreat would presumably be at least technically an assault. And yet, cases in which an otherwise innocent individual scares off an assailant by showing his weapon seems like a benefit of "Stand Your Ground" laws to me. Of course, the individual who shows his assailant his weapon in this way may put himself in a position where he must use it, since he has likely used up precious time that could have been used to retreat.

[21] Draft Report at v. Given the existence of ordinary self-defense and Castle Doctrine cases in the database, even if the data had shown bias, it would be unclear whether the bias came from the application of "Stand Your Ground" laws or the application of other self-defense doctrines. It is one thing to argue for the repeal of "Stand Your Ground" laws. Reasonable policymakers have taken both sides of that issue. It is quite another to argue for the repeal of the right of self-defense generally and hence for a "Duty to Die" rule for those who find themselves under attack. Alas, while it appears that racial bias may not be an issue in this particular context, racial bias has certainly been known to rear its ugly head in employment, real estate sales and credit. Yet no one argues that this is a sufficient reason to abolish employment, home ownership and credit. Nor would it be a good reason to eliminate the basic right to self-defense.

[22] Draft Report at 28.

[23] The difference between blacks and Hispanics were significant at all levels. The difference between whites and Hispanics was statistically significant at the .10 level.

For a while, there was talk within the Commission about trying to re-do the project.[24] Eventually, though, the staff who had originally been the most immersed in this project (our statistician from OCRE, as well as Commissioner Yaki's special assistant and counsel) left the Commission, and the discussions stopped. A majority of the Commission's members were apparently happy not to issue a report. But lately, they seem to be taking the position that the *quantity* of reports that the Commission issues is important. More than two years after we received the initial draft, the Commission voted to scrap that draft altogether and instead publish the report in the form you see today.

I believe that the findings that were contained in the draft are worth publishing, despite the fact that they do not resolve every issue we might like them to have. They are at least a bit of a counterweight to some of the more fevered commentary about the intent and effects of "Stand Your Ground" laws. Take, for example, the following comments, all of which were aimed at "Stand Your Ground" laws:

> "There is a word for the unfounded, pre-emptive, due-process-free (but tacitly sanctioned) form of killing perpetrated against black people in this country in an effort to safeguard white property: lynching." –Sabrina Strings, Assistant Professor of Sociology, University of California at Irvine.[25]

> "… SYG laws make it easier for straight, cisgender people to kill queer people, for white people to kill people of color, and for men to kill women, while preventing targeted minorities from defending themselves." Caroline E. Light, Director of

[24] In February 2016, there was supposed to be a meeting of the eight special assistants and the then-head of OCRE to address some of the concerns about the first draft and discuss a plan for moving forward with the report. The meeting was cancelled after the OCRE head was assigned to a different role within the Commission. It was never rescheduled.

In his Commissioner's statement, Commissioner Yaki writes that "Through no fault of the Commission and its staff, the lack of resources—both fiscal and personnel—hampered the ability of the Commission to engage in the type of fact-finding this matter deserved. Because of the way that data is recorded in Stand Your Ground shootings—or, more accurately, was not recorded, as will be discussed later—the intensive investigative resources that would have been required to be dedicated proved to be beyond the reach of the Commission." As discussed above, I do not fault the Commission's career staff for the staff-generated section of this report's failure to come to fruition. But I do not think it is entirely accurate to suggest that the failure was mostly about a lack of resources. It was not. The Commission could have had three times its level of resources, and it still would have been without the data it needed to draw conclusions.

[25] See Sabrina Strings, *Protecting What's White: A New Look at Stand Your Ground Laws*, The Feminist Wire (2014), available at https://thefeministwire.com/2014/01/protecting-whats-white-a-new-look-at-stand-your-ground-laws/.

> Undergraduate Studies in the Program in Women, Gender, and Sexuality Studies, Harvard University.[26]
>
> "This [is] structural racism at its finest: a modern-day lynch law. … The arming and acquitting of racists is nothing new in our country, but [proposed Stand Your Ground laws] are open invitations for racist violence."—Mari Christmas, Visiting Fellow in Creative Writing, Idaho State University.[27]

The Commission's study certainly fails to substantiate these statements. Common sense is all that's needed to understand that they are unhelpful and overblown.

Of course, misunderstanding about the racial aspects of "Stand Your Ground" laws is only one of several misunderstandings concerning these laws. There are others:

**THE APPARENTLY WIDESPREAD NOTION THAT "STAND YOUR GROUND" LAWS ARE A RECENT INNOVATION IS FALSE.**

Many people are under the incorrect impression that "Stand Your Ground" laws are a recent innovation and that they greatly expand the circumstances under which the right to self-defense can be invoked. The truth, however, is that "Duty to Retreat" rules and "Stand Your Ground" rules have existed side by side, at least as far back as 17th century England.[28] It hasn't always been easy to tell which rule applies to which situations, but Anglo-American law has muddled through nonetheless. It is true that American law may be leaning somewhat more than English common law toward "Stand Your Ground" rules. But the differences are smaller than many seem to think.

Former Attorney General Eric Holder is among those who seems to be under this misimpression that "Stand Your Ground" laws are novel (beyond the fact that they are now statutory, whereas before they were common law). In addressing the NAACP in 2013, he stated: "These laws try to fix something that was never broken. … [I]t's time to question laws that senselessly expand the concept of self-defense and sow dangerous conflict in our neighborhoods …. [W]e must examine laws … eliminate[e] the common-sense and age-old requirement that people who feel threatened have a duty to retreat, outside their home, if they can do so safely. By allowing and perhaps

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[26] Caroline E. Light, Stand Your Ground: A History of America's Love Affair with Lethal Self-Defense 184 (2017).

[27] Mari Christmas, *Stand Your Ground Is a Modern-Day, Racist Lynch Law*, Idaho State Journal (March 11, 2018), available at https://www.idahostatejournal.com/opinion/columns/stand-your-ground-is-a-modern-day-racist-lynch-law/article_d530e232-c638-5c00-a8d2-2cbb8bcee138.html.

[28] Cynthia Ward, *"Stand Your Ground" and Self Defense*, 42 Am. J. Crim. L. 89 (2015).

encouraging violent situations to escalate in public, such laws undermine public safety.… [W]e must … take a hard look at laws that contribute to more violence than they prevent."[29]

Those who believe that recent "Stand Your Ground" statutes overrule a long history of precedent imposing a duty to retreat (outside the home) before a right of self-defense can be invoked sometimes rely upon William Blackstone's *Commentaries on the Laws of England* as their authority. That treatise states, "[T]he law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault …."[30] I'm guessing that most of those who cite to Blackstone for this purpose do not own their own copies of Blackstone. I do. Browsing his section on homicide, one finds that he is speaking of a particular kind of homicide—that arising in the course of a "sudden brawl or quarrel."

This is an important qualifier. Going back to Lord Edward Coke's Institutes of the Lawes of England, we learn that initial aggressors and mutual combatants had a duty to retreat before invoking the right to use lethal force in self defense, but that no duty to retreat existed where the an individual was simply defending his or her life or property.[31] (Yes, I own my own copies of

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[29] Attorney General Eric Holder's Remarks on Trayvon Martin at NAACP Convention (full text), Washington Post (July 16, 2013), available at https://www.washingtonpost.com/politics/attorney-general-eric-holders-remarks-on-trayvon-martin-at-naacp-convention-full-text/2013/07/16/dec82f88-ee5a-11e2-a1f9-ea873b7e0424_story.html?utm_term=.e69c760b26c4.

[30] IV William Blackstone, Commentaries on the Laws of England 184-85 (University of Chicago facsimile ed. 1979).

[31] Edward Coke, The Third Part of the Institutes of the Lawes of England 55-56 (1669). In it, he makes the distinction between mutual combatants and victims of an attempted serious crime. Here we learn that retreat, if it can be accomplished in reasonable safety is required for mutual combatants:

> Some [homicides] be voluntary, and yet being done upon an inevitable cause are no felony. As if A, be assaulted by B, and they fight together, and before any mortall blow given A, [retreats], until he cometh unto a hedge, wall, or other strait, beyond which he cannot passé, and then in his own defence, and for safeguard of his own life killeth the other: this is voluntary, and yet no felony, and the jury that finde, it was done *se defendendo*, ought to finde the speciall matter. … If A assault B so fiercely and violently, and in such place, and in such manner, as if B should [retreat], he should be in danger of his life, he may in this case defend himself; and if in that defence he killeth A, it is *se defendendo* ….

On the other hand, the victim of an attempted serious crime has no duty to retreat:

> Some without any [retreat] to a wall, &c. or other inevitable cause. As if a thiefe offer to rob or murder B, either abroad, or is his house, and thereupon assault him, and B defend himself without any [retreat], and in is defence killeth the theif, this is no felony; for a man shall never give way to a thief, &c., neither shall he forfeit anything.

See also 1 Edward Hyde East, A Treatise on the Pleas of the Crown 220-21 (1803)(stating that there is no duty to retreat from someone who comes with the intent to commit a forcible felony against one's person or property); Michael Foster, A Report of Some Proceedings 273 (Oxford, Clarendon Press 1762)("[An] injured party may repel force with force in defense of his person, habitation, or property, against one who manifestly intends and endeavors with violence or surprise to commit a known felony upon either. In these case he is not obligated to retreat ….");

Coke's Institutes too. I am a law nerd.) This is consistent with a different section of Blackstone's Commentaries in which he discusses "such homicide, as is committed for the *prevention* of any forcible and atrocious *crime*" and makes no mention of a duty to retreat.[32] In the modern world, where dueling and just plain brawling is less common, this part of Blackstone's and Coke's commentaries is more significant. Never lose sight of the fact that we live in gentler times than most of our 17th and 18th century ancestors, no matter what part of the globe those ancestors came from.

Professor Cynthia Ward attempts to summarize the dominant theme among these distinguished legal commentators this way:

> "Early English commentators distinguished between two fundamental scenarios: (1) cases in which the defendant's use of deadly force was *justified*—for example, where a blameless and law-abiding defendant used deadly force to repel an attack from a thief or a burglar who intended to kill or gravely injure him, and (2) cases in which the use of deadly force was merely *excused*—for example where the defendant either bore some responsibility for the deadly encounter, or had reasonably *but incorrectly* believed that he or she was faced with imminent threat of death or serious injury and responded with deadly force. In the former type of case, a defendant could claim self-defense although he or she had stood his or her ground and did not retreat; in the latter case, only defendants who could prove that they attempted to retreat before using deadly force could successfully claim self-defense. Even then, defendants of the second type did not merit a full acquittal but only an escape from execution, which was the usual penalty for intentional killings by private citizens. Thus under the English rule, as articulated by Edward Coke, a person was justified in using deadly force against another, even to the point of killing the other, if threatened with imminent death or grave injury for which the defendant bore no responsibility or blame. In other cases where the defendant and the deceased mutually came to blows and the embroglio reached the point where the defendant found it necessary to kill the other rather than die, the defendant could only claim self-defense in the defendant had first attempted to retreat."[33]

American law has developed beyond the English law over the course of 19th and 20th centuries. And, for the most part, it has done so toward somewhat more liberal use of the "Stand Your

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Matthew Hale, The History of the Pleas of the Crown 481 (1736)(stating that a "true man" has no duty to retreat and that if he kills his assailant, it is not a felony). See Cynthia Ward, *"Stand Your Ground" and Self Defense*, 42 Am. J. Crim. L. 89 (2015)(citing all three of the above).

[32] Blackstone at vol. III at 180.

[33] Ward at 98-99.

Ground" approach.[34] *Erwin v. State* (1876) was a significant early case.[35] It concerned an altercation between a farmer and his son-in-law, who is described as a "cropper" on the farmer's land. The two argued over who had the rights to a certain shed. In the course of the argument, the son-in-law was said to have approached his father-in-law with an ax in a threatening manner, despite the latter's warning to stop. When the son-in-law got within striking distance, the father-in-law shot him.

After discussing the evolution of the doctrine in this area, the Ohio Supreme Court asked: "Does the law hold a man who is violently and feloniously assaulted responsible for having brought [the necessity for self defense] upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so?" The Court's answer was no. It held that while the right to use deadly force in self-defense is not available for minor trespasses or to a man who provoked the assault, "a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."

Some later authorities have assumed that the *Erwin* court was using the term "true man" as a way of invoking a particularly "virile man" or "macho man."[36] In fact, the court was simply using the term used by Matthew Hale in the 17th century. Both the Erwin court and Hale appear to have

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[34] See Ward at 99-100 ("In the mid-to-late nineteenth century … the American approach changed as homegrown commentators, influential state supreme courts, and United States Supreme Court opinions developed a more robust Stand Your Ground doctrine, which become a widely adopted basis for self-defense in this country"). See Richard Maxwell Brown, No Duty to Retreat: Violence and Values in American History and Society 5-7 (1994).

[35] 29 Ohio St. 186 (1876).

[36] See, e.g., State v. Abbott, 174 A.2d 881, 884 (N.J. 1961)("advocates of no-retreat say the manly thing to do is to hold one's ground, and hence society should not demand what smacks of cowardice"); Richard Maxwell Brown, No Duty to Retreat: Violence and Values in American History and Society 17 (1994)(The language of the [Erwin Court] with its emphasis on the action of a 'true man' … illustrates … concern for the values of masculine bravery in a frontier nation"). See also Caroline E. Light, Stand Your Ground: A History of American's Love Affair with Lethal Self-Defense (2017). Light acknowledges that Hale used the term "true man," but seems unaware that of how that term was used in the 18th century. Instead, she writes that "[l]ethal self-defense was a right of "true manhood." For reasons that make no sense to me, Light specifically associates "Stand Your Ground" laws with white men in particular:

> Standing one's ground against a perceived threat has long been a white, masculine prerogative in the United States. When European settlers arrived on American soil, they justified violence as necessary to their basic survival, seizing land that was already inhabited while imprisoning or exterminating its occupants. Settler colonialism and, later, the idea of Manifest Destiny—spreading Christianity across the continent—together demanded the subjugation of nonwhites. And the rights, privileges, and protections of citizenship were inaccessible to all but white, property-owning men. The legacies of this under-recognized history of repression and exclusion in the name of national survival still haunt us today.

Id. at 1.

meant "true" in the sense of trustworthy and honest. A "trueman" as used in the 18th century was a law-abiding man.[37]

Note that the defendant in *Erwin* had been arguing with the deceased. Just in case Blackstone and Coke viewed mutual combatants as including two individuals engaged in an spirited argument, the court made it clear that, under Ohio law, given that the father-in-law had not assaulted the son-in-law, he was not blameworthy and hence retained the right to stand his ground. It is not and should not be regarded as blameworthy to engage in an argument—not in America.

A year later, the Indiana Supreme Court decided *Runyan v. State* (1877).[38] *Runyan* was an Election Day altercation. Both the defendant and the deceased were in town to vote and to hear the election results for the 1876 Presidential contest between Rutherford B. Hayes (favored by the deceased) and Samuel Tilden (favored by the defendant). The deceased, who was described by the court as "a large and vigorous man," had several encounters with the defendant during the day at which he used strong and threatening language. Out of fear of the deceased, the defendant, who had lost much of the use of his right arm fighting for the Union during the Civil War, borrowed a gun. Later that day, the deceased rushed him, striking him several times. The defendant drew his gun and shot him dead. The jury was instructed that he had a duty to retreat and hence convicted him.

The Indiana Supreme Court reversed. Stating that "the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed," the Court stated: "[W]hen a person, being without fault and in a place where he as a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable."[39]

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[37] See The Compact Oxford English Dictionary (2d ed. 1991)("trueman … A faithful or trusty man; an honest man (as distinguished from a thief or other criminal"). The OED considers this definition to be obsolete. See Garrett Epps, The History of Florida's "Stand Your Ground Law, American Prospect (March 12, 2012)("a 'true man' in the legal sense—means not a manly man but, in the words of the Oxford English Dictionary, 'an honest man (as distinguished from a thief or other criminal"), available at http://prospect.org/article/history-floridas-stand-your-ground-law.

[38] 57 Ind. 80 (1877).

[39] Id. at 84.

Many courts followed *Erwin* and *Runyan*[40]--but not all. In *Judge v. State* (1877),[41] the Supreme Court of Alabama, in retaining its duty to retreat, had this to say:

> We are pleased to observe that in this case, the old, sound, and much disregarded doctrine, that no man stands excused for taking human life, if, with safety to his own person, he could have avoided or retired from the combat, has been given in charge, and must have been acted on by the jury. It is to be regretted that this salutary rule is not universally observed by juries, without reference to the social standing of the prisoner. Its observance would exert a wholesome restraint on unbridled passions and lawlessness, and would, in the end, preserve to the commonwealth many valuable lives.[42]

Note that the Alabama court wrote that *no* man who could have retreated stands excused for taking a life. This differs not just from *Erwin* and *Runyan*, but also from Coke and Blackstone (although the court does not appear to know this).

Federal courts have been accused of initially appearing to have gone in two directions. In *Beard v. United States* (1895), the U.S. Supreme Court appeared to some to be taking an approach similar to *Erwin* and *Runyan*.[43] Indeed, it quoted with approval broad language from *Erwin*. But just a year later, in *Allen v. United States* (1896), the Court made it clear that it intended to apply a "Stand Your Ground" rule only to cases that occur in the defendant's home or on his or her property.[44]

Meanwhile, Harvard law professor Joseph H. Beale called the doctrine pronounced in *Erwin* and *Runyan* "brutal."[45] In his view, ""[n]o killing can be justified on any ground, which was not necessary to secure the desired and permitted result; and it is not necessary to kill in self-defense when the assailed can defend himself by the peaceful though often distasteful method of withdrawing to a place of safety."[46]

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[40] See, e.g., People v. Lewis, 48 Pac. 1088, 1089-90 (Cal. 1897); Boykin v. People, 45 Pac. 419, 422 (Colo. 1896); State v. Hatch, 46 Pac. 708, 708 (Kan. 1896); State v. Bartlett, 71 S.W. 148 (Mo. 1902). Professor Joseph H. Beale has collected a number of other such cases in Joseph H. Beale, *Homicide in Self-Defense*, 3 Colum. L. Rev. 526, 539, §8 n. 5 (1903).

[41] 58 Ala. 406 (1877). Professor Joseph H. Beale has collected a number of other cases that appear to impose a duty to retreat in cases involving an otherwise non-blameworthy defendant acting outside his or her home in Joseph H. Beale, *Homicide in Self-Defense*, 3 Colum. L. Rev. 526, 540, §8 n. 1 (1903).

[42] Id. at 413-14.

[43] 158 U.S. 550 (1895).

[44] 164 U.S. 492(1896).

[45] Joseph H. Beale, *Retreat from a Murderous Assault*, 16 Harv. L. Rev. 579 (1902-1903).

[46] Id. at 580.

While Beale advocated a duty to retreat, he took pains to point out that the availability of firearms changes the calculus for many Americans:

> It is of course true that to retreat from an assailant with a revolver in his hand is dangerous, and one whose revolver is in his hip pocket is not to be despised; the hip-pocket ethics of the Southwest are doubtless based on a deep-felt need. But because retreat is less often safe than in the days of knives and small-swords, it by no means follows that retreat when certainly safe should be less requisite.[47]

Ultimately, the U.S. Supreme Court moved in the direction of *Erwin* and *Runyan*. It just took a few years. In *Brown v. United States* (1921), Justice Holmes argued against any duty of retreat on the part of otherwise non-blameworthy defendants:

> The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense. That has been the decision of this Court [referring to *Beard*]. Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in the Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than kill him.[48]

I can see at least two arguments for "Stand Your Ground" laws. The first argument is the one the Ohio Supreme Court employed in the *Erwin* case: *A "Stand Your Ground" rule saves lives.*

In *Erwin*, the Attorney General of Ohio, arguing in favor of a duty to retreat, had asserted that the Court should pick the rule that will save the most lives. In rejecting the Attorney General's argument, the Court stated that, yes, in adopting a "Stand Your Ground" rule, it was doing exactly that:

> The suggestion, by the attorney-general, that that rule should be declared the law which is best calculated to protect and preserve human life, is of great weight, and we can safely say, that the rule announced is, at least, the surest to prevent the occurrence of occasions for taking life; and this, by letting the would-be robber, murderer, ravisher, and such like, know that their lives are, in a measure, in the

[47] Id.

[48] Id. at 343.

hands of their intended victims.[49]

What did the Ohio Supreme court mean by that? It meant that if thugs, including would-be rapists, murderers and armed robbers, are conscious—even vaguely conscious—of the fact that their intended victims are obliged to flee rather than fight, it will embolden them. Indeed, it will embolden them even if they simply have a vague expectation that they are more likely to flee. Put differently, there will be more such attacks as they perceive, however faintly, that efforts to commit a crime are low risk and efforts to forcibly drive someone from a place they have a right to be will be successful.

Thugs need not have a grasp of the law for the Ohio Supreme Court to be right. Laws both reflect culture and influence culture, and they do it in ways that both subtle and not-so-subtle. Sure, expectations about how a victim is likely to behave may be based on knowledge of what the law requires him to do. But, perhaps more likely, they will be based on vague notions of what the victim ought to do, which in turn are influenced by often-distant memories of what has happened in the past or of what others have said about what should happen based on their own memories of what has happened in the past.

Also the extent to which thugs are emboldened need not be great for the Ohio Supreme Court to be right. They need not believe their victims will certainly flee. All that is necessary is that a "Duty to Retreat" rule alter their expectations slightly relative to their expectations under a "Stand Your Ground" rule.

On the other hand, the view that "Stand Your Ground" rules save lives is contestable. Indeed, the Alabama Supreme Court did just that in *Judge v. State*, when it wrote that a "Duty to Retreat" rule "would exert a wholesome restraint on unbridled passions and lawlessness, and would, in the end, preserve to the commonwealth many valuable lives."

Who is right? Does a "Stand Your Ground" rule or a "Duty to Retreat" rule save more lives? I am somewhat inclined to believe that in the long term it is a mistake to send a message to aggressors that their victims are required by law to respond passively. Eventually, they may learn to take advantage of that. I note that some researchers believe they have evidence to the contrary,[50]

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[49] 29 Ohio St. at 200.

[50] McClellan & Tekin (whose study is cited favorably by Commissioner Yaki in his Commissioner's Statement) are among those who believe that they have uncovered evidence to the contrary. States that have passed "Stand Your Ground" laws or are considering passing or repealing such laws should certainly be willing to examine that evidence and any further evidence that may come to light on the issue. But comparing crime rates of two very different sets of states with different histories, cultures and demographics, attempting to control for those differences the best one can, but then attributing the remaining differences to "Stand Your Ground" laws is fraught with risk. States are complicated things. And the evidence that McClellan & Tekin have produced is rather odd. It purports to show that in the seven months following each "Stand Your Ground" state's adoption of its law, homicides dropped sharply relative to other states, but that beginning in the eighth month through the fourteenth month, the homicide rates in

those states began to climb, while they remained more stable in the other states. The net effect of these changes was to raise the homicide rate in "Stand Your Ground" state relative to the other states. Such a roller coaster relationship is hard to attribute to changes in the law (which, at least with a change as minor as this one, one would expect to take a decade or more to affect the culture anyway). Why would a "Stand Your Ground" law cause a decrease in homicides during the first seven months followed by a six-month increase?

The most obvious explanation is that something else is driving this (especially since the study finds states that enacted more limited "Stand Your Ground" statutes during the same period were found to have experienced a *decrease* in homicides rather than an increase like that found for the states that enacted the stronger versions of that law). Knock me over with a feather if large numbers of the citizens of these states could tell you the difference between their state's statute and the statutes of other "Stand Your Ground" states.

There are several possibilities I can think of that are worth exploring. I'm sure others can think of more. First, the states that adopted the strong versions of "Stand Your Ground" are disproportionately located in the South, where incarceration rates have historically been higher than average. During the period of the enactment of these statutes, those incarceration rates had become controversial and difficult to maintain. The trend toward greater incarceration de-accelerated and ultimately reversed itself in the years around 2006-2009. Is it possible that Southern states were disproportionately affected and hence witnessed an uptick in homicides not matched in other parts of the country? I believe this is worth looking into.

An alternative explanation was suggested by the authors themselves--that gun ownership was climbing faster in "Stand Your Ground" states than in others (although the authors suggest that "Stand Your Ground" statutes may have *caused* that increase). The notion that "Stand Your Ground" laws led to a greater rate of gun ownership rates strikes me as attributing too much to these laws. The more likely explanation for any difference in rates of increase in gun ownership is that Southern states, for cultural reasons, were especially fertile ground for sparking increased interest in firearms at a time that the Supreme Court was deciding Second Amendment rights. Issues of firearm control were very much on the minds of many Americans. See District of Columbia v. Heller, 554 U.S. 570 (2008). Prior to the Trayvon Martin case "Stand Your Ground" laws received far less attention.

A third possibility is that that increases in population over the course of the decade were insufficiently taken into account by the authors. Since the "Stand Your Ground" states tend to be high-growth states, this would make it appear that homicides were increasing in "Stand Your Ground" states, while the increase was largely a function of population growth. Texas, Arizona, and Florida, for example, grew 20.6%, 24.6% and 16.6%% respectively and were "Stand Your Ground" states, while Illinois, New York, and Ohio grew 3.3%, 2.1% and 1.6% respectively and did not enact "Stand Your Ground" statutes. I cannot tell the extent to which the authors adjusted their figures to account for this constant change in population size.

Note the fact that population growth can itself result in increased feelings of rootlessness and hence in higher crime. Even taking into consideration actual population for each time period looked at will not account for this.

I am not in a position to draw conclusions here, except to state that the peculiarities in the findings of McClellan & Tekin leave me unconvinced that they have discovered a causal connection between "Stand Your Ground" statutes and an increase in homicide rates. See also supra at n. 12.

The same is true of the findings in Cheng & Hoekstra. Their study is similar to that off McClellan & Tekin in that it attempts something that is nearly impossible: It tries to isolate the effects of "Stand Your Ground" laws from the many other differences between states like Texas, Florida, and Arizona (which have adopted "Stand Your Ground" statutes) and states like New York, Illinois and Ohio (which have not).

Cheng & Hoekstra (whose study is also cited favorably by Commissioner Yaki) used a difference within difference approach. They make two findings: (1) If "Stand Your Ground" statutes have any deterrence effect on robbery, aggravated assault and burglary, it is a very small one; and (2) On the other hand, states that passed "Stand Your Ground" statutes (which the authors repeatedly call "Castle Doctrine" laws) experienced a very substantial uptick in homicide following the adoption of those statutes.

just as some believe they have evidence in support.[51] But I am skeptical that overly ambitious and complex regressions can be the basis of any conclusions.[52] And I submit that anybody who is

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If I were, for example, a Texas state legislator, I'm not sure I'd be as discouraged as Cheng & Hoekstra at the evidence of the deterrence effect of "Stand Your Ground" laws. They admit that it may well be the case that "Stand Your Ground" laws caused a 2.5% decrease in aggravated assault, a 1.9% decrease in robbery, and a 2.1% decrease in burglary. The authors evidently think that is small potatoes. In fact, however, that would represent 1,822 fewer aggravated assaults, 633 fewer robberies, and 3, 123 burglaries in Texas each year.

That may not be as impressive as the effect one might get from hiring 500 more police officers or cutting the unemployment rate by a percentage point, but it takes far less from the public purse than the former and it is more within the control of the state legislature than the latter. If I were a Texas legislator I would be more than delighted to learn that such a small tweak to state law had such a beneficial effect.

But Texas legislators shouldn't get excited. Cheng & Hoekstra did not find such an effect; they simply could not eliminate the possibility. Moreover, their finding that "Stand Your Ground" states have experienced an 8% uptick in homicide relative to other states (after controlling for many differences between the groups of states) demonstrates that their analysis did not take into consideration all the differences between the groups of states. It is simply implausible that "Stand Your Ground" statutes would have such a profound effect on homicide rates. It would be easier to believe that "Stand Your Ground" laws cause cancer. Consequently, their findings on deterrence must be viewed with great skepticism as well.

Why is the 8% implausible? "Stand Your Ground" laws affect only a very small number of homicide cases. Very few homicides involve claims of self defense. See text and note at n.10. Of those that do, most involve situations in which it is obvious that the individual invoking self defense had no opportunity to flee. The danger was imminent. Of those where flight would have been possible, many occur in the home, where the right to stand one's ground is longstanding and universal across American jurisdictions.

[51] A Texas study in this regard is interesting. In September of 2007, Texas passed a "Stand Your Ground" law. In November of the same year, in suburban Houston, resident Joe Horn shot and killed two burglars who had been burglarizing his neighbor's home. He said they were coming at him in the neighbor's front yard. The incident was recorded on a 911 tape with the 911 operator urging Horn to wait for the police to arrive rather than to insert himself into the situation. See https://en.wikipedia.org/wiki/Joe_Horn_shooting_controversy. Rightly or wrongly under Texas law, the grand jury declined to indict.

Researchers found that through the period leading up to August 31, 2008, burglaries decreased in Houston, but not in Dallas. Ling Ren, Yan Zhang & Jihong Solomon Zhao, *The Deterrent Effect of the Castle Doctrine Law on Burglary in Texas: A Tale of Outcomes in Houston and Dallas*, 61 Crim & Delinquency 1127 (2012). Did Texas' "Stand Your Ground" law have any causal role to play here? It is certainly plausible that the intense publicity surrounding the Horn case deterred burglaries. But did Horn's action have any causal connection to the "Stand Your Ground" law? If he would have acted the same way under previous law, then the answer would be "no." But it is difficult to say. Maybe he would not have.

[52] A good example is a study of Arizona's 2006 "Stand Your Ground" law. Looking at data from 2002 to 2011, its author found that the number of robberies was not decreased by the passage of that legislation and (more importantly) the number of homicides was not increased. This suggests the change was not very important. Curiously, it nevertheless found that the number of suicides had increased. Since it is not obvious why "Stand Your Ground" legislation would lead to more suicides (but not more homicides), it seems odd to attribute the suicide increase to the "Stand Your Ground" law. But the author seems inclined to do so anyway. Mitchell B. Chamlin, *An Assessment of the Intended and Unintended Consequence of Arizona's Self-Defense, Home Protection Act*, 37 J. Crime & Justice 327 (2014). Perhaps the Great Recession, which commenced in 2008 and lasted many years, is a more likely contributor to rising suicide rates over this period. Mayowa Oyesanya, Javier Lopez-Morinigo, and Rina Dutta, *Systematic Review of Suicide in Economic Recession*, 5 World J. Psych. 243 (2015). See also David K. Humphreys, Antonion Gasparrini & Douglas J. Wiebe, *Evaluation the Impact of Florida's "Stand Your*

certain about the answer to this question for all time is making a mistake. It depends on a host of unknowables. And the answer may be different for one culture than it is for another. It is thus a question that needs to be left to the political judgment of legislatures or, in the absence of a judgment by a legislature, by the courts.

The best I can offer may be this: I very much doubt the effect is large, no matter which direction it goes. Stand Your Ground laws apply to only a few cases, and most citizens are unaware of their existence. Some advocates of the "Duty to Retreat" have tried to suggest that the states that have adopted "Stand Your Ground" rules tend to be those that value a gun-slinging image. One would think, however, the longer a state has employed a "Stand Your Ground" rule, the more dangerous they would be to live in (and the longer a state had been known for its "Duty to Retreat" rule, the more tranquil it would be). If so, that would mean Ohio and Indiana should be among the most dangerous, and Alabama among the most tranquil. Yet I doubt many Americans view those states that way.

The second argument in favor of a "Stand Your Ground" rule is a prudential one that arises out of the difficulty of knowing for sure whether a defendant could have safely retreated. One could say that "Stand Your Ground" rules create an irrebuttable presumption that if an otherwise innocent person decides to stand his ground rather than flee, that is was because he could not have safely retreated. Such a presumption will be wrong sometimes, but it may be right more often than a rule that juries must decide in each case whether the defendant could have safely retreated.[53]

Beale, of course, disputed the wisdom of such a rule. He argued that just because it is often difficult to judge whether retreat would have been safe it "by no means follows that retreat when certainly safe should be less requisite. "

One can conceptualize taking the issue away from the jury by irrebuttably presuming an otherwise innocent defendant could not have safely retreated as adhering to the logic of Justice Holmes: Expecting detached calculation from someone who is in danger of imminent death is to expect far too much. Give them a break.

I don't need to resolve these issues. Legislatures are in a better position to judge these matters than a law professor. But here's the bottom line: Whether one supports or opposes "Stand Your

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*Ground" Self-Defense Law on Homicide and Suicide by Firearm*, JAMA Intern. Med. 44 (January 2017)(making extraordinary claims out of proportion to the number of self-defense cases).

[53] The argument for this approach may be stronger in more recent centuries than it was in 16th century England, when altercations were more likely to involve swords, knives or fists than guns. In 19th-, 20th- or 21st-century United States, the likelihood that guns will be involved increased very substantially. The proportion of cases in which retreat will be ill-advised thus increased substantially. At some point, it arguably makes sense to presume irrebuttably that retreat would have been unsafe.

Ground" laws, Attorney General Holder's view that they are somehow novel is incorrect. This is a debate that has been going on a long time.

**THE APPARENTLY WIDESPREAD NOTION THAT "STAND YOUR GROUND" LAWS ALLOW AN INDIVIDUAL TO USE DEADLY FORCE IF HE SIMPLY "FEELS THREATENED" IS FALSE.**

The argument that "Stand Your Ground" laws allow anyone who feels threatened is frequently repeated.[54] Even former President Obama appears to have bought into this misimpression. Shortly after George Zimmerman was acquitted in the Trayvon Martin case, Obama asked what would have happened had the roles been reversed: "[D]o we actually think that [Trayvon Martin] would have been justified in shooting Mr. Zimmerman, who had followed him in car, because he *felt threatened*?"[55]

But it is an ill-informed question. Florida's "Stand Your Ground" law as to the use of deadly force is as follows:

> **776.012 Use or threatened use of force in defense of person.**— …
> (2) A person is justified in using or threatening to use deadly force if he or she ***reasonably*** believes that using or threatening to use such force is ***necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony***. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

Note that what I am discussing here is not really about "Stand Your Ground" itself. This goes to the contours of basic self-defense law.[56] Florida requires a reasonable belief that one is being

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[54] Commissioner Yaki appears to be among those who buy into this misconception. See Yaki Statement at 16-17.

See also Robert Leider, *Understanding Stand Your Ground*, Wall Street Journal (April 18, 2012)("Many have asserted that in Florida anyone who believes he is in danger can use deadly force. … These perceptions of the law are wrong. … [Florida's Stand Your Ground law requires that an individual] "reasonably believe that the aggressor threatened him with death, great bodily injury, or intended to commit a forcible felony ….").

[55] *Transcript: Obama Addresses Race, Profiling and Florida Law*, CNN (July 19, 2013)(italics added), available at https://www.cnn.com/2013/07/19/politics/obama-zimmerman-verdict/index.html. See also *Editorial: "Stand Your Ground" Doesn't Stand Common Sense Test*, York Dispatch (October 24, 2018)("[T]here should be little argument that so-called "stand your ground" laws, which allow armed citizens to shoot and kill assailants if they feel threatened, are unnecessary invitations to vigilante homicide and need to be rescinded"), available at https://www.yorkdispatch.com/story/opinion/editorials/2018/10/24/editorial-stand-your-ground-doesnt-stand-common-sense-test/1737906002/.

[56] In tort law, only someone who ***reasonably*** believes that his assailant is about to inflict an ***intentional contact or other bodily harm*** and that he is thereby put in ***peril of death, serious bodily harm or ravishment***, which can be ***safety prevented only by the immediate use of force*** likely to cause death or serious bodily harm. See Restatement (Second) of Torts § 65 (1965). The Model Penal Code, on the other hand, is a little different and is considered

threatened. And not just any threat of intentional contact or bodily harm will do. The threat has to put the individual in peril of death, great bodily harm or the imminent commission of a forcible felony (e.g. rape). Moreover, the threat must be imminent. If there is time to call the police, then the police must be called. Any suggestion that deadly force can be employed if someone merely feels threatened is thus false. [57]

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unusual: It doesn't mention reasonableness (though it does require "the actor [to] believe[] that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." Model Penal Code § 3.04(1). The Model Penal Code, however, does impose a duty to retreat (in places other than the home). I can see the argument for the Model Penal Code's failure to require the use of deadly force in self-defense to be reasonable for criminal law purposes (although for tort law purposes there needs to remain, at the very least, a requirement of reasonableness). One could argue that incarcerating or otherwise punishing a person who happens to be unreasonably timid and anxious serves no purpose. But if one is going to take that position it is important that one stick with a duty to retreat. "Stand Your Ground" jurisdictions should (and do) require reasonableness.

[57] A variation of this argument involving the concept of "implicit bias" appears in Commissioner Yaki's Statement. Commissioner Yaki does not define the term "implicit bias," but I understand him to be referring to the "attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner." http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/. In the racial context, this is often interpreted to mean that many white persons who profess not to be racially biased nonetheless actually are unconsciously biased against racial and ethnic minorities and that this unconscious bias means that whites frequently discriminate against racial and ethnic minorities without being aware of it.

Talk of "implicit bias" is fashionable these days, especially among those involved in the diversity training business – perhaps in large part because a free, readily available online test purports to be able to measure an individual's "implicit bias" against African Americans. See Project Implicit, available at https://implicit.harvard.edu/implicit/takeatest.html. There is, however, significant reason for skepticism that the test accurately measures an individual's actual bias.

A full discussion of the merits of the IAT lies beyond the scope of this Statement, but for overviews of the major criticisms of the IAT, *see generally* Jesse Singal *Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job*, New York Magazine, January 11, 2017, available at https://www.thecut.com/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html; Olivia Goldhill, *The world is relying on a flawed psychological test to fight racism*, Quartz, December 3, 2017, available at https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight-racism/; Althea Nagai, The Implicit Association Test: Flawed Science Tricks Americans into Believing They Are Unconscious Racists, The Heritage Foundation, December 12, 2017, available at https://www.heritage.org/science-policy/report/the-implicit-association-test-flawed-science-tricks-americans-believing-they; Heather Mac Donald, *Are We All Unconscious Racists?* City Journal, Autumn 2017, available at https://www.city-journal.org/html/are-we-all-unconscious-racists-15487.html.

The important part is this: Even if one is less skeptical of implicit bias than I am, it still makes little sense to use implicit bias as an argument against the "reasonable belief" component of "Stand Your Ground" laws. As discussed above, the plain text of the Florida law requires that the person must believe that the use of force is "*necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony*." The perception that an individual is threatening merely because of his or her race would not qualify under this standard. Moreover, the "reasonable belief" standard in not just a component of "Stand Your Ground" laws, it is part of traditional self defense. I trust that Commissioner Yaki would not abrogate traditional self defense—i.e. impose upon Americans who are being threatened with imminent death or great bodily harm have a duty to die simply because the implementation of that defense will never be perfect.

**THE APPARENTLY WIDESPREAD NOTION THAT INITIAL AGGRESSORS CAN BENEFIT FROM "STAND YOUR GROUND" LAWS IS ALSO FALSE.**

Another common misunderstanding is that an initial aggressor can invoke the right to stand his ground. This, too, is mistaken. From the time of Coke and Blackstone, it has been repeatedly articulated that if two individuals are engaging in mutual combat with each other, such that they are both in some way at fault, there is a duty to retreat if it can be done safely before deadly force may be employed. This aspect of the rule is important to the law. Consider, for example, the case of duelists—perhaps the quintessential mutual combatants. Without a duty to retreat on the part of mutual combatants, whoever prevails in the duel would be able to claim that since the other party intended to kill him they are in the clear for acting in self-defense. Imposing a duty to retreat on both of them preserves to the state the ability to come down hard on duelists.

The case for denying the initial aggressor in an attack on an innocent victim is a fortiori an exception to traditional "Stand Your Ground" rules. Blackstone discusses the *innocent* victim's right of self-defense without any qualifier. Coke is explicit that the *innocent* victim has no duty to give way.

This was evident in American cases as well. For example, in *Erwin v. State*, the Indiana Supreme Court placed an important qualifier on its "Stand Your Ground" rule. It stated that a man "who is without fault" "is not obliged to fly from his assailant." It never suggested that an initial aggressor (i.e. a man who is with fault) is entitled to that same option.

Most important, the Florida "Stand Your Ground" law is not to the contrary. It explicitly states that the justification of self-defense is *not* available to an individual who:

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

Fla. Stat. § 776.041 (2014).

Determining what constitutes the "initial aggression" (or in the words of the Florida statute, what "initial[] provo[cation]" may sometimes require a little thought. The most obvious cases involve physical attacks. Indeed, physical attacks are by far the most typical initial aggression. If Alice walks up to Bob and punches him in the nose, and Bob, fearful that Alice is about to cause him seriously bodily harm, draws his gun, Alice has a duty to retreat, if she can do so safely, rather than to draw her gun and kill Bob. Why? Because Alice initially provoked Bob (§ 776.041(2)). This is so even though the punch in the nose may itself be only a misdemeanor and not a felony under § 776.041(1).

At the other end of the spectrum, certain things are *not* considered initial aggression or provocation. An individual has the right to discuss a sensitive subject, to engage in an inconsiderate act, to demand an explanation of the other individual's actions, and even to hurl insulting epithets at the other individual without forfeiting any aspect of his right to defend himself.[58]

One can easily see how a nation that is careful to protect free expression in so many ways would be careful not to define the exercise of free expression as "aggression" or "provocations."

Are there things that don't constitute violence that are classed as initial aggression or provocation? Professor Cynthia Ward in "Stand Your Ground and Self-Defense" cites "being caught sleeping with the deceased wife" as a possible example.[59] But, if so, that goes far beyond inconsiderate acts, insults, or annoying interrogations.

The Trayvon Martin case was thus not a case of initial aggression by Zimmerman. Some have suggested that George Zimmerman somehow "provoked" Martin by following him and asking him why he was there. But this does not rise to the level of aggression or provocation as those terms have been understood.

Even if it did constitute aggression or provocation within the meaning the Florida statute, Zimmerman would likely qualify under § 776.041 (2)(b) as having "withdraw[n] from physical contact with [Martin] and indicate[d] clearly to [Martin] that he … desire[d] to withdraw and terminate the use or threatened use of force, but [Martin] continue[d] … the use or threatened use of force.

The uncontradicted evidence was not just that he had turned away and was surprised by Martin, who had turned the tables and was now following Zimmerman. The jury found that Martin had knocked Zimmerman to the ground and was beating Zimmerman's head into the concrete sidewalk when Zimmerman pulled out his gun and shot Martin. At that point, retreat was impossible.

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[58] 2 Wharton's Criminal Law § 128 (5th ed. 1993), quoted in Ward at 114.

[59] Ward at 114 (citing id.).

Might the jury have been wrong about the facts? Anything is possible (though the scrapes on the back of Zimmerman's head must have gotten there somehow). But the point remains that the problem in that case was not the Florida "Stand Your Ground" law.

**CONCLUSION:**

The Commission is publishing this transcript more than seven years after Trayvon Martin passed away—without any reference to its independent research on the subject . The controversy over his death and over "Stand Your Ground" laws has largely faded out of the headlines. Some members of this Commission might be inclined to bemoan this report not being as relevant as it might have been had it been ready closer to 2012. I disagree. Cooler heads should have prevailed early on during the debate over Stand Your Ground laws. But they did not. Now that years have passed, the Commission could have made a modest contribution to that debate by publishing the results of its research. It chose to bury those results instead only because they did not go in the direction the Commission's majority was hoping for.