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PREPARED FOR THE

COMMITTEE OF THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,  
AND HUMAN RIGHTS

OF THE UNITED STATES SENATE

**HEARING:**

**“Stand Your Ground” Laws:**

**Civil Rights and Public Safety Implications of the  
Expanded Use of Deadly Force**

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## INTRODUCTION

Thank you Chairman Durbin, Ranking Member Cruz, and members of the Subcommittee on the Constitution, Civil Rights, and Human Rights. My name is Ronald Sullivan and I am a Clinical Professor of Law at the Harvard Law School where I serve as faculty director of the Harvard Criminal Justice Institute and the Harvard Trial Advocacy Workshop. I teach and write in the areas of criminal law, criminal procedure, legal ethics, and race theory. Prior to my faculty appointments at the Harvard and Yale law schools, I served as Director of the Public Defender Service for the District of Columbia, where I represented hundreds of indigent clients in thousands of matters as a staff attorney, General Counsel, and, then, as Director.

I am here pursuant to this Subcommittee's request that I provide written and oral testimony regarding the impact of Stand Your Ground ("SYG") laws.<sup>1</sup>

Scholars often begin the introductory course in criminal law with a nineteenth century English case, called *Regina v. Dudley and Stephens*.<sup>2</sup> *Dudley and Stephens* tells the story of the crew of an English vessel caught in a terrible storm, and lost at sea, some 1000 miles away from land.<sup>3</sup> The crew's predicament was dire. They were virtually without sustenance for 20 days. During the first 12 days, the crew subsisted on two 1 lb. cans of turnips and a small turtle.<sup>4</sup> For the final eight days, they had no food whatsoever and only small amounts of rainwater they were able to catch in their hats.<sup>5</sup>

Realizing that their death was imminent, Dudley and Stephens decided that one of the crew had to be sacrificed in order to save the lives of the others. They reasoned that but for this drastic act, the entire crew would certainly perish.<sup>6</sup> As such, on the 20<sup>th</sup> day of being lost at sea, with "no sail in sight, or any reasonable prospect of relief,"<sup>7</sup> Dudley and Stephens decided to kill a boy, who was already significantly closer to death than anyone else.<sup>8</sup> As was a "custom of the sea" at that time, the crew sustained themselves by eating one of their fellows.<sup>9</sup>

Dudley and Stephens ultimately were rescued, nursed back to health, and then arrested and prosecuted for the homicide. They sought to be excused from criminal liability on the theory that their actions were motivated by necessity—that in order to save their own lives and the life of the other crew member, it was necessary that one life be sacrificed.<sup>10</sup>

It was not disputed that the crew was near death, and that the decedent probably would have died prior to the others.<sup>11</sup> It was further not disputed that the crew had no reasonable hope that they would be rescued.<sup>12</sup> Although the crew argued that the killing was justified as their only option, the court wisely disagreed.<sup>13</sup>

In reaching its decision, the court fully recognized that even though the crew was under great stress and legitimate fear of death, and that most would have felt impelled to behave as Dudley and Stephens did in the face of their own pending death, the law could not condone the taking of life.<sup>14</sup> Strikingly, the court reasoned that it "was often compelled to set up standards which we could not ourselves satisfy."<sup>15</sup> In so writing, the judges were

admitting that they, too, might have engaged in the same conduct as Dudley and Stephens when face-to-face with their own mortality, but the law sounds on an aspirational register. Often the law insists on our better angels.

One reason, therefore, that scholars teach *Dudley and Stephens* is to foreshadow a principle that sits at the heart of the Anglo-American juridical tradition. Human life is sacred<sup>16</sup> and the law will justify the taking of human life by civilians only in narrowly defined circumstances.<sup>17</sup>

## THE LAW OF SELF-DEFENSE

It is in this context that I discuss the law of self-defense, particularly as applied to the use of lethal force. Simply put, the law of self-defense holds that a person, who is not the aggressor, is justified in using deadly force against an adversary when he reasonably believes that he is in imminent danger of death or serious bodily injury.<sup>18</sup>

Here, I should bracket law enforcement officials for whom the rules differ. It is axiomatic that law enforcement is privileged to use force in a way different from average citizens.<sup>19</sup> In appropriate circumstances, law enforcement also is privileged to use deadly force.<sup>20</sup> Citizens, who are not law enforcement, by contrast, are not similarly privileged. Their ability to use deadly force in the face of an adversary's aggression is constrained by our self-defense law.

U.S. law has treated the privilege to use deadly force with circumspection. Inasmuch as the sanctity of human life sits as a central norm in our law, the law of self-defense imposes important limitations on its use. Five important concepts are necessary for a fulsome understanding of self-defense law: 1) proportionality, 2) temporality, 3) reasonability, 4) first-aggressor limitations, and 5) duty to retreat.

First, any use of force by a non-law enforcement officer requires that such force is proportional to the force employed by the aggressor.<sup>21</sup> For example, a light shove on the shoulder by an aggressor does not authorize the use of deadly force in response. Such force would be disproportionate to the initial aggression.

The second important concept in the law of self-defense is temporality. The individual seeking to insulate herself from criminal liability on a self-defense theory must reasonably believe that a threat is imminent.<sup>22</sup> This limitation is quite sensible. The threat has to be immediate. Any other rule would permit an individual to leave a dangerous situation, plan revenge, and engage in vigilante justice, all the while being protected by the law. For many self-evident reasons, this state of affairs is not desirable.

Third, an individual's fear must be reasonable.<sup>23</sup> That is to say, the law will not countenance every subjective fear of death or serious bodily injury. Rather, the law insists that the fear be objectively reasonable, the sort of fear that would be apprehended by a reasonable person.<sup>24</sup>

Importantly, and fourth, U.S. law normally makes the self-defense justification unavailable to the so-called first-aggressor. Put simply, one cannot start a fight, and then, when the victim retaliates, rely on a theory of self-defense to avoid criminal liability. The law only allows innocents or those with “clean hands” to be protected by the self-defense justification.<sup>25</sup>

Finally, and central to the national debate on Stand Your Ground laws, is the concept of duty to retreat. At common law, before using deadly force, the actor must retreat, if it was safe for her to do so. Without this limitation, our society could revert to a Wild West mentality where citizens take the law into their own hands.

## GENEALOGY OF STAND YOUR GROUND LAWS

The foregoing represents important limitations enshrined in the common law’s treatment of self-defense. The Stand Your Ground laws, by contrast, which are subject of today’s hearing, diverge from the requisites of common law in two important respects. The first is the duty to retreat. The second is the presumption of reasonable fear.

In order to understand the significance of this divergence, a brief history of how Stand Your Ground laws emerged is in order. Modern Stand Your Ground laws and our modern self-defense doctrine sprung from the same medieval English law root.<sup>26</sup> More specifically, English law and its early Anglo-American progeny held the duty to retreat to be a constitutive part of any justification to use lethal force.<sup>27</sup> That is, so long as one could safely retreat, he must do so prior to employing lethal force in response to an attack.<sup>28</sup> There was one exception to this principle at common law: a person had no duty to retreat in the home.<sup>29</sup> This exception to the general duty to retreat is commonly known as the “Castle Doctrine.”<sup>30</sup> It emerged from a strong seventeenth century norm which gave voice and vocabulary in the maxim that a “man’s home is his castle.”<sup>31</sup>

Early Anglo-American law existed in this form for much of the nineteenth and twentieth centuries.<sup>32</sup> The law of self-defense required an actor to safely retreat from threatening or dangerous situations, except when in the home. In this way, courts balanced the value of sanctity of human life and an individual’s right to protect self, family, and property.<sup>33</sup> During this period, several states remained faithful to this self-defense/Castle Doctrine model, including Alabama,<sup>34</sup> Delaware,<sup>35</sup> Florida,<sup>36</sup> Georgia,<sup>37</sup> Iowa,<sup>38</sup> New Jersey,<sup>39</sup> South Carolina,<sup>40</sup> and Vermont.<sup>41</sup>

Other states began to tweak the Castle Doctrine slightly by extending the non-retreat norm to spaces outside of the home.<sup>42</sup> Importantly, however, these states nonetheless expressly limited this expanded Castle Doctrine to instances where the actor reasonably believed the threat was “imminent.”<sup>43</sup> Where no reasonably imminent threat existed, the actor still had a duty to retreat. States that adopted this model include Arkansas,<sup>44</sup> Colorado,<sup>45</sup> the District of Columbia,<sup>46</sup> Kentucky,<sup>47</sup> Michigan,<sup>48</sup> Montana,<sup>49</sup> Nebraska,<sup>50</sup> Nevada,<sup>51</sup> New York,<sup>52</sup> North Carolina,<sup>53</sup> Ohio,<sup>54</sup> Oregon,<sup>55</sup> Rhode Island,<sup>56</sup> South Dakota,<sup>57</sup> Virginia,<sup>58</sup> West Virginia,<sup>59</sup> and Wisconsin.<sup>60</sup>

The conceptual space between self-defense laws in these two groups of states is not much. The former contains an absolute privilege of non-retreat in the home, while the latter extends that privilege to areas where one reasonably is in imminent fear of death or serious bodily injury. In fact, the latter formulation is not functionally different from traditional self-defense doctrine. It still limits the use of lethal force by insisting that an adversary's threat be "imminent" and the actor's fear be "reasonable."

This expansion of the Castle Doctrine in these states, therefore, is markedly different from the extant Stand Your Ground laws in Florida and other states for reasons I shall discuss in detail below. Suffice it to say, until 2005, variations notwithstanding, the law of self-defense and the Castle Doctrine remained fairly consistent.

Only nine states, by the early twentieth century, had completely abandoned the duty to retreat model: California,<sup>61</sup> Illinois,<sup>62</sup> Indiana,<sup>63</sup> Kansas,<sup>64</sup> Mississippi,<sup>65</sup> Missouri,<sup>66</sup> Oklahoma,<sup>67</sup> Texas,<sup>68</sup> and Washington.<sup>69</sup> But, even these states required an actor seeking the benefit of the self-defense justification to make a showing of "reasonableness."<sup>70</sup>

It is important here to note the values that motivated the expansion of the Castle Doctrine in the U.S. These changes grew out of decidedly twisted conceptions of "honor, chivalry, and the right to freedom from attack . . . entrenched in Southern society."<sup>71</sup> The formal law began to reflect then-existing societal norms sounding in "cultural acceptance of homicide as a method for resolving personal difficulties."<sup>72</sup> In other words, private law enforcement—bar fights and the like—was normative in dispute resolution.<sup>73</sup> Here, we see phrases like "true-man" and "stand your ground" creep into the self-defense doctrine.<sup>74</sup> But, even with this creep, and the abdication of the duty to retreat, a showing of reasonableness remained the burden of the one who sought the justification.

I raise these motivations to point out that private law enforcement is no longer and should no longer be a motivation to ease the restrictions on the legally authorized use of lethal force by private citizens. While the Clanton-McLaury gang might deem the Shootout at the O.K. Corral an appropriate mechanism to resolve disputes, the U.S. has matured considerably since the Old West. Presumably, no one wants to encourage a sea of bullets cascading through our City Centers. Yet, radical departures from the common law moorings of self-defense law ultimately and inescapably will lead to the very sort of pernicious private law enforcement that troubled so many Americans in the Trayvon Martin case.

This brings me to versions of Stand Your Ground laws that have recently populated so many states' statutory codes. Indeed, a seismic shift came in self-defense law when Florida promulgated its Stand Your Ground Law in 2005.<sup>75</sup> Florida's law, and states that follow its model, differ drastically from the common law in three important respects.

First, these instantiations of Stand Your Ground completely removed the duty to retreat from any space in which a person has a legal right to be.<sup>76</sup> This emboldens individuals to escalate confrontation, even deadly confrontation, whereas an alternative rule would decrease the likelihood of deadly exchanges. The Trayvon Martin matter is a case in

point. The very existence of this law emboldened Mr. Zimmerman to disregard the command of the 911 dispatcher and follow Trayvon Martin, arrogating law enforcement—what should be a public function—to himself. This private law enforcement attitude, made possible and emboldened by Florida’s Stand Your Ground law, coupled with a permissive concealed carry law, was the “but for” cause of Trayvon Martin’s death. But for the fact that Zimmerman exited his vehicle that evening, Trayvon Martin would be alive today.

Second, the law shifts the presumption regarding the reasonableness of one’s fear of death or serious bodily injury.<sup>77</sup> This departure from the common law under Florida’s regime carries a presumption that one who uses lethal force in her home or automobile is in reasonable fear. The actor, therefore, is presumed to be in reasonable fear of imminent death or grievous bodily injury. This presumption abrogates the need for someone who is responsible for a homicide to demonstrate the necessity for using lethal force. In so doing, the positive law insulates those already predisposed to forms of vigilante justice from having to affirmatively show the necessity of using lethal force and that the force was proportional to the imposed threat.

Third, the law provides for immunity from criminal arrest and civil liability. Such immunity has the invidious potential to encourage the very sort of vigilantism that ordinary law eschews. Indeed, it encourages a Wild West mentality that protects the “true man” who engages in battle. George Zimmerman’s recent domestic dispute illustrates the impact the law has on behavior.

In September, Zimmerman’s estranged wife, Shellie Zimmerman called 911 alleging that George Zimmerman was barricaded in her garage and threatening her and her father with a gun. The 911 exchange is telling, and I reproduce it, in pertinent part, below:

PD: 911 do you need police, fire or medical?

We do have units en route to you ma'am. Is he still there?

Shellie Zimmerman: Yes he is and he is trying to shut the garage door on me.

PD: Is he inside now?

SZ: No, he is in his car and he continually has his hand on his gun and he keeps saying step closer and he is just threatening all of us.

PD: Step closer and what?

SZ: And he is going to shoot us.

PD: OK.

These are the most ominous lines of the entire exchange. In real time,<sup>78</sup> Shellie Zimmerman is reporting that George Zimmerman “keeps saying step closer.” If this is true,<sup>79</sup> it demonstrates how knowledge of one’s rights in a Stand Your Ground jurisdiction animates aggressive forms of behavior. It is as if Mr. Zimmerman is goading Mrs. Zimmerman to enter a space in which Mr. Zimmerman could plausibly claim he had a right—a presumption, even—to “stand his ground.”

We are fortunate that no one was injured, or worse—killed, during this domestic altercation, but this provides a real life example of potential negative externalities that flow from Stand Your Ground laws—laws that encourage a daring, frontiersman mentality. There is a reason proponents and opponents, alike, refer to these laws as “shoot first.” The moniker does not derive from whole cloth.

Supporters of Stand Your Ground laws often cite crime reduction as a justification for the promulgation of such laws. I submit that the empirics do not bear this argument out, and I discuss the empirical evidence, in detail, below. Beyond the empirics, though, Stand Your Ground laws engender unintended consequences that sound in how people behave in Stand Your Ground states. Any law that invites these forms of private law enforcement carries with it the potential for misuse. Consider the following organizational justification for armed self-defense:

We exist “to protect the weak, the innocent, and the defenseless, from the indignities, wrongs and outrages of the lawless, the violent, and the brutal.”

This vocabulary is in form similar to the language deployed by supporters of Stand Your Ground laws. On its face, it reads as a noble calling, a calling for which reasonable citizens would be loath to object. The reader may be surprised, however, to learn that the above mission statement comes from the Ku Klux Klan’s founding documents.<sup>80</sup> This should serve as a cautionary example. Private law enforcement has the potential to breed forms of domestic terrorism. Citizens are neither trained nor prepared to engage in law enforcement functions, particularly in this increasingly heterogeneous polity.

Regrettably, the proliferation of Stand Your Ground laws, modeled after Florida’s statute, appears not to be the result of thoughtful legislative deliberation. Instead, interest groups and interested financial concerns were central to the passage of Florida’s law and the many that followed.

The National Rifle Association (“NRA”) played a significant role in developing Florida’s statute. Florida had long been a fertile state for new NRA-backed laws, beginning with the 1987 passage of Florida’s expansive “shall issue” concealed carry law.<sup>81</sup> Florida’s Stand Your Ground legislation was championed by former NRA president Marion Hammer, a prominent advocate in the Florida statehouse, and was passed quickly into

law in April 2005.<sup>82</sup> The bill's sponsor claimed the bill was inspired by a post-hurricane incident when an elderly man shot an intruder in his trailer and had to wait several months before prosecutors decided his shots were justified.<sup>83</sup> But the NRA's real agenda in Florida had been to promote an environment where expansive concealed carry laws were paired with expanded permission to use deadly force. NRA lobbyist Chris Cox articulated this vision in 2011, stating that "Florida, which can fairly be said to have launched the modern reform of state self-defense laws by adopting its Right-to-Carry law in 1987, continued in its trendsetting role in 2005 by adopting a comprehensive Castle Doctrine law. . . . Just as we work toward the day when all states allow all good citizens of age to carry firearms for protection, we will work until all states fully protect the right of law-abiding people to use force in defense of themselves and one another, without fear of prison or bankruptcy."<sup>84</sup> Scholars have speculated that the NRA's push for these laws was motivated at least in part by the decline in gun ownership in America, pointing out that as fewer Americans engaged in hunting and sport shooting the NRA has sought to liberalize concealed carrying and provide more legal cover for those who use guns in populated areas.<sup>85</sup>

In August 2005, Marion Hammer proposed model legislation that was nearly identical to Florida's law to the Criminal Justice Task Force of the American Legislative Exchange Council ("ALEC").<sup>86</sup> ALEC is an ideologically conservative organization that brings hundreds of corporate representatives and thousands of state legislators together at conferences where they jointly draft model legislation that they then work to pass in state legislatures.<sup>87</sup> According to an NRA bulletin, Hammer's presentation was "well-received" and her Florida-style legislation was adopted as ALEC model legislation titled the "Castle Doctrine Act."<sup>88</sup> From there, the model legislation spread quickly to statehouses across the country, with thirteen other states enacting bills in 2006 that incorporated provisions from the model.<sup>89</sup> The rapid spread of Stand Your Ground was a reflection of ALEC's customary effectiveness in advancing its model legislation in state legislatures; ALEC has claimed that lawmakers "typically introduced more than 1,000 bills based on model legislation each year and passed about 17 percent of them."<sup>90</sup>

Since 2005, over half the states have now passed laws based in whole or in part on Florida's law and ALEC's model legislation.<sup>91</sup> After Trayvon Martin's death in 2012, ALEC was criticized for its role in spreading Stand Your Ground and issued a statement claiming that its model law "is designed to protect people who defend themselves from imminent death and great bodily harm. It does not allow you to pursue another person. It does not allow you to seek confrontation. It does not allow you to attack someone who does not pose an imminent threat."<sup>92</sup> This claim did not reflect the reality of the model law's provisions, nor did it prevent a number of ALEC's corporate members from cutting ties with the organization.<sup>93</sup> ALEC subsequently announced in April 2012 that it would disband its task force that created the model Stand Your Ground law.<sup>94</sup> However, state legislators continue to introduce bills based on ALEC's model, with one watchdog organization identifying ten such bills introduced so far this year, two of which became law.<sup>95</sup>

### **Dates When States Adopted Stand Your Ground Laws—post 2005<sup>96</sup>**

2005	Florida
2006	Alabama (part 1), Alaska (part 1), Arizona (part 1), Georgia, Idaho,* Indiana (part 1), Kansas, Kentucky, Louisiana, Michigan, Mississippi, Oklahoma, South Carolina, South Dakota
2007	Missouri, North Dakota, Tennessee, Texas
2008	Ohio, West Virginia, Wyoming
2009	Montana
2010	Arizona (expansion)
2011	Arizona (expansion), New Hampshire, Nevada, North Carolina, Pennsylvania, Wisconsin
2012	Indiana (expansion)
2013	Alabama (expansion), Alaska (expansion)

\* Idaho only passed civil immunity in 2006.

### **STAND YOUR GROUND: PUBLIC SAFETY & CIVIL RIGHTS**

Proponents of Stand Your Ground laws often point to public safety and a reduction of crime as evidence of the efficacy of these laws. The empirical data appears to contradict these assertions. In fact, two studies find that homicide rates have increased—not decreased—in Stand Your Ground states as compared to states that have not changed their Stand Your Ground laws. In a recent Texas A&M empirical study, Mark Hoekstra and Cheng Cheng set out compelling evidence<sup>97</sup> indicating that “the laws do not deter burglary, robbery, or aggravated assault.”<sup>98</sup> In contrast, they lead to a statistically significant 8 percent net increase in the number of reported murders and non-negligent manslaughters.”<sup>99</sup> Hoekstra and Cheng go on to conclude, “[T]here is considerable evidence that these laws have generated an increase in homicides—more killings that would not otherwise have occurred absent the change in law.”<sup>100</sup>

Similarly, in a study conducted by the National Bureau of Economic Research, Chandler B. McClellan and Erdal Tekin question the claim that enactment of Stand Your Ground laws increase the “cost of violence”<sup>101</sup> and lower crime rates overall.<sup>102</sup> McClellan and Tekin, using compiled monthly data from the CDC,<sup>103</sup> suggest that both gun deaths and homicides have increased since the enactment of Stand Your Ground laws<sup>104</sup> and “rather than increase the costs of violence [to a would be attacker], SYG laws decrease them by expanding the range of legal defenses available to an attacker.”<sup>105</sup> In other words, the authors argue that Stand Your Ground laws benefit criminal elements, rather than deter them.

Other studies do not make quite as strong a claim, but they refute any suggestion that Stand Your Ground laws correlate with crime reduction. Prof. Robert Spitzer, for example, undertook a comprehensive analysis of empirical studies, and reached a set of conclusions that should give legislators pause.<sup>106</sup> First, Prof. Spitzer concluded that there is no evidence that Stand Your Ground laws reduce or suppress crime.<sup>107</sup> He writes:

None of these studies closes the book on the consequences of stand your ground laws, but they all point to the same conclusions. First, there was and is no identifiable benefit to be had by their enactment or the gun carrying that has typically accompanied it. There is no evidence that they reduce or suppress crime, or generate any societal benefit, beyond perhaps a feeling among gun carriers that they are acting justly or beneficially when potential self-defense situations arise.<sup>108</sup>

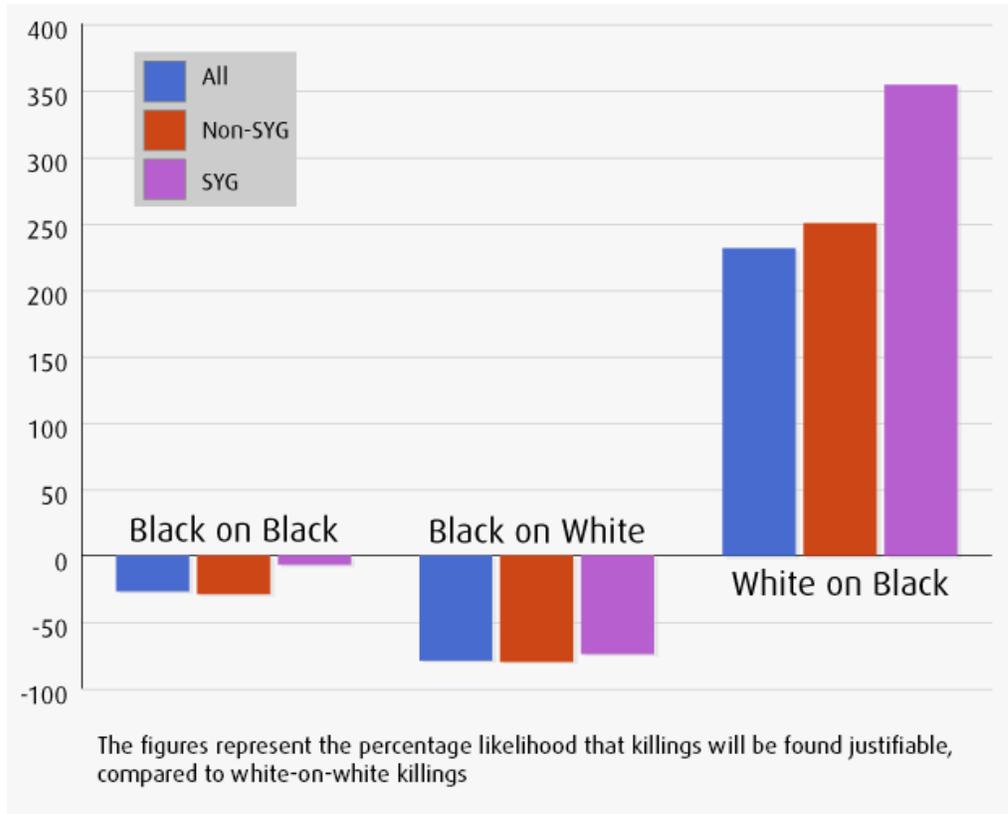
To be fair, these and like studies have limitations owing to the particular tools they employ. Causal claims, therefore, become difficult to prove.<sup>109</sup> This brings me to some promising research done by Anton Strezhnev. He has cross-researched to see whether these findings hold when using a different approach to causal inference.<sup>110</sup> Strezhnev writes,

Florida's Stand Your Ground law did not have a deterrence effect on homicide, and may in fact have increased the state's murder rate.<sup>111</sup> This and other evidence strongly suggests that state governments should re-think their approach to self-defense laws. While politically appealing from a "tough on crime" perspective, Stand Your Ground laws likely do much more harm than good.<sup>112</sup>

In sum, while the empirical data may not be sufficiently robust to responsibly make a causal claim in either direction, the weight of the research appears to point in one direction. Stand Your Ground laws have little, if any, impact on homicide reduction. And, the promulgation of these laws appears to correlate with an increase in certain types of violent crime.<sup>113</sup> This data, or the absence of data that show Stand Your Ground laws as having the desired effect of crime reduction, should give legislatures pause, particularly given the very many negative externalities associated with these laws.

Finally, the Senate should pay particular attention to the proliferation of Stand Your Ground laws as they impact the civil rights of citizens of color. It is beyond dispute that Blacks and other racial and ethnic minorities are disproportionately, negatively impacted by our criminal justice system.<sup>114</sup> We know that rates of conviction in the criminal justice system correlate with the race of the victim.<sup>115</sup> Defendants of all races are more likely to be convicted if the victim is white.<sup>116</sup> This disparity is even more pronounced when comparing dispositions in Stand Your Ground states versus non-Stand Your Ground states. In non-Stand Your Ground states, for example, Whites are 250 percent more likely to prevail on a theory of justified homicide of a black person as compared to a white victim. By contrast, in Stand Your Ground states Whites are 354 percent more likely to prevail when the victim is black.<sup>117</sup> A recent Urban Institute study found that in cases comparable to Trayvon's—where a younger black man is killed by an unfamiliar older white man with a handgun—"the rate of justifiable homicide[] is almost six times higher."<sup>118</sup> Ultimately, this study found that "Stand Your Ground laws appear to exacerbate those [racial] differences, as cases overall are significantly more likely to be justified in SYG states than in non-SYG states."<sup>119</sup>

Below is a graphic representation of this disparity generated by Frontline.<sup>120</sup>



### **CONCLUSION: TRAYVON & TREY**

I shall close, if I may, by making the following observations about the Trayvon Martin case. This case best illustrates why these Stand Your Ground laws are so destructive to our cities and states. I am honored to share the dais with Sybrina Fulton, Trayvon Martin's mother. And, I extend my heartfelt sympathies for your tragic loss.

Many have argued that the jury in the Trayvon Martin case did exactly what they were instructed to do. They held Florida to its burden of proving the case beyond a reasonable doubt by applying Florida law to the facts presented at trial. But, even for those who contend that the verdict was correct in that it was consistent with Florida law, the result nonetheless seems to have offended the moral sensibilities of many Americans. Why? Quite simply, the incontrovertible fact is that an armed adult followed and killed an unarmed and innocent black child.

Zimmerman's acquittal was made possible because Florida's Stand Your Ground and concealed weapons laws conspired to set the perfect background conditions for an acquittal.

Earlier I mentioned that most jurisdictions deny the protection of the self-defense justification to the first-aggressor. In the Trayvon Martin case, the jury clearly found that Zimmerman was not the first-aggressor in a strict legal sense. That is, at the point in time when Zimmerman fired the fatal shot, the jury presumably decided that Mr. Zimmerman was the victim. And, the verdict indicates that the state did not present sufficient proof that Zimmerman engaged in any conduct that would constitute provocation under Florida law.

Notwithstanding the requisites of first-aggressor status under Florida's positive law, it is equally clear that Zimmerman was the first-aggressor in a moral sense. He was an armed adult who pursued a defenseless child against the command of the police dispatcher.<sup>121</sup> I also strongly suspect that Zimmerman followed Trayvon Martin because he could not apprehend any lawful reason for a young black male to be walking through his Florida middle-class neighborhood. To Zimmerman, Martin's blackness served as a crude proxy for criminality. This is racial profiling in its purest and ugliest form. And, this ugly form of racial profiling led to the untimely and tragic death of an unarmed American child.

In sum, Florida's Stand Your Ground and concealed carry laws permitted Zimmerman to carry a loaded firearm, disregard the clear directive of the 911 dispatcher, pursue Trayvon Martin, and then stand his ground when Martin presumably and reasonably sought to defend himself against a threat.

The most unfortunate outcome of this shameful episode in our juridical history is the two-fold message it sends. First, it tells Floridians that they can incorrectly profile young black children, kill them, and be protected by a legal justification if ever tried for the resulting death.

But, second, this decision sends an even more troubling message to young black children who happen to walk down public streets of Florida. They might reasonably infer that if accosted by a threatening adult stranger, who is not law-enforcement, the child should use all reasonable force—including deadly force—to protect himself. What is the alternative: The innocent child dies and the offending adult is exonerated?

This unfortunate lesson instructs children of color in any Stand Your Ground state, not just Florida. I consider myself fortunate to live in a jurisdiction where the Stand Your Ground laws have not been voted into law. Indeed, I have an African-American son who is just shy of his thirteenth birthday and whose name, ironically, is "Trey." What advice would I give him if we lived in a Stand Your Ground state? In light of verdicts like the Zimmerman exoneration, and the data I cite above that correlates so strongly with race, I regret that the only responsible advice would be the following: if you feel threatened by a stranger, use all reasonable force, up to and including deadly force, to protect yourself. Or, as both proponents and opponents of Stand Your Ground laws contend, "shoot first" and ask questions later.<sup>122</sup>

To be sure, this is not a world that I want my son to grow up in. I would rather not counsel him in using lethal force when being profiled by vigilantes. That said, however, I

would rather my Trey be alive and able to argue that he “stood his ground” than dead and portrayed by lawyers and media alike as the personification of a stereotypical black male criminal.

This is not a desirable America for anyone. But, these laws might well inspire a rabid vigilantism, and corresponding responses, in the body politic. Rather than making us safer as Stand Your Ground proponents contend, we could degenerate into a Wild West atmosphere where none of us are safe.

Thank you for providing me the opportunity and space to share my thoughts with you. I urge this Subcommittee and the full Senate to take the lead in helping America think through the consequences of Stand Your Ground laws. It is imperative, in my view, that our elected officials help to create a country where citizens are not shooting and killing each other. I respectfully suggest that we permit police officials to police, and citizens go about the business of building peaceful communities.

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<sup>1</sup> I am deeply grateful for the expert research assistance provided by Dehlia Umunna, Teliza Ain Adams, Asmara Carbado, Ashley Lewis, and Kyle Wirshba. Any errors, of course, are mine alone.

<sup>2</sup> *Regina v. Dudley & Stephens*, [1884] 14 Q.B.D. 273 (Lord Coleridge C.J.) (Eng.).

<sup>3</sup> *Id.* at 273–74.

<sup>4</sup> *Id.* at 274.

<sup>5</sup> *Id.* at 273–74.

<sup>6</sup> *Id.* at 278 (“Homicide is excusable through unavoidable necessity and upon the great universal principle of self-preservation, which prompts every man to save his own life in preference to that of another, where one of them must inevitably perish.”); *see United States v. Holmes*, 26 F. Cas. 360 (E.D. Pa. 1842) (No. 15,383).

<sup>7</sup> *Id.* at 275.

<sup>8</sup> *Id.* at 274.

<sup>9</sup> NEIL HANSON, *THE CUSTOM OF THE SEA*, 123, 172 (John Wiley & Sons, Inc., 2000) (1999).

<sup>10</sup> *Dudley & Stephens*, 14 Q.B.D. at 287; *see Holmes*, 26 F. Cas. at 360, 367 (finding before the protection of the law of necessity can be invoked, a case of necessity must exist, the slayer must be faultless, he must owe no duty to the victim).

<sup>11</sup> *Dudley & Stephens*, 14 Q.B.D. at 274. The defendants contended that the boy’s death was imminent due to his diminished state.

<sup>12</sup> *Id.* at 279, 287 (“[I]t appears sufficiently that the prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best.”).

<sup>13</sup> *Id.* at 273, 279, 282–83, 285–86.

<sup>14</sup> *See id.* at 279, 285 (“The American case . . . in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but . . . the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly . . . be an authority satisfactory to a court in this country.”).

<sup>15</sup> *Id.* at 288 (“It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy.”)

<sup>16</sup> *See Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (“In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction.”).

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- <sup>17</sup> See Norman L. Cantor & George C. Thomas, III, *Legal Bounds of Physician Conduct Hastening Death*, 48 BUFF. L. REV. 83, 154–55 (2000) (“Government reinforces the sanctity of human life principle by banning all killings, including self-killings, except in extremely limited circumstances.”).
- <sup>18</sup> MODEL PENAL CODE § 3.04 (2012).
- <sup>19</sup> *Graham v. Davis*, 880 F.2d 1414 (D.C. Cir. 1989).
- <sup>20</sup> *Tennessee v. Garner*, 471 U.S. 1, 4 (1985) (noting that deadly force can be used when it is “necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others”).
- <sup>21</sup> See *United States v. Black*, 692 F.2d 314, 318 (4th Cir. 1982).
- <sup>22</sup> See *United States v. Holt*, 79 F.3d 14, 16 (4th Cir. 1996) (rejecting defendant's argument for self-defense for failure to demonstrate imminent threat of death or bodily injury).
- <sup>23</sup> *United States v. Daija*, 529 F. Supp. 2d 465 (S.D.N.Y. 2008).
- <sup>24</sup> There are exceptions to this rule. Consider, for example, battered women syndrome. *Paine v. Massie*, 339 F.3d 1194, 1199 (10th Cir. 2003) (“Several of the psychological symptoms that develop in one suffering from the syndrome are particularly relevant to the standard of *reasonableness* in self-defense.”) (internal quotation marks omitted).
- <sup>25</sup> One can only use force that is necessary to escape one’s attacker. *United States v. Peterson*, 483 F.2d 1222, 1230, (D.C. Cir. 1973). Thus, in the event that victim uses excessive force on the first aggressor, the victim will assume the role of aggressor and the first aggressor will assume the role of victim.
- <sup>26</sup> L.W.B., Annotation, *Homicide: Duty to Retreat When Not on One’s Own Premises*, 18 A.L.R. 1279 (1922).
- <sup>27</sup> RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 4 (1991); Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 567 (1903).
- <sup>28</sup> Darrell A.H. Miller, *Guns As Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1342 (2009) (“[V]iolent self-defense could be justified if the victim of such violence made every effort to avoid the confrontation.”).
- <sup>29</sup> *Id.* at 1341 (citing MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 486 (Thomas Dogherty ed., London, E. Rider 1800) (1678)); Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL’Y 504, 505 (2007) (citing Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903)).
- <sup>30</sup> Miller, *supra* note 28, at 1341.
- <sup>31</sup> Catalfamo, *supra* note 29, at 506.
- <sup>32</sup> L.W.B., Annotation, *Homicide: Duty to Retreat When Not on One’s Own Premises*, 18 A.L.R. 1279 (1922).
- <sup>33</sup> 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, 111–34 (2010).
- <sup>34</sup> *Morton v. Bradley*, 30 Ala. 683 (1857).
- <sup>35</sup> *State v. Talley*, 33 A. 181 (Del. O. & T. 1886).
- <sup>36</sup> *Danford v. State*, 43 So. 593 (1907).
- <sup>37</sup> See *Heard v. State*, 70 Ga. 597 (1883).
- <sup>38</sup> *State v. Thompson*, 9 Iowa 188 (1859).
- <sup>39</sup> *State v. Wells*, 1 N.J.L. 424 (1790).
- <sup>40</sup> *State v. McIntosh*, 18 S.E. 1033 (1894), *overruled by State v. Belcher*, 685 S.E.2d 802 (2009).
- <sup>41</sup> *State v. Roberts*, 21 A. 424 (1891).
- <sup>42</sup> L.W.B., Annotation, *Homicide: Duty to Retreat When not on One’s Own Premises*, 18 A.L.R. 1279 (1922).
- <sup>43</sup> *Id.*
- <sup>44</sup> *McPherson v. State*, 29 Ark. 225 (1874).
- <sup>45</sup> *Enyart v. People*, 180 P. 722 (Colo. 1919).
- <sup>46</sup> *Marshall v. United States*, 45 App. D.C. 375 (1916).
- <sup>47</sup> *Holloway v. Commonwealth*, 74 Ky. 344 (1875).

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- <sup>48</sup> Pond v. People, 8 Mich. 150 (1860).
- <sup>49</sup> State v. Rolla, 55 P. 523 (Mont. 1898).
- <sup>50</sup> See Willis v. State, 61 N.W. 254 (1894).
- <sup>51</sup> State v. Kennedy, 7 Nev. 374 (1872).
- <sup>52</sup> Shorter v. People, 2 N.Y. 193 (1849).
- <sup>53</sup> State v. Mazon, 90 N.C. 676 (1884).
- <sup>54</sup> Erwin v. State, 29 Ohio St. 186 (1876).
- <sup>55</sup> State v. Gibson, 73 P. 333 (Or. 1903).
- <sup>56</sup> See State v. Sherman, 18 A. 1040 (1889).
- <sup>57</sup> State v. Jaukkuri, 168 N.W. 1047 (1918).
- <sup>58</sup> See McCoy v. Commonwealth, 99 S.E. 644 (1919).
- <sup>59</sup> State v. Clark, 41 S.E. 204 (1902).
- <sup>60</sup> Miller v. State, 119 N.W. 850 (1909).
- <sup>61</sup> People v. Gonzales, 12 P. 783 (Cal. 1887).
- <sup>62</sup> Hammond v. People, 64 N.E. 980 (1902).
- <sup>63</sup> Runyan v. State, 57 Ind. 80 (1877).
- <sup>64</sup> State v. Reed, 37 P. 174 (1894).
- <sup>65</sup> Long v. State, 52 Miss. 23 (1876).
- <sup>66</sup> State v. Hudspeth, 51 S.W. 483 (1899).
- <sup>67</sup> Kirk v. Territory, 60 P. 797 (Okla. 1900).
- <sup>68</sup> W. v. State, 2 Tex. App. 460 (1877).
- <sup>69</sup> State v. Carter, 45 P. 745 (Wash. 1896).
- <sup>70</sup> L.W.B., Annotation, *Homicide: Duty to Retreat When Not on One's Own Premises*, 18 A.L.R. 1279 (1922) (“If the person assailed is without fault, and in a place where he has a right to be, and put in reasonable apparent danger of losing his life or receiving great bodily harm, he need not retreat, but may stand his ground, repel force by force, and if, in the *reasonable* exercise of his right of self-defense, he kills his assailant, he is justified.”) (emphasis added).
- <sup>71</sup> Catalfamo, *supra* note 29, at 505.
- <sup>72</sup> *Id.* at 508.
- <sup>73</sup> *Id.*
- <sup>74</sup> Miller, *supra* note 28, at 1340.
- <sup>75</sup> FLA. STAT. § 776.013 (2005).
- <sup>76</sup> *Id.* at § 776.013 (3) (“A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.”).
- <sup>77</sup> *Id.* at § 776.013 (1).
- <sup>78</sup> In a court of law, these 911 remarks likely would be admissible in evidence under either an excited utterance theory or a present sense impression theory. See Fed. R. Evid. 803(2)–(3).
- <sup>79</sup> George Zimmerman, through his attorney, denied the allegations and the authorities found no gun on Mr. Zimmerman’s person. See Josh Voorhees, *Shellie Zimmerman Changes Her Story, Says George Didn't Threaten Her With a Gun*, SLATE (Sept. 10, 2013, 1:11 PM), [http://www.slate.com/blogs/the\\_slatest/2013/09/10/george\\_zimmerman\\_gun\\_shellie\\_zimmerman\\_changes\\_her\\_story\\_says\\_husband\\_didn.html](http://www.slate.com/blogs/the_slatest/2013/09/10/george_zimmerman_gun_shellie_zimmerman_changes_her_story_says_husband_didn.html).
- <sup>80</sup> Miller, *supra* note 28, at 1348 (citing *The Ku Klux Klan Organization and Principles* (1868), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 498–500 (Henry Steele Commager ed., Prentice Hall 1973)).
- <sup>81</sup> See Alex Altman, *Beyond Trayvon: How “Stand Your Ground” Laws Spread from Florida to Half the U.S.*, TIME (Mar. 28, 2012), <http://swampland.time.com/2012/03/28/beyond-trayvon-how-stand-your-ground-laws-spread-from-florida-to-half-the-u-s/>.
- <sup>82</sup> *Id.*

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<sup>83</sup> See Ben Montgomery, *Florida's "Stand Your Ground Law" was Born of 2004 Case, but Story Has Been Distorted*, TAMPA BAY TIMES (Apr. 14, 2012), <http://www.tampabay.com/news/publicsafety/floridas-stand-your-ground-law-was-born-of-2004-case-but-story-has-been/1225164>.

<sup>84</sup> Chris W. Cox, *Castle Doctrine Legislation: Protecting Your Right to Protect Yourself*, NRA INSTITUTE OF LEGISLATIVE ACTION (Apr. 1, 2012), <http://www.nraila.org/news-issues/articles/2012/castle-doctrine-legislation-protecting-your-right-to-protect-yourself.aspx>. See generally CTR. FOR MEDIA & DEMOCRACY, *Press on ALEC Exposed*, SOURCEWATCH, [http://sourcewatch.org/index.php?title=Press\\_on\\_ALEC\\_Exposed](http://sourcewatch.org/index.php?title=Press_on_ALEC_Exposed) (last modified, Jul. 24, 2013).

<sup>85</sup> Robert J. Spitzer, *The NRA's silent motive*, SALON (Apr. 3, 2012), [http://www.salon.com/2012/04/03/the\\_nras\\_silent\\_motive/](http://www.salon.com/2012/04/03/the_nras_silent_motive/). See generally CTR. FOR MEDIA & DEMOCRACY, *supra* note 84.

<sup>86</sup> *NRA Presents ALEC Model Legislation in Grapevine, Texas*, NRA INSTITUTE OF LEGISLATIVE ACTION (Aug. 12, 2005), [http://www.prwatch.org/files/NRA\\_2005.png](http://www.prwatch.org/files/NRA_2005.png). See generally CTR. FOR MEDIA & DEMOCRACY, *supra* note 84.

<sup>87</sup> Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?pagewanted=all>. See generally CTR. FOR MEDIA & DEMOCRACY, *supra* note 84.

<sup>88</sup> *NRA Presents ALEC Model Legislation in Grapevine, Texas*, NRA INSTITUTE OF LEGISLATIVE ACTION (Aug. 12, 2005), [http://www.prwatch.org/files/NRA\\_2005.png](http://www.prwatch.org/files/NRA_2005.png). See generally CTR. FOR MEDIA & DEMOCRACY, *supra* note 84.

<sup>89</sup> Adam Weinstein, *How the NRA and Its Allies Helped Spread a Radial Gun Law Nationwide*, MOTHER JONES (June 7, 2012, 3:10AM), <http://www.motherjones.com/politics/2012/06/nra-alec-stand-your-ground>. See generally CTR. FOR MEDIA & DEMOCRACY, *supra* note 84.

<sup>90</sup> Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?pagewanted=all>. See generally CTR. FOR MEDIA & DEMOCRACY, *supra* note 84.

<sup>91</sup> See *Shoot First Laws Policy Summary*, L. CENTER TO PREVENT GUN VIOLENCE (July 18, 2013), <http://smartgunlaws.org/shoot-first-laws-policy-summary/>. See generally CTR. FOR MEDIA & DEMOCRACY, *supra* note 84.

<sup>92</sup> Press release, *ALEC Statement on 'Stand Your Ground' Legislation*, American Legislative Exchange Council (Mar. 26, 2012), <http://www.alec.org/alec-statement-on-stand-your-ground-legislation-32612/>. See generally CTR. FOR MEDIA & MEDIA & DEMOCRACY, *supra* note 84.

<sup>93</sup> David Ingram, *Conservative group retreats on "stand your ground,"* REUTERS (Apr. 17, 2012), <http://www.reuters.com/article/2012/04/17/usa-alec-idUSL2E8FH7DY20120417?feedType=RSS&feedName=everything&virtualBrandChannel=11563>.

<sup>94</sup> *Id.* See generally CTR. FOR MEDIA & DEMOCRACY, *supra* note 84.

<sup>95</sup> CTR. FOR MEDIA & DEMOCRACY, *ALEC at 40: Turning Back the Clock on Prosperity and Progress*, SOURCEWATCH (Aug. 2013), [http://www.sourcewatch.org/images/8/88/ALEC\\_report\\_2013.pdf](http://www.sourcewatch.org/images/8/88/ALEC_report_2013.pdf).

<sup>96</sup> Specific state bills enacted into law are as follows: 2006 Ala. Acts 303; S. 283, 2006 Leg., Reg. Sess. (Ala. 2006); 2013 Ala. Acts 283, S.B. 286, 2013 Leg., Reg. Sess. (Ala. 2013); S. 200, 24th Leg., 2nd Sess. (Alaska 2006); H.R. 24, 28th Leg., 1st Sess. (Alaska 2013); S. 1145, 47th Leg., 2nd Reg. Sess. (Ariz. 2006); SB 1469 (Ariz. 2011) HB 2629 (Ariz. 2010); S. 436, 2006 Leg., Reg. Sess. (Fla. 2005); S. 396, 148th Gen. Assemb., Reg. Sess. (Ga. 2006); S. 1441, 58th Leg., 2nd Reg. Sess. (Idaho 2006); H.R. 1028, 114th Gen. Assemb., 2nd Reg. Sess. (Ind. 2006); S. 1, 117th Gen. Assemb., 2nd Reg. Sess. (Ind. 2012); S. 366, 2006 Leg., Reg. Sess. (Kan. 2006); S. 38, 2006 Leg., Reg. Sess. (Ky. 2006); H.R. 89, 2006 Leg., Reg. Sess. (La. 2006); 2006 Mich. Acts 309; S. 2426, 2006 Leg., Reg. Sess. (Miss. 2006); S. 62, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007); H.R. 228, 61st Leg., Reg. Sess. (Mont. 2009); Assemb. 321, 76th Leg., Reg. Sess. (Nev. 2011); S. 88, 2011 Gen. Court, Reg. Sess. (N.H. 2011); H.R. 650, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011); H.R. 1319, 60th Assemb., Reg. Sess. (N.D. 2007); S. 184, 127th Gen. Assemb., Reg. Sess. (Ohio 2008); H.R. 2615, 50th Leg., 2nd Reg. Sess. (Okla. 2006); H.R. 40, 2011 Gen. Assemb., Reg. Sess. (Pa. 2011); H.R. 4301, 2006 Gen. Assemb., 116th Sess. (S.C. 2006) H.R. 1134, 2006 Leg., 81st Sess. (S.D. 2006); H.R. 1907, 104th Gen. Assemb., Reg. Sess. (Tenn. 2007); S. 378, 2007 Leg., 80 Sess. (Tex. 2007); S. 145, 2008 Leg., Reg. Sess. (W.Va. 2008); Assemb. 69, 2011 Leg., Reg. Sess. (Wis. 2011); H.R. 137,

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2008 Leg., Reg. Sess. (Wyo. 2008). See generally Chandler B. McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries* 39–40 (Nat'l Bureau of Econ. Research, Working Paper No. 18187, 2012), available at <http://www.nber.org/papers/w18187>; CTR. FOR MEDIA & DEMOCRACY, *supra* note 84; *Shoot First Laws Policy Summary*, *supra* note 91.

<sup>97</sup> The study, conducted using standard regression procedures, measured the causal effects within state variations, while controlling for potential confounding variables, in SYG laws to examine their effect on homicides and violent crime. Anton Strezhnev, *Some More Evidence That Florida's Stand Your Ground Laws Increased Firearm Homicide Rates*, CAUSAL LOOP (Jul. 16, 2013, 3:29 PM),

<http://causalloop.blogspot.com/2013/07/some-more-evidence-that-floridas-stand.html>.

<sup>98</sup> Mark Hoekstra & Cheng Cheng, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from the Castle Doctrine 2, 4, 16–17* (Nat'l Bureau of Econ. Research, Working Paper No. w18134, 2012), available at <http://ssrn.com/abstract=2079878>.

<sup>99</sup> *Id.* at 4, 28.

<sup>100</sup> *Id.* at 4–5, 23.

<sup>101</sup> McClellan & Tekin, *supra* note 96, at 23–24.

<sup>102</sup> *Id.*

<sup>103</sup> Centers for Disease Control.

<sup>104</sup> McClellan & Tekin, *supra* note 96, at 23–24.

<sup>105</sup> Strezhnev, *supra* note 97 (“Because of the vagueness of the ‘presumption of reasonable fear,’ and the absence of many third-party witnesses, SYG laws stack the deck to favor the assailant by raising the prosecution’s evidentiary burden.”).

<sup>106</sup> Robert J. Spitzer, *Perspectives on the ‘Stand Your Ground’ Movement* (forthcoming 2013).

<sup>107</sup> *Id.* at 11–13. Prof. Spitzer analyzes empirical studies and compared crime rates before and after Stand Your Ground laws were passed in “model” states to crime trends in the “blind” states where there was no Stand Your Ground law. This practice is standard in social science policy evaluation studies. See *id.* The empirical studies created “indicators” that were adjusted for permutations in state economic conditions, variances in state policing and law enforcement policies, and demographic composition shifts. *Id.* These indicators allowed for several different empirical specifications, in which the researchers’ model could be applied. *Id.* The findings “suggest that their key results are robust to alternative specifications of the empirical model.”

<sup>108</sup> *Id.* at 13.

<sup>109</sup> Strezhnev, *supra* note 97 (“While the method employed by Prof. Spitzer—parametric regression—is a ubiquitous and powerful tool in analyzing casual inference, it relies heavily on a standard regression model.”). Traditionally, this method can lead to false conclusions when the model does not run parallel to the data. *Id.* To make a positive correlation to whether “x causes z” one must compare the factual (actual event) to the counterfactual (what would have happened if a factor had been different). *Id.* The problem with Spitzer’s reliance on the expert’s causal inferences on the effect of Stand Your Ground law is that the studies have no counterfactual information. *Id.* Only the result is known. *Id.* In most cases, the counterfactual is estimated based on the data given. *Id.* Ideally, it should be identical to the factual, with variance in only one characteristic. *Id.* In this case, Stand Your Ground laws and violent crime, as opposed to just violent crime rates alone. *Id.* But, to date, no state has instituted identical Stand Your Ground legislation, so we have no dependable counterfactual reference point. *Id.*

<sup>110</sup> Strezhnev, *supra* note 97. Instead of regression, Strezhnev employs the Synthetic Control Method developed by Abadie, Diamond, and Hainmueller to estimate the effect of Florida’s 2005 Stand Your Ground law on firearm homicide rates. *Id.* Strezhnev contends that his use of synthetic control methods compares the factual time series of the outcome variable in a unit exposed to the treatment (Florida) with a “synthetic” counterfactual constructed by weighting a set of “donor” units not exposed to the treatment (states without Stand Your Ground) such that the synthetic control matches the factual unit as closely as possible on potential confounding variables and pre-treatment outcomes. *Id.* By forcing the weights to be positive and sum to one, this method ensures that the estimated counterfactual stays within the bounds of the data, thereby guarding against exaggerated causal claims. *Id.*

<sup>111</sup> The trajectory of Florida’s homicide rate is certainly unusual and difficult to attribute to pure chance. Strezhnev, *supra* note 97. Supporters of Florida’s Stand Your Ground law point to reductions in the violent

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crime rate since 2005 as evidence that the law's deterrent effect is working. *Id.* However, just looking at a trend as evidence of causation makes no sense, because in order to assign causality, one needs to make a comparison with some counterfactual case with “indicators.” *Id.* Violent crime rates in Florida have been declining overall since 2000, so it is unlikely that the downward trend would not have existed had Stand Your Ground not been passed. *Id.*

<sup>112</sup> Strezhnev, *supra* note 97.

<sup>113</sup> Hoekstra & Cheng, *supra* note 98, at 2, 4, 16–17.

<sup>114</sup> Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2120 (2011) (“Odds of a death sentence for those suspected of killing Whites are approximately three times higher than the odds of a death sentence for those suspected of killing Blacks.”); *Racial Disparity in NYPD Stops-and-Frisks: Preliminary Report of UF-250 Data From 2005 Through June 2008*, CENTER FOR CONSTITUTIONAL RIGHTS (January 15, 2009), <http://ccrjustice.org/files/Report-CCR-NYPD-Stop-and-Frisk.pdf> (outlining disparity in NYPD “stop and frisk” policy); *Report to Senate and House Committees on the Judiciary, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (February 26, 1990), U.S. GOVERNMENT ACCOUNTABILITY OFFICE, <http://www.gao.gov/assets/220/212180.pdf>.

<sup>115</sup> Spitzer, *supra* note 106.

<sup>116</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987) (citing the statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth, which showed that defendants received the death sentence 4.3 times more when the victim was white than black even when 39 nonracial variables were considered for racial disparity); see also *Report to Senate and House Committees on the Judiciary*, *supra* note 114 (finding 82% of the 28 studies evaluated provided by the committee evidence that the race of the victim influenced whether a defendant would receive a death sentence).

<sup>117</sup> Sarah Childress, *Is There Racial Bias in “Stand Your Ground” Laws*, FRONTLINE (July 31, 2012, 12:40 PM), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/is-there-racial-bias-in-stand-your-ground-laws/>; see also Robert Cross, *How to Prevent the Next Trayvon Martin: Repealing Stand Your Ground Laws that Provide a License for Vigilantism* (forthcoming 2013).

<sup>118</sup> John K. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data*, URBAN INSTITUTE, 9 (July 2013), available at <http://www.urban.org/UploadedPDF/412873-stand-your-ground.pdf>.

<sup>119</sup> *Id.*

<sup>120</sup> John Roman, *Is American Criminal Justice Color-Blind? The Statistics Say No*, METRO TRENDS BLOG (July 16, 2013), <http://blog.metrotrends.org/2013/07/american-criminal-justice-color-blind-statistics/>.

<sup>121</sup> This conduct does not violate Florida law. See FLA. STAT. § 776.012(2) (2005).

<sup>122</sup> See, e.g., Mollie Reilly, *Michael Bloomberg: George Zimmerman Verdict Shows ‘Shoot-First’ Laws Must Go*, THE HUFFINGTON POST (June 15, 2013 11:33AM), [http://www.huffingtonpost.com/2013/07/14/michael-bloomberg-george-zimmerman\\_n\\_3595064.html](http://www.huffingtonpost.com/2013/07/14/michael-bloomberg-george-zimmerman_n_3595064.html).