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From Threat to Victim: Why Stand Your Ground Laws Are Inherently Prejudiced and Do Nothing to Further Justice

RENE PEREZ¹

Abstract: *Stand Your Ground laws give jurors too much leeway in determining what constitutes a reasonable threat in defense cases.² By removing the traditional duty to retreat, the reasonableness determination makes or breaks a case and inherently discriminates against people of color. This is because reasonableness can all too easily become a character determination instead of an objective adjudgment. Because Stand Your Ground is present at the investigator’s discretion stage, the prosecutorial discretion stage, and finally the judicial stage through jury instructions and juror bias—there is a unique platform for implicit bias to dictate how defendants are advantaged or disadvantaged in their defense. This article examines the history of Stand Your Ground and how it has affected people of color, particularly Black men. The effectiveness of Stand Your Ground on violence, in general, is also examined. Finally, selected solutions are offered in the form of a change to normative reasonableness standards and removing the civil and criminal immunities granted by Stand Your Ground statutes.*

The victim who is able to articulate the situation of the victim has ceased to be a victim: he or she has become a threat.

—James Baldwin³

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2. While Stand Your Ground laws apply to law enforcement as well, the protections and immunities afforded to law enforcement is beyond the scope of this article, and instead focuses on the application to “civilians.” See, e.g., Frances Robles, *Florida’s ‘Stand Your Ground’ Law Applies to Police, Too, Court Rules*, N.Y. TIMES (Mar. 21, 2012), <https://www.nytimes.com/2018/12/13/us/florida-stand-your-ground-police.html>.

3. Baldwin’s use of the word “threat” is a synonym for “empowered,” as the victim has identified their oppression and has called the occupier out. Baldwin wrote that “Harlem [was] policed like occupied territory,” and perhaps the Black man in America has never ceased to

I. INTRODUCTION

On February 23, 2020, Ahmaud Arbery was jogging, unarmed on the road near Brunswick, Georgia, when he was confronted by armed father and son, Gregory McMichael and Travis McMichael. The confrontation would end with Arbery shot dead.⁴ In April of 2020, District Attorney George E. Barnhill wrote a memo that claimed that while the McMichaels initiated the encounter, Arbery “initiated the fight.” Barnhill cited Georgia’s Stand Your Ground statute in arguing that Travis McMichael “was allowed to use deadly force to protect himself” when “Arbery grabbed the shotgun.” Barnhill went so far as to posit that Arbery caused the shooting when he pulled on the gun, before recommending that no charges be made for lack of probable cause.⁵ A viral video later showed that “by the time the clearly unarmed Arbery is tussling with Travis McMichael, who is holding the long gun, a shot has already been fired.”⁶ After the video, the McMichaels were arrested and charged with murder and aggravated assault.⁷ However, before the video, it seemed as no charges were to be filed despite the McMichaels bringing firearms to a confrontation they initiated.⁸ Still, the fact that the McMichaels are white and Arbery was Black increases the likelihood that they will be

be policed like occupied territory. With Stand Your Ground, the oppressor has usurped the role of victim in order to become a threat again and the survivors are struggling to call out this new legally-backed oppression. Mychal Denzel Smith, *From ‘Victim’ to ‘Threat’*, NATION (Feb. 10, 2015), <https://www.thenation.com/article/archive/victim-threat-james-baldwin-and-demands-self-respect/>.

4. Richard Fausset, *Georgia Prosecutor Will Bring Shooting of Ahmaud Arbery to Grand Jury*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/us/ahmaud-arbery-killing-georgia.html>.

5. Richard Fausset, *Two Weapons, a Chase, a Killing and No Charges*, N.Y. TIMES (Apr. 26, 2020), <https://www.nytimes.com/2020/04/26/us/ahmed-arbery-shooting-georgia.html>.

6. Joanna Walters, *Georgia to Consider Charges in Killing of Unarmed Black Jogger as Video Emerges*, GUARDIAN (May 6, 2020), <https://www.theguardian.com/us-news/2020/may/05/georgia-brunswick-shooting-ahmaud-arbery-grand-jury>.

7. *Id.*; Christina Carrega & Morgan Winsor, *Father and Son Charged With Murder of Unarmed Black Man Ahmaud Arbery in Georgia*, ABC NEWS (May 7, 2020), <https://abcnews.go.com/US/mother-unarmed-black-man-killed-georgia-speaks-ahmaud/story?id=70552216>.

8. A grand jury later indicted all three defendants on nine counts: malice murder, four counts of felony murder, two counts of aggravated assault, false imprisonment and criminal attempt to commit false imprisonment. See Richard Fausset, *Suspects in Ahmaud Arbery’s Killing Are Indicted on Murder Charges*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/ahmaud-arbery-shooting-murder-indictment.html>. Additionally, because Georgia has no Hate Crime statute, Travis McMichael faces no hate crime charges despite standing over Arbery’s lifeless body and calling him a “fucking n[——].” Madison J. Gray, *Ahmaud Arbery Killing: Assailant Hurling Racial Slur While Standing Over His Dead Body*, BET (June 4, 2020), <https://www.bet.com/news/national/2020/06/04/ahmaud-arbery-travis-mcmichael-murder-trial-racial-slur.html>.

acquitted by 354%, rather than if the racial make-up were reversed.⁹ How are two people who shoot a jogger to death not immediately charged with murder? How is it that they are instead sent home? Perhaps more importantly: why does race benefit the defense beyond accounting for implicit bias?¹⁰ The answer to those questions, and the McMichaels' main defense as of the writing of this article, is Stand Your Ground.¹¹

Stand Your Ground law(s) ("SYG"), or Shoot First laws by critics, allow the use of deadly force in public for self-defense, regardless of whether a safe retreat is available.¹² The majority of states now have some form of SYG statute.¹³ Proponents claim that SYG statutes are designed to protect people who defend themselves from imminent death and great bodily harm.¹⁴ However, SYG laws have statistically escalated violence, show no evidence that they deter crime, and seem to stifle the criminal justice system.¹⁵ Moreover, there is a disparity in the way SYG laws are applied to Black people and other people of color compared to white persons: evidence shows that immunity determinations based on police discretion disparately impact Black shooters.¹⁶

SYG came to the national forefront in the wake of the killing of Trayvon Martin by George Zimmerman. On the evening of February 26, 2012, Martin, a 17-year-old Black male, was walking to his father's home in a gated community in Sanford, Florida.¹⁷ Zimmerman, a 28-year-old mixed-race

9. See Sarah Childress, *Is There Racial Bias in Stand Your Ground Laws?*, PBS (July 31, 2012), <https://www.pbs.org/wgbh/frontline/article/is-there-racial-bias-in-stand-your-ground-laws/>; see also *infra* note 66.

10. See *Understanding Implicit Bias*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> (last visited Oct. 7, 2020). Implicit bias refers to the "attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner." *Id.*

11. Janell Ross, *Arbery Case Exemplifies Abuse of 'Stand Your Ground,' But the Damage Is Broad and Systemic*, NBC NEWS (May 26, 2020), <https://www.nbcnews.com/news/nbcblk/arbery-case-exemplifies-abuse-stand-your-ground-damage-broad-systemic-n1212816>.

12. *Shoot First Laws*, COALITION TO STOP GUN VIOLENCE (Sept. 7, 2019), <https://www.csgv.org/issues-archive/652-2/>; Hendrick DeBoer & Mark Randall, *The Castle Doctrine and Stand-Your-Ground Law*, CONN. OFF. OF LEGIS. RES. (Apr. 24, 2012), <https://www.cga.ct.gov/2012/rpt/2012-R-0172.htm>.

13. See Roman, *infra* note 66; see *infra* Table.

14. Kaitlyn Buss, *ALEC Statement on "Stand Your Ground" Legislation*, ALEC (Mar. 26, 2012), <https://www.alec.org/press-release/alec-statement-on-stand-your-ground-legislation-32612/>.

15. See Roman, *infra* note 66.

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

17. See Adam Weinstein et al., *The Trayvon Martin Killing, Explained*, MOTHER JONES

male, was volunteering as the neighborhood watch coordinator of the same gated community.¹⁸ Zimmerman spotted Martin and phoned the police because he thought Martin appeared “suspicious.” Zimmerman based his suspicion on Martin’s hooded sweatshirt and a string of recent burglaries in the area.¹⁹ This would be Zimmerman’s sixth report to police regarding the presence of “suspicious” Black men that year.²⁰

Police advised Zimmerman to wait for the police.²¹ Instead, an altercation between Zimmerman and Martin resulted in Zimmerman shooting Martin with his concealed-carry handgun.²² Martin would die of a chest wound, face down in the grass, a little over 200 feet from his father’s house.²³ Zimmerman’s defense did not seek a pretrial hearing for immunity based on the Stand Your Ground law.²⁴ However, Florida’s Stand Your Ground statute required that the judge instruct the jurors that Zimmerman had no duty to retreat.²⁵

A. The Elements and History of SYG

Florida was the first state to pass a Stand Your Ground statute in 2005 and the following year the American Legislative Exchange Council (“ALEC”), supported by the NRA, made Florida’s law into “model legislation” which was subsequently adopted in part or in full by a majority of states.²⁶

Traditional self-defense laws give people the ability to protect themselves and others without discarding a duty to avoid causing bodily harm or death if a safe retreat is available. SYG stems from the common law “castle doctrine,” which allows a person in their own home to use deadly

(Mar. 18, 2012), <https://www.motherjones.com/politics/2012/03/what-happened-trayvon-martin-explained/#newvideo>.

18. Weinstein et al., *supra* note 17.

19. *Id.*

20. Kyle Hightower & Mike Schneider, *Judge Hears Zimmerman’s Previous Calls to Police*, BOS. GLOBE (June 26, 2013), <https://www.bostonglobe.com/news/nation/2013/06/25/judge-trayvon-martin-case-weighs-police-calls/KZp40nWVKXP9hcPIsQq2CJ/story.html>.

21. *See* Weinstein et al., *supra* note 17.

22. *Id.*

23. *Id.*

24. Brad Knickerbocker, ‘Stand Your Ground’ Laws Rattle US Politics, Society, CHRISTIAN SCI. MONITOR (July 21, 2013), <https://www.csmonitor.com/USA/Politics/DC-Decoder/2013/0721/Stand-your-ground-laws-rattle-US-politics-society>.

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

26. Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, ATLANTIC (Apr. 14, 2012), <https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/>.

force in self-defense with no duty of retreat.²⁷ Stand your ground laws extend this doctrine to allow people to use deadly force even when a safe retreat or nonlethal force is possible, as long as the actor believes that it is reasonably necessary.²⁸

Florida and some other states originally had provisions that gave civil and criminal immunity to justified uses of deadly force.²⁹ Besides teetering on the edge of turning Florida into an Old-West saloon, the law prohibited the natural police response to a person being shot—a lawful arrest—unless there was probable cause that the force was used or threatened was unlawful.³⁰ In situations where probable cause depends on eye-witnesses or evidence not evident to the responding officer, this can be especially confusing for officers. A 2017 amendment to the Florida SYG puts the burden on the prosecution by a standard of clear and convincing evidence, further bolstering a defense based on a facially justified SYG claim.³¹

With origins dating back as far back as 1945, ALEC, the organization behind SYG, was truly borne in the aftermath of the Barry Goldwater defeat of 1964.³² The Republican Party was then shifting towards the social and fiscal conservatism from what would be considered a more moderate ideology today.³³ ALEC works by recruiting lobbyists, state legislators, and corporations to sit on task forces that approve model bills.³⁴ Overwhelmingly conservative legislators then propose the model bills in their respective states.³⁵ Journalist and Georgetown Adjunct Lecturer Nancy Scola writes that ALEC, a think tank of conservative state legislators and private corporation representatives, has drafted and lobbied over 800 pieces of state legislation since the late 1990s.³⁶ Doug Clopp, deputy director of programs at Common Cause, alleges that ALEC has developed, “anti-immigration bills written hand-in-glove with private prison corporations [and worked] with the N.R.A. on ‘Shoot to Kill’ laws[.]”³⁷ Despite backlash after Trayvon Martin and similar cases, ALEC enjoys a strong influence across legislatures nationwide. This is because the structure of ALEC allows corporations to have an impact at a state level across many states at the same time. One

27. *See* *Unis v. Florida*, 717 So. 2d 581, 581 (Fla. Dist. Ct. App. 1998).

28. *See* *Pileggi v. State*, 232 So. 3d 415, 417 (Fla. Dist. Ct. App. 2017).

29. FLA. STAT. § 776.032(1).

30. *Id.*; Taylor Martin, *supra* note 16.

31. FLA. STAT. § 776.032(4).

32. BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 65, 137 (2008) (ebook).

33. *Id.* at 135–50.

34. *ALEC Attacks*, CTR. FOR CONST. RTS. 6–7 (2019), <https://www.alecattacks.org/sites/default/files/ALEC%20Attacks.pdf>.

35. *Id.*

36. Scola, *supra* note 26.

37. *Id.*

Republican senator, for instance, introduced “31 bills copied from [ALEC’s] model legislation.”³⁸

B. SYG Does Not Deter Crime or Increase Safety

The National Bureau of Economic Research found that SYG has no deterrence effects on burglary or robbery, but conversely does increase homicide in SYG states by 8%.³⁹ Another study found that gun-related homicide went up 6.8% in SYG states and ultimately concluded that the removal of the duty to retreat was the reason for the increase.⁴⁰ In Florida alone, SYG correlated with a 31.6% increase in gun-related homicide and a startling 75% increase in justifiable homicide.⁴¹ Because individual states have criminal immunity within the statute, and that immunity includes the detention stage, confused law enforcement officers defer to prosecutors to make arrest calls on SYG incidents.⁴² Contrary to proponent intention, drug dealers have often gone free where drug deals resulted in shoot outs.⁴³ The defense has even been successfully used where a rival gang shooting resulted in the death of a 15-year-old boy.⁴⁴ In 2014, a 71-year-old man shot a 43-

38. Yvonne Wingett Sanchez & Rob O’Dell, *What Is ALEC? ‘The Most Effective Organization’ for Conservatives, Says Newt Gingrich*, USA TODAY (Apr. 5, 2019), <https://www.usatoday.com/story/news/investigations/2019/04/03/alec-american-legislative-exchange-council-model-bills-republican-conservative-devos-gingrich/3162357002/>.

39. Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime Or Escalate Violence? Evidence From Castle Doctrine 4* (Nat’l Bureau of Econ. Research, Working Paper No. 18134, 2012), <http://www.nber.org/papers/w18134>.

40. Chandler B. McClellan & Erdal Terkin, *Stand Your Ground Laws, Homicides, and Injuries 7* (Nat’l Bureau of Econ. Research, Working Paper No. 18187, 2012), <https://www.nber.org/papers/w18187.pdf>.

41. David K. Humphreys, et al., *Evaluating the Impact of Florida’s “Stand Your Ground” Self-Defense Law on Homicide and Suicide by Firearm: An Interrupted Time Series Study*, 177 JAMA INTERNAL MED. 44, 49 (2017), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2582988>; David K. Humphreys et al., *Association Between Enactment of a “Stand Your Ground” Self-Defense Law and Unlawful Homicides in Florida*, 177 JAMA INTERNAL MED. 1523 (2017), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2648742>. See also Lisa Rapaport, *Murders Surge in Florida in Decade After ‘Stand Your Ground’ Law*, REUTERS (Aug. 14, 2017), <https://www.reuters.com/article/us-health-homicides-standyourground/murders-surge-in-florida-in-decade-after-stand-your-ground-law-idUSKCN1AU1QL>.

42. *Examining the Race Effects of Stand Your Ground Laws*, U.S. COMMISSION ON C.R., 8 (Feb. 2020), <https://www.usccr.gov/pubs/2020/04-06-Stand-Your-Ground.pdf>; see also Arkadi Gerney & Chelsea Parsons, *License to Kill, How Lax Concealed Carry Laws Can Combine with Stand Your Ground Laws to Produce Deadly Results*, CTR. FOR AM. PROGRESS 6 (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/09/StandYrGround.pdf>.

43. See Taylor Martin, *supra* note 16.

44. Adam Weinstein, *How the NRA and Its Allies Helped Spread a Radical Gun Law Nationwide*, MOTHER JONES (June 12, 2012), <https://www.motherjones.com/politics/2012/06/nra-alec-stand-your-ground/>.

year-old man in a movie theater for throwing popcorn at him. Surveillance shows the younger man throwing popcorn right before the older man opens fire. Moments later, an off-duty officer seated a few rows back confiscates the gun.⁴⁵ A judge rejected the SYG defense, but after the 2017 amendment that shifted the burden to the prosecution, a lengthy appeals process ensued where the shooter argued that he deserved a new trial based on SYG.⁴⁶ The trial is pending as of this writing. As mentioned above, SYG does not make SYG states safer but instead increases the homicide rate, and SYG encounters themselves have a 60% mortality rate.⁴⁷

C. Reasonableness and Duty to Retreat

Twenty-seven states now have SYG statutes.⁴⁸ Two states have similar laws that apply when the shooter is in a vehicle.⁴⁹ North Dakota has a statute that applies when the shooter is in an occupied motor home.⁵⁰ Five states allow deadly force with no duty to retreat in self-defense through state-specific combinations of statutes and case law.⁵¹

1. A “Pure” Statute

What seems to be the “pure” SYG law is a statute that allows for deadly force if the actor reasonably and imminently fears death or serious bodily harm to himself. In this “pure” form, where the fear is reasonably held, there is no duty to retreat as long as they are not the initial aggressor. Most SYG states hold that deadly force is authorized to protect the actor or third party if there is an objectively reasonable belief and a subjective belief that force is necessary to prevent death or serious bodily injury.⁵² All SYG states have

45. Aaron Mesmer, *Deputy who witnessed theater shooting takes stand*, FOX 13 TAMPA BAY (Mar. 1, 2017), <http://www.fox13news.com/news/local-news/deputy-who-witnessed-theater-shooting-takes-stand>.

46. Eric Glasser, *Florida Supreme Court Ruling Clears Way for Movie Theater Shooter Trial*, 10 TAMPA BAY (Dec. 20, 2019), <https://www.wtsp.com/article/news/local/pascocounty/supreme-court-ruling-clears-way-for-curtis-reeves-trial/67-43ace75c-d773-46d5-9cd4-12f603611cb4>.

47. *Examining the Race Effects of Stand Your Ground Laws*, U.S. COMMISSION ON C.R., 10 (Feb. 2020), <https://www.usccr.gov/pubs/2020/04-06-Stand-Your-Ground.pdf>; see also John Roman, *Stand Your Ground Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force*, URB. INST. (Oct. 29, 2013), <https://www.urban.org/research/publication/stand-your-ground-laws-civil-rights-and-public-safety-implications-expanded-use-deadly-force>.

48. See *infra* Table.

49. See *infra* Table (Ohio and Wisconsin).

50. See *infra* Table (N.D. CENT. CODE § 12.1-05-07(2)(b)(2)).

51. See *infra* Table (California, Illinois, Oregon, Virginia, and Washington).

52. *Infra* Table.

subjective elements in their statutes, and all but one of the SYG states, Kentucky, has an objective element in their law.⁵³ However, subsequent Kentucky case law has made it clear that objective reasonableness is a required element.⁵⁴

2. Three Main Outliers to the “Pure” Statute

Several states delineate their statutes as SYG laws, where the laws require some sort of mitigation duty relating to retreat.⁵⁵ Alaska and Pennsylvania specifically have a provision that the actor must retreat if they can do so in complete safety.⁵⁶ This seemingly would put them at odds with the spirit of SYG (essentially extending Castle Doctrine outside the home), but these laws are still considered SYG statutes. One possible reason is that this duty to retreat in safety is a subjective one.⁵⁷ The Idaho SYG statute requires that the actor must really and in good faith have endeavored to decline any further struggle before using deadly force.⁵⁸ However, the Idaho Supreme Court clarified in *State v. Bodenbach* that this is an exception to the general rule that there is no requirement to retreat that applies only when one is the initial aggressor.⁵⁹

New Hampshire also has a subjective duty to retreat rule; however, the court in *State v. Etienne* found it unreasonable to kill when it is not objectively necessary under the circumstances.⁶⁰ The court noted that, because of the immense value of human life, deadly force in self-defense should be considered against the availability of non-deadly force.⁶¹ It is worth noting that despite some states having no duty to retreat, like New Hampshire, the reasonableness component of the statute could be interpreted by the state’s judiciary to contain a duty to retreat if retreat can be made in complete safety. This is speculative, but it is not unimaginable that judicial interpretation of an SYG statute could import the duty to retreat into the reasonableness element.

53. *Infra* Table.

54. *Infra* Table (Banks v. Commonwealth, 196 Ky. 639, 24 (1922)).

55. *Infra* Table.

56. *Infra* Table.

57. *See, e.g.*, ALASKA STAT. § 11.81.335 (From Alaska Senate Journal Supp. No. 47, at 126–28 (June 12, 1978) ([D]efendant must know that he has a safe retreat; it is not enough that a reasonable person would have believed he could have retreated safely.”); Kathleen McCoy, *Self Defense and “Stand Your Ground” Laws in Alaska*, KSKA (Aug. 22, 2018), <https://www.alaskapublic.org/2018/08/22/self-defense-and-stand-your-ground-laws-in-alaska/>.

58. IDAHO CODE § 18-4009 (“[Defendant] must really and in good faith have endeavored to decline any further struggle before the homicide was committed.”).

59. *State v. Bodenbach*, 448 P.3d 1005, 1013 (Idaho 2019).

60. *State v. Etienne*, 163 N.H. 57 (2011).

61. *Id.* at 74.

3. Reasonableness and Duty to Retreat Among the SYG States

It would be difficult to put into a table all the nuances that each state statute contains, especially considering the refinement through case law. However, below is a table comparing all SYG states by their most basic elements: reasonableness and duty to retreat. Unless otherwise noted, deadly force is authorized outside the home to protect the actor or a third party if there is an objectively reasonable belief and a subjective belief that force is necessary to prevent death or serious bodily injury.⁶²

62. *See* Table. Retrieved May 2020.

SYG States	Source	Deadly Force ⁶³	Duty to Retreat ⁶⁴
Alabama	Ala. Code § 13A-3-23.	Threat must be imminent.	No duty to retreat if lawfully present.
Arizona	Ariz. Rev. Stat. §§ 13-405(B); 13-411(B); 13-418(B).	Reasonable if force is necessary to prevent death. 13-418(B).	No duty to retreat if lawfully present. 13-405(B).
Florida	Fla. Stat. §§ 776.012; 776.013(3).	Threat must be imminent. 776.012.	No duty to retreat if lawfully present. 776.012.
Georgia	Ga. Code Ann. §§ 16-3-23.1; 16-3-21.	Threat must be imminent.	No duty to retreat.
Indiana	Ind. Code Ann. § 35-41-3-2.	Also authorized to stop the commission of a forcible felony.	No duty to retreat.
Idaho	Idaho Code §§ 18-4009, 19-202A.	Also authorized to stop the commission of a forcible felony. 18-4009.	Must really and in good faith have endeavored to decline any further struggle before the homicide was committed. 18-4009.
Iowa	Iowa Code § 704.1.	No deviation from reasonableness standard. See note 63.	No duty to retreat if lawfully present.
Kansas	Kan. Stat. Ann. § 21-5230; 21-3214 (repealed 2011).	Threat must be imminent. 21-3214 (repealed 2011).	No duty to retreat. 21-5230.

63. Deadly Force is authorized to protect the actor or a third party if there is an objectively reasonable belief and a subjective belief that force is necessary to prevent death or serious bodily injury. [Hereinafter “reasonableness standard”]. *See* Table.

64. Duty to retreat outside of the home. *See* Table.

Kentucky	Ky. Rev. Stat. Ann. §§ 503.050(4); 503.070(3); 503.080(3); <i>Banks v. Commonwealth</i> , 196 Ky. 639, 24 (1922).	<i>Banks</i> clarifies that this must be objective as well as subjective.	No duty to retreat.
Louisiana	La. Rev. Stat. Ann. § 14:19(C).	No deviation from reasonableness standard. See note 63	No duty to retreat if lawfully present.
Michigan	Mich. Comp. Laws Serv. § 780.972(2).	No deviation from reasonableness standard. See note 63	No duty to retreat if lawfully present.
Mississippi	Miss. Code. Ann. § 97-3-15(4).	Also authorized to stop the commission of a felony	No duty to retreat if lawfully present.
Missouri	Mo. Rev. Stat. § 563.031.3.	Threat must be imminent.	No duty to retreat if lawfully present.
Montana	Mont. Code. Ann. § 45-3-110; 45-3-102.	Threat must be imminent.	No duty to retreat if lawfully present.
Nevada	Nev. Rev. Stat. Ann. § 200.120(2); <i>Hill v. State</i> , 98 Nev. 295, 647 (Nev. 1982)	No deviation from reasonableness standard. See note 63.	No duty to retreat if lawfully present.
North Carolina	N.C. Gen. Stat. § 14-51.3.	No deviation from reasonableness standard. See note 63	No duty to retreat if lawfully present.
Oklahoma	21 Okl. St. §§ 733; 1289.25(D).	Also authorized to stop the commission of a forcible felony. § 733	No duty to retreat if lawfully present. 21 O.S. § 1289.25(D).
South Carolina	S.C. Code § 16-11-440(C); 16-1-60.	Also authorized to stop the commission of a violent crime as defined in Section 16-1-60	No duty to retreat if lawfully present. 16-1-60.

South Dakota	S.D. Codified Laws §§ 22-16-35; 22-18-4.	Third person must be a husband, wife, parent, child, master, mistress, or servant. Threat must be imminent. Also authorized to stop the commission of a felony	No duty to retreat if lawfully present.
Tennessee	Tenn. Code Ann. § 39-11-611(b)(2).	Threat must be imminent.	No duty to retreat if lawfully present.
Texas	Tex. Penal Code § 9.31(e); 9.32.	No deviation from reasonableness standard. See note 63.	No duty to retreat if lawfully present.
Utah	Utah Code Ann. § 76-2-402.	Threat must be imminent. Also authorized to stop the commission of a forcible felony	No duty to retreat if lawfully present.
West Virginia	W. Va. Code § 55-7-22(c).	Threat must be imminent.	No duty to retreat if lawfully present.
Wyoming	Wyo. Stat. § 6-2-602.	No deviation from reasonableness standard. See note 63	No duty to retreat if lawfully present.
Vehicle or Motor Home* States	Source	Deadly Force	Duty to Retreat
North Dakota*	N.D. Cent. Code § 12.1-05-07(2)(b)(2).	No deviation from reasonableness standard. See note 63.	No duty to retreat from motorhome.
Ohio	Ohio Rev. Code 2901.05(B)(1).	No deviation from reasonableness standard. See note 63	No duty to retreat from vehicle.
Wisconsin	Wis. Stat. Ann. § 939.48.	No deviation from reasonableness standard. See note 63	No duty to retreat from vehicle or place of business.

Case Law/ Combination States	Source	Deadly Force	Duty to Retreat
California	Cal. Penal Code § 198.5; CALCRIM 505, 506; <i>People v. Hughes</i> (1951) 107 Cal.App.2d 487, 493 (No duty to retreat)	No deviation from reasonableness standard. See note 63.	No duty to retreat. Pursuing assailant is allowed if needed. CALCRIM 505.
Illinois	<i>People v. Rodriguez</i> , 187 Ill. App. 3d 484, 490 (1989).	No deviation from reasonableness standard. See note 63	No duty to retreat.
Oregon	ORS § 161.219; <i>State v. Sandoval</i> , 342 Or. 506, 513–14 (2007).	Threat must be imminent. Also authorized to stop the commission of a forcible felony. ORS § 161.219	No duty to retreat. <i>State v. Sandoval</i> , 342 Or. 506, 513–14 (2007).
Virginia	<i>McGhee v. Commonwealth</i> , 219 Va. 560, 562 (1978); <i>Commonwealth v. Cary</i> , 271 Va. 87, 99 (2006); <i>Adams v. Com</i> , 163 Va. 1053 (1935).	Threat must be imminent. <i>Commonwealth v. Cary</i> , 271 Va. 87, 99 (2006).	No duty to retreat. <i>Adams v. Com</i> . 163 Va. 1053 (1935).
Washington	RCW 9A.16.050; <i>State v. Williams</i> , 81 Wash. App. 738 (1996).	Threat must be imminent. <i>State v. Williams</i> .	No duty to retreat. <i>State v. Williams</i> , 81 Wash. App. 738 (1996).
States where actor has a duty to retreat if actor can safely leave.	Source	Deadly Force	Duty to Retreat
Alaska	Alaska Stat. §§ 11.81.335(b)(5); 11.81.350(f).	No deviation from reasonableness standard. See note 63	Duty to retreat if actor can safely leave. 11.81.335(b)(5).
New Hampshire	N.H. Rev. Stat. Ann. § 627:4(III)(a); <i>State v. Etienne</i> , 163 N.H. 57, 35 (N.H. 2011).	Threat must be imminent.	Duty to retreat if actor can safely leave. 627:4(III)(a). Case law has found it unreasonable to kill

			when it is not necessary under the circumstances. <i>State v. Etienne</i> , 163 N.H. 57, 35 (N.H. 2011).
Pennsylvania	18 Pa.C.S.A. § 505(2) and (2.3).	Also authorized to stop the commission of kidnapping or rape.	Duty to retreat if actor believes they can safely leave.

II. DISCRIMINATORY TRENDS IN SYG STATUTE IMPLEMENTATION

SYG is inherently racist because implicit bias exists as a permanent and essential characteristic of its existence, not because the statutes are facially discriminatory. Washington University School of Medicine Statistical Data Analyst, Nicole Ackermann, and colleagues, found that, in SYG cases, a defendant is twice as likely to be convicted in a case with white victims compared to cases with non-white victims.⁶⁵ A white-on-Black homicide is found justified 281% more often than a white-on-white homicide.⁶⁶ A study of more than 200 Florida SYG cases found that 73% of people who killed a Black person faced no penalty under the law, compared to 59% of those who killed a white person.⁶⁷ The study also revealed that “the justifiable homicide rate is 34%, compared to a rate of 3% when the shooter is African American and the victim is white.”⁶⁸

A. Unequal Defense of Black Shooters

Most conceal-carry permits are issued to white people.⁶⁹ Traditional thinking would find logic in the fact that white people make most successful

65. Nicole Ackermann, et al., *Race, Law, and Health: Examination of ‘Stand Your Ground’ and Defendant Convictions in Florida*, 142 SOC. SCI. & MED. 194–201 (2015).

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

67. Sarah Iverson, *Beyond ‘Stand Your Ground’: Florida’s Other Racial Profiling Practices*, CTR. FOR AM. PROGRESS (Oct. 11, 2012), <https://www.americanprogress.org/issues/race/reports/2013/10/11/76860/beyond-stand-your-ground-floridas-other-racial-profiling-practices/>.

68. *Id.*

69. John R. Lott, *Concealed Carry Permit Holders Across the United States: 2018*, CRIME PREVENTION RES. CTR. 25 (Aug. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3233904.

SYG defenses. However, the better spotlight is comparing the situation where the shooter is white and the victim is Black, and where the shooter is Black and the victim is Black. In July 2013, John K. Roman, senior fellow in the Justice Policy Center at the Urban Institute, looked at 43,500 homicides from 2005 to 2010 (excluding manslaughter). The pool was narrowed to shootings with a single shooter and victim, where both parties were strangers, both parties were private, and the homicides were found justified. Roman found that SYG states increased the odds of justifiable killing by 65%.⁷⁰ In 2012 (the year Trayvon Martin was killed), in SYG states, more homicides were found justified than non-SYG states overall, but whites who killed Blacks in those states were far more likely to be found justified in their killings: in non-SYG states, white-on-Black killings were found 250% more likely than white-on-white killings to be considered justified. In SYG states, white-on-Black killings were found 354% more likely than white-on-white killings to be considered justified.⁷¹

The law has not treated Black and white shooters equally in SYG states.⁷² In 2012, Marissa Alexander, a Black Florida woman, was convicted of aggravated assault after firing a warning shot at her abusive husband.⁷³ Alexander was given a 20-year sentence of which she ultimately served less than 6 years.⁷⁴ A pretrial hearing rejected Alexander's use of Florida's SYG statute because of a "factual dispute," which would have precluded any further prosecution. Her husband had acknowledged his violence towards her in his testimony.⁷⁵

Boston University School of Law Professor Jasmine B. Gonzales Rose, based on a critical race theory analysis, found that because of implicit racial bias, white witnesses are considered more credible than witnesses of color.⁷⁶ This means that where a white witness has their credibility comparatively

70. Roman, *supra* note 66.

71. *Id.* at 7.

72. Rebecca Voelker, *Psychologists Laud ABA's Move to Oppose Stand Your Ground Laws*, 46 *MONITOR ON PSYCHOL.* 5, 13 (2015).

73. *See State v. Alexander*, No. 16-2010-CF-008579, 2012 WL 10738699 (Fla. Cir. Ct. May 11, 2012).

74. *Id.*

75. Christine Hauser, *Florida Woman Whose 'Stand Your Ground' Defense Was Rejected Is Released*, *N.Y. TIMES* (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/marissa-alexander-released-stand-your-ground.html>.

76. Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 *MINN. L. REV.* 2243, 2268 (2017); *see generally* Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 *UCLA L. REV.* 450, 471, 477-84 (2016) (conducting a case study of the George Zimmerman trial and noting that jurors' credibility determinations are more negative when minority witnesses do not "perform whiteness"); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 *MICH. J. RACE & L.* 261 (1996).

bolstered, witnesses of color are disadvantaged unless their character is formally attacked and then can rebut with character evidence. Ultimately, SYG laws provide what Professor Gonzales Rose calls an introduction of “de facto evidence” and “racial character evidence” to jurors in violation of evidence law.⁷⁷

B. Unequal Exercise of Discretion by Police

While some SYG states place the burden of proof for reasonable self-defense on the defendant, SYG statutes in six states give law enforcement initial discretion in determining criminal immunity.⁷⁸ This turns an element of a potential murder investigation into a subjective moral character determination. Before Florida’s SYG law, law enforcement was entrusted with establishing that an unlawful act had happened; they then passed along the evidence to a prosecutor, who used their discretion to press charges against a shooter.⁷⁹ At the onset of Florida’s SYG law, law enforcement had to determine whether a shooter will be accused of a crime. Essentially, the statute tasks a police officer with discretion regarding SYG in determining a suspect’s immunity before making an arrest.⁸⁰

University of Florida Levin College of Law Professor Kenneth Nunn writes in a *New York Times* opinion page, based on data from Harvard’s Project Implicit, that a violence-prone and dangerous view of Black males is widely shared and sometimes unconsciously.⁸¹ In giving law enforcement what is essentially prosecutorial discretion, therein lies the genuine danger that racial bias can inform an officer’s SYG determination. The attorney hired by Trayvon Martin’s family pointed out that police at the scene of the Trayvon Martin killing ran a background check on Trayvon

77. See, e.g., FED. R. EVID. 404.

78. See, e.g., ALA. CODE § 13A-3-23(d) (2018); FLA. STAT. ANN. § 776.032(2) (West 2018); KAN. STAT. ANN. § 21-5231(a) (West 2018); KY. REV. STAT. ANN. § 503.085(1) (West 2018); OKLA. STAT. ANN. tit. 21, § 1289.25(G) (2018); S.C. CODE ANN. § 16-11-450(B); see, e.g., *State v. Jones*, 416 S.C. 283, 301 (2016) (“Therefore, the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence.”); *Peterson v. State*, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008) (“[W]e hold that a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches.”).

79. Elizabeth B. Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to “Get Away with Murder”*, 34 AM. J. TRIAL ADVOC. 105, 112 (2010).

80. See *Velasquez v. State*, 9 So. 3d 22, 24 (Fla. Dist. Ct. App. 2009).

81. Kenneth Nunn, *Racism Is the Problem, Not the Stand Your Ground Laws*, N.Y. TIMES (Mar. 21, 2012), <https://www.nytimes.com/roomfordebate/2012/03/21/do-stand-your-ground-laws-encourage-vigilantes/racism-is-the-problem-not-the-stand-your-ground-laws>.

Martin but not on George Zimmerman.⁸²

III. CHANGING THE STANDARDS: SELECT SOLUTIONS

A. The Legacy of Goetz: A Blueprint for Reasonable Racism

On December 22, 1984, Bernhard Goetz, a white 37-year-old, was approached by four Black teenagers on a New York City subway car.⁸³ One of the four teens, Troy Canty, asked Goetz twice for five dollars to which Goetz replied by pulling out his handgun and opening fire on the teens.⁸⁴ Goetz, upon realizing he missed one of the teens, Darrell Cabey, walked up to Cabey, said “[y]ou seem to be all right, here’s another,” and shot him, severing his spinal cord and paralyzing him for life.⁸⁵ Goetz was tried by a jury of ten whites and two Blacks. He was acquitted of the attempted murder and first-degree assault charges and convicted of criminal possession of a weapon in the third degree.⁸⁶ In a motion for dismissal, the Appellate Division of the New York Supreme Court interpreted the New York statutory test for justifiable self-defense as a “wholly subjective [standard], focusing entirely on the defendant’s state of mind when he used such force. It concluded that dismissal was required for [the erroneous instruction containing an objective component] because the justification issue was at the heart of the case.”⁸⁷ The Court of Appeals reversed and held that a subjective test was contrary to legislative intent and allowed for idiosyncratic fears to justify violence.⁸⁸

Jonathan Markovitz, Staff Attorney at the American Civil Liberties Union of San Diego and Imperial Counties, suggests that, while the objective component rules out racial extremists and bizarre racial fears, it does nothing to prevent commonly accepted fears which are racist in origin, especially because “reasonableness” is frequently equated with “typicality.”⁸⁹ Markovitz points out the difficulty with a subjective/objective standard like New York’s at the time of *Goetz*, where the subjective portion recognizes

82. *CNN Special Report with Soledad O’Brien, Beyond Trayvon: Race and Justice in America, Transcript of Television Broadcast March 31, 2012*, CNN, <http://transcripts.cnn.com/TRANSCRIPTS/1203/31/se.01.html> (last visited Oct. 19, 2020).

83. *People v. Goetz*, 497 N.E.2d 41, 43 (N.Y. 1986).

84. *Id.*

85. *Id.* at 44.

86. Otto Friedrich, Roger Franklin & Raji Samghabad, *Not Guilty*, TIME (June 29, 1987), available at <https://web.archive.org/web/20101022233418/http://www.time.com/time/magazine/article/0,9171,964773,00.html> (last visited Oct. 7, 2020).

87. *Goetz*, 497 N.E.2d at 46.

88. *Id.* at 50.

89. Jonathan Markovitz, “*A Spectacle of Slavery Unwilling to Die*”: *Curbing Reliance on Racial Stereotyping in Self-Defense Cases*, 5 U.C. IRVINE L. REV. 873, 905 (2015).

“relevant knowledge the defendant had about that person [and] physical attributes of all persons involved.”⁹⁰ Nothing in these types of formulations limits race as characteristics. Even now, and certainly, at the time of *Goetz*, Markovitz argues, society was informed by relationships assumed about race and crime, and these stereotypes could encourage jurors to see the victims through the actor’s eyes.⁹¹

Some commentators claim that SYG imputes a subjective presumption into the reasonable belief standard that neutralized the objectively reasonable person standard.⁹² Essentially, a person who has a subjective belief that, say, a brown person is more likely to harm them than a white person, can use that as a defense to show that they were in reasonable fear.⁹³ This, in combination with implicit bias and the negative perpetuation of minorities can create deadly results.⁹⁴

B. Select Solutions: A Blueprint for Change

1. Normative Standard or Critical Standard

In 1996, George Washington University Law School Professor Cynthia Lee suggested replacing the objective standard with what she called the “Normative Standard.” This standard would require “not only that the defendant’s beliefs and actions were those of the average person, but that the defendant’s beliefs and actions were also normatively justified.”⁹⁵ Ultimately, the point would be to develop an antiracist, anti-gendered, and normative standard of reasonableness.

a. The Reality of Race

Building upon some of Professor Lee’s themes, Boston University School of Law Professor Jasmine B. Gonzales Rose writes that racism is pervasively ordinary in American society because, among other reasons,

90. Markovitz, *supra* note 89. at 905.

91. *Id.* at 904.

92. See Katheryn Russell-Brown, *Go Ahead and Shoot, The Law Might Have Your Back: History, Race, Implicit Bias, and Justice in Florida’s Stand Your Ground Law*, in *DEADLY INJUSTICE: TRAYVON MARTIN, RACE, AND THE CRIMINAL JUSTICE SYSTEM* 115–37 (Devon Johnson, Patricia Y. Warren, & Amy Farrell eds., 2015).

93. See generally Song Richardson & Phillip Goff, *Self Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 295 (2012).

94. See Nicole Ackermann et. al., *Race, Law, and Health: Examination of ‘Stand Your Ground’ and Defendant Convictions in Florida*, 142 SOC. SCI. & MED. 194–201 (2015).

95. Cynthia Kwei Yung Lee Jr., *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 390–91 (1996).

whiteness is the standard.⁹⁶ Because whiteness is the standard in society, it is the standard in our justice system and corrupts evidence law structurally so that it inadvertently disadvantages people of color.⁹⁷ The federal and state rules of evidence have provisions that exclude relevant evidence if the danger of unfair prejudice substantially outweighs its probative value. Professor Gonzales Rose writes that to be structurally fair, this should include expressly racial prejudice.⁹⁸ Perhaps the realities of an indivisible racial bias within SYG make a case that evidence regarding the statistical disparities around SYG themselves should be included in juror instructions or be admitted by the prosecution. Further, race was and continues to be character evidence, Professor Gonzales Rose writes, just as blackness was once evidence of being a slave or evidence of intent in a rape case, blackness and brownness remain evidence of a bad character.⁹⁹ Prosecutors, for example, will frequently point to racial background as character propensity for engaging in illegal acts. In one case from 2014, a prosecutor pointed to Hispanics and Blacks congregating together as evidence of a drug deal.¹⁰⁰

b. Where Stereotype Enters

Professor Lee writes that race operates within the reasonable standard in two main ways.¹⁰¹ One is the beliefs and acts of the defendant, and the other is the racial stereotypes of the jury.¹⁰² Though lambasted by jurists, the use of subjective stereotype as a defense is unclear. Criminal liability is imposed if the actor had the appropriate mens rea and if the mens rea is obfuscated because of subjective but honest racial prejudices; should that prevent harsher sentences? If so, the jury should certainly be aware of the source of the belief to act in self-defense.¹⁰³

c. Normative Standards

Self-defense is a justification rather than an excuse. Both an excuse and a justification admit that the defendant committed a prohibited act, but

96. Gonzales Rose, *supra* note 76, at 2255.

97. *Id.*

98. *Id.* at 2257.

99. *Id.* at 2262.

100. Calhoun v. United States, Nos. SA-14-CA-155, SA-08-CR-351, 2014 WL 2723188, at *3 (W.D. Tex. June 16, 2014). Professor Gonzales Rose cites this case where a prosecutor said “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Doesn’t that tell you—a lightbulb doesn’t go off in your head and say, this is a drug deal?” *Id.*

101. Lee, *supra* note 95.

102. *Id.* at 471.

103. *Id.* at 472.

justification is said to have a positive impact that outweighs the negative impact so that it is not blameworthy. Whereas an excuse mitigates the punishment of an act that was committed under a false belief, not entirely voluntary, or under duress.¹⁰⁴ A defendant being found justified where their racial biases provided the basis for their reasonable belief in the need to defend themselves to many would sound dubious at best. The proper standard for adjudging the defendant's beliefs in the case of justification defenses should be the normative standard. Thus, the test should be not only a subjective test but an objective test within the context of the situation at hand while accounting for racial biases that affect most Americans. To ignore the context of racial biases would be to conflate positivist and normative standards, which would be no different than the standard of today. Professor Lee provides an overture of this position and writes that "whether a defendant's actions are normatively reasonable will depend in part on where the crime occurred, who is deciding the question, and the facts of the specific case."¹⁰⁵ Racial stereotyping affects jurors because it affects humans in general. This reality undermines the integrity of the criminal justice system. The criminal justice system cannot thus be said to protect a group of people it was never designed to protect. The standard is designed for the white male, and as long as it remains unamended for the structural biases that exist, it cannot be said to be free from prejudice. It is appropriate to say that the criminal justice system is inherently racist because, at its core, it favors one group at the detriment of others.

d. A Note on Flight

People of color frequently run from the police, not because they are guilty but because they have been entrenched by structural racial bias. They avoid the police because they fear being harassed, brutalized, or killed.¹⁰⁶ Furthermore, people often run when they have prior criminal convictions for fear of being brought into a criminal investigation that could negatively impact them. On the stand, if forced by the circumstances to testify to their prior conviction, they will be overwhelmingly prejudiced as juries tend to factor in prior criminal history in the conviction process.¹⁰⁷ Philando Castile, a Black man who was shot by police, was stopped forty-nine times in the last

104. JOHN KAPLAN, ROBERT WEISBERG, GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 513–14 (7th ed. 2012).

105. Lee, *supra* note 95, at 499.

106. Gonzales Rose *supra* note 76, at 2269; *see, e.g.*, *People v. Howard*, 408 N.E.2d 908, 911 (N.Y. 1980) (flight considered where a suspect changed directions and quickened pace when confronted with an officer).

107. Gonzales Rose, *supra* note 76, at 2271.

years of his life.¹⁰⁸ Castile was shot while reaching for his ID, as directed by the officer who killed him.¹⁰⁹ Many called Castile's case and others like it a modern-day lynching.¹¹⁰ It is no stretch that this avoidance of police, despite any racial makeup of police involved in deadly shootings, transmutes to an adult white male with a gun. A gunman approaches an unarmed man and demands they submit, if they do not comply, they die. Situations like the shooting of Ahmaud Arbery are analogous to the modern-day lynching and replace the discretionary immunity of police with the civil and criminal immunity associated with SYG.

2. Removing Civil and Criminal Immunity Provisions

Civil liability deters unlawful shootings by offering the potentiality of wrongful death suits in cases where criminal charges are defeated or immune. Since the burden is the preponderance of the evidence in civil cases, the availability of civil suits to deter SYG killings is put into the hands of the families and loved ones of the victims. This edges along the scope of restorative justice and gives a financial respite to the many aggrieved. Removing criminal immunity allows for a clearer standard, allowing a jury to treat cases more like traditional self-defense. This allows juries to consider the reasonableness of situations on a case-by-case basis. In contrast, SYG may preclude juries' ability to simply consider the reasonableness of the shooter's actions within the context of that particular shooter's subjective experiences.

3. Gun Education and Education about Guns

Gun education and training are beyond the scope of this article, but especially where concealed-carry is concerned, education specifically on SYG is a good start. SYG is a looming threat in the Black community. On the eve of new SYG legislation in Ohio, one Ohio woman said, "That means more death in my community. People that look like me. So that's a scary place for me."¹¹¹ If we can mitigate the effect of the main escalator in SYG deaths, the gun, perhaps SYG inequities could be curbed.

Japan has around ten firearm-related deaths per year, with a total of 127 million people.¹¹² Business Insider reports that "If Japanese people want to

108. Gonzales Rose, *supra* note 76, at 2274.

109. *Id.*

110. *Id.* at 2275.

111. Ambriehl Crutchfield, 'A Very Scary Thing For Me': Some Black Gun Owners Worried About 'Stand Your Ground,' WOSU RADIO (Dec. 13, 2019), <https://radio.wosu.org/post/very-scary-thing-me-some-black-gun-owners-worried-about-stand-your-ground#stream/0>.

112. Chris Weller, Ivan De Luce & Rebecca Aydin, *Two Students Were Killed in a*

own a gun, they must attend an all-day class, pass a written test, and achieve at least 95% accuracy during a shooting-range test.”¹¹³ Next is a mental health check and background check that covers criminal records and interviews with friends and family. Finally, and perhaps more important than it would seem at first glance, Japanese citizens are not allowed to purchase handguns, only rifles and shotguns.¹¹⁴ The UK has around fifty firearm-related deaths per year, with a total of 56 million people. The UK has also banned handguns and semiautomatic and pump-action firearms.¹¹⁵

The American Public Health Association reports that guns kill more than “38,000 people per year and cause approximately 85,000 non-fatal injuries.”¹¹⁶ Most of these deaths are from suicides and murders, not mass shootings.¹¹⁷ Statistics show that concealed-carry permits increase the number of firearm homicides.¹¹⁸ Right-to-carry proponents argue that concealed-carry is a deterrent. However, basic logic would suggest that it is difficult to be deterred by something that is not perceived. Studies show that concealed-carry increases firearm homicides by 9%.¹¹⁹

Preventing domestic abusers from owning guns reduces the murders of intimate female partners by 17%.¹²⁰ The Lautenberg amendment to the 1968 Gun Control Act disqualifies those convicted for domestic abuse from owning or buying firearms.¹²¹ The next step might be to seek out similar solutions. For example, stricter licensing standards for people even implicated in such crimes might be useful if they passed constitutional muster. That analysis is outside the scope of this article. Additionally, harsher sentencing for crimes involving guns seems to have dropped at least gun-robbery rates by 5%.¹²²

Banning assault weapons would significantly curb gun massacre rates. In 2004, Congress let a ban on assault weapons expire, and the gun massacre rate exploded by 183%.¹²³ Here, assault weapon means “military-style

School Shooting in Los Angeles on Thursday — Here Are 5 Countries That Have Taken Radical Steps to Eliminate Firearm Deaths, BUS. INSIDER (Nov. 15, 2019), <https://www.businessinsider.com/gun-deaths-nearly-eliminated-in-countries-what-us-can-learn-2017-11>.

113. Weller, De Luce & Ayin, *supra* note 112.

114. *Id.*

115. *Id.*

116. Kevin Loria, *Gun Control Really Works — Here’s the Science to Prove It*, BUS. INSIDER (Aug. 27, 2018), <https://www.businessinsider.com/science-of-gun-control-what-works-2018-2>.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

weapon with a high-capacity magazine.”¹²⁴ Banning large caliber weapons and ammunition might also reduce homicide rates. The caliber of ammunition is integral to the likelihood of fatality for gunshot wounds. Essentially, people who get shot with big bullets die easier.¹²⁵ The study took a cross-section from five years of data and found that gunshot injuries with larger caliber firearms increased fatality.¹²⁶ Moreover, the caliber itself was not related to any other characteristics of the assault, i.e., intent, etc.¹²⁷

Certainly, combating the inequities of SYG through gun reform is indirect and perhaps like putting a bandage on a wound that needs dressing. Gun reform is unlikely to do much to solve the racial biases that exist in the United States, but it will save lives and mitigate the effects of SYG. Additional but partial solutions also include public safety task forces proving information to communities affected by SYG or at risk of being affected by SYG; and, training of law enforcement in SYG states to make better determinations when the SYG defense is invoked.

IV. CONCLUSION

Bernhard Goetz, when asked his opinion about the trial of George Zimmerman after the killing of Trayvon Martin, had the following to say:

People automatically take the position, well, if you're the victim and you get the shit beaten out of you, well, then you're a good guy. But if you're in the unusual case where the victim turns on the aggressor and fucks up the aggressor, then there's the question, is the original victim a good guy or a bad guy?¹²⁸

SYG laws give jurors enough leeway in determining what constitutes a reasonable threat of serious bodily injury that implicit bias might be enough to influence jurors into disproportionately disadvantaging people of color.¹²⁹

124. Loria, *supra* note 116.

125. *Id.*; see generally Anthony A. Braga & Philip J. Cook, *The Association of Firearm Caliber With Likelihood of Death From Gunshot Injury in Criminal Assaults*, JAMA NETWORK OPEN (2018).

126. Loria, *supra* note 116.

127. *Id.*; see generally Anthony A. Braga & Philip J. Cook, *The Association of Firearm Caliber With Likelihood of Death From Gunshot Injury in Criminal Assaults*, JAMA NETWORK OPEN (2018).

128. Filipa Ioannou, *Bernhard Goetz on "Bad Guy" Trayvon Martin, and Staying Armed After Winning in Court*, DAILY BEAST (July 11, 2013), <https://www.thedailybeast.com/bernhard-goetz-on-bad-guy-trayvon-martin-and-staying-armed-after-winning-in-court/>.

129. Tamara F. Lawson et al., *Final Report and Recommendations*, NAT'L TASK FORCE ON STAND YOUR GROUND LAWS, 24 (Sept. 2015), <https://www.issuelab.org/resources/22713/22713.pdf>.

SYG exacerbates this by removing the duty to retreat, thus amplifying the effect of the reasonableness element. SYG then turns reasonableness into a subjective character determination to be made by a jury. However, this reasonableness problem itself is nothing new; it is the same standard that is found in any typical self-defense case. The significant structural change that SYG makes is giving a variety of legal actor's discretion to determine that an SYG defendant acted on reasonable fear. With SYG, bias can infiltrate at the investigator's discretion stage, the prosecutorial discretion stage, and finally, the judicial stage through jury instructions and juror bias. The simple solution is to go back to a necessity-based self-defense doctrine and reinstate the duty to retreat. The better solution is also to remove the immunities given to people who are successful in a self-defense claim and pursue better gun reform. The best solution and the one most outside of the scope of this article is to reimagine the standards we afford jurors in determining guiltiness. The standard should have the pragmatic context of the real world.