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## LETHAL WEAPON: HOW PENNSYLVANIA'S STAND-YOUR-GROUND LAW EFFECTIVELY LIMITS THE REASONABLE BELIEF ELEMENT OF SELF-DEFENSE

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# LETHAL WEAPON: HOW PENNSYLVANIA’S STAND-YOUR-GROUND LAW EFFECTIVELY LIMITS THE REASONABLE BELIEF ELEMENT OF SELF-DEFENSE

Matthew G. Simons\*

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## INTRODUCTION

In July of 2018, Michael Drejka shot Markeis McGlockton outside of a Florida convenience store, reigniting the national debate on stand-your-ground laws and the state of American self-defense doctrine.<sup>1</sup> Stand-your-ground statutes, though relatively new, have quickly become the majority rule<sup>2</sup> throughout the country since Florida introduced its groundbreaking stand-your-ground law in 2005.<sup>3</sup> Such laws provide that a person has the right to use deadly force in any place they are lawfully allowed to be without first retreating, so long as the person reasonably believes deadly force is necessary.<sup>4</sup> The Drejka-McGlockton case is the latest in a series of high-profile self-defense altercations that have drawn national attention.<sup>5</sup> Yet, it could be the most consequential case to date because the incident was recorded by surveillance cameras, allowing prosecutors, jurors, and the public to see exactly what had occurred.<sup>6</sup> This is significant because the facts of stand-your-ground cases are often put together by circumstantial evidence and eye-witness testimony.<sup>7</sup> Surveillance footage, however, is not susceptible to the same sort of manipulation that often plagues circumstantial evidence—though how and why the Drejka-

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<sup>1</sup> Cleve R. Wootson Jr., *He is Accused of Killing Someone in a Parking Spot Dispute. Authorities Say He Was Standing His Ground*, WASH. POST (July 23, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/07/21/hes-accused-of-killing-someone-in-a-parking-spot-dispute-authorities-say-he-was-standing-his-ground/>.

<sup>2</sup> “*Stand Your Ground*” Laws, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/> (last visited Aug. 1, 2020) (listing 27 states with stand-your-ground statutes on their books and 3 others with expanded Castle Doctrine laws).

<sup>3</sup> FLA. STAT. § 776.012 (2018).

<sup>4</sup> *Self Defense and “Stand Your Ground,”* NAT’L CONF. ST. LEGISLATURES (May 26, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/self-defense-and-stand-your-ground.aspx>.

<sup>5</sup> See *Trayvon Martin Shooting Fast Facts*, CNN, <https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html> (last updated Feb. 16, 2020, 7:01 PM); see also Suevon Lee, *Five ‘Stand Your Ground’ Cases You Should Know About*, PROPUBLICA (June 8, 2012), <https://www.propublica.org/article/five-stand-your-ground-cases-you-should-know-about>.

<sup>6</sup> Kathryn Varn, *We Talked to Jurors Who Found Michael Drejka Guilty of Manslaughter*, TAMPA BAY TIMES (Aug. 29, 2019), <https://www.tampabay.com/news/crime/2019/08/29/we-talked-to-jurors-who-found-michael-drejka-guilty-of-manslaughter/> (“Now, it appears the video also played a major role in how the jurors and three alternates in Drejka’s manslaughter trial weighed the case against him. Jurors who have spoken publicly since Drejka’s conviction Friday said they arrived at a guilty verdict after watching, again and again, the grainy black and white figures move across the screen.”).

<sup>7</sup> See, e.g., Barbara Liston, *Eyewitness Describes Trayvon Martin’s Fatal Struggle to Florida Jury*, REUTERS (June 28, 2013), <https://www.reuters.com/article/us-usa-florida-shooting/eyewitness-describes-trayvon-martins-fatal-struggle-to-florida-jury-idUSBRE95Q0EE20130629>.

McGlockton confrontation escalated is surely up for debate. For the first time, a court decision had the chance to delineate the oft-blurred line between self-defense and murder.

The surveillance video depicts Markeis McGlockton's car pulling into a convenience store parking lot at around 3:30 in the afternoon.<sup>8</sup> McGlockton exits the vehicle with his son and enters the store while his girlfriend and other children remain in the car.<sup>9</sup> Shortly after, Michael Drejka pulls up to the store and notices that McGlockton's car is parked in a handicap spot.<sup>10</sup> Drejka circles the car, apparently looking for a handicap parking permit.<sup>11</sup> Not seeing any, Drejka appears to complain to McGlockton's girlfriend, who is sitting in the driver's seat, sparking an argument between the two of them.<sup>12</sup> After a minute or so, likely having noticed the argument, McGlockton exits the store and approaches Drejka in defense of his girlfriend.<sup>13</sup> McGlockton immediately places both hands on Drejka's chest and forcefully shoves him to the ground.<sup>14</sup> Drejka then pulls out a gun and points it at McGlockton.<sup>15</sup> McGlockton backs away a few steps before Drejka shoots him once in the chest, prompting McGlockton to retreat into the store, where he died shortly after.<sup>16</sup>

A jury convicted Drejka of manslaughter in August 2019, and he was sentenced to twenty years in jail.<sup>17</sup> During the trial, the judge called Drejka a "wannabe" cop, and a member of the prosecution team admitted that the prosecution never really thought Florida's stand-your-ground law applied.<sup>18</sup> Even the National Rifle Association and Republican legislators responsible for writing Florida's stand-your-

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<sup>8</sup> Wootson, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Heather Murphy, *Florida Man Sentenced to 20 Years in Deadly Parking Confrontation*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/us/florida-michael-drejka-sentence.html>.

<sup>18</sup> *Id.*

ground law voiced criticisms of Drejka's actions.<sup>19</sup> Consequently, this case might appear to be clear cut: Drejka shot McGlockton, who was unarmed, despite McGlockton's retreat and after the threat to Drejka's safety had abated.

Nevertheless, while Drejka's conviction now seems to be the inevitable outcome of the case, it was anything but guaranteed leading up to trial. Often, seemingly clear-cut stand-your-ground cases have unpredictable outcomes.<sup>20</sup> For example, Drejka maintained that he acted lawfully, claiming that he "cleared every hurdle that the law had put in front of [him]."<sup>21</sup> The Pinellas County sheriff agreed with Drejka, at least initially, when explaining his decision not to arrest Drejka immediately after the incident.<sup>22</sup> Accordingly, Drejka was not charged with manslaughter until nearly a month after the shooting, when the Florida State Attorney reviewed the case and decided to prosecute him.<sup>23</sup> Notwithstanding his conviction, Drejka's firm belief that the law authorized him to shoot McGlockton outside the convenience store is a stark example of how dangerous stand-your-ground laws can be. Drejka was emboldened to use his gun in a situation that, though rather hostile, most likely did not call for self-defense with a deadly weapon.

Moreover, the sheriff's reluctance to arrest Drejka highlights not only the controversy over stand-your-ground laws but also the confusion about how these laws are applied.<sup>24</sup> This confusion likely stems from varying perceptions of what constitutes a "reasonable" belief of imminent and serious bodily injury.<sup>25</sup> It should come as no surprise that, in the midst of deliberations, the jury in the Drejka trial asked the judge for "clarity on what defines reasonable doubt in the justified use of

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<sup>19</sup> *Id.*

<sup>20</sup> 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/>.

<sup>21</sup> Bill Hutchinson, *Florida 'Stand Your Ground' Shooter Michael Drejka Says 'I Followed the Law,'* ABC NEWS (Sept. 2, 2018, 7:44 PM), <https://abcnews.go.com/US/florida-stand-ground-shooter-michael-drejka-law/story?id=57562288>.

<sup>22</sup> Alex Horton & Cleve R. Wootson Jr., *Man Charged in 'Stand Your Ground' Killing Has History of Guns and Threats, Prosecutors Say*, WASH. POST (Aug. 14, 2018), <https://www.washingtonpost.com/news/post-nation>.

<sup>23</sup> *Id.*

<sup>24</sup> Cynthia V. Ward, "Stand Your Ground" and Self Defense, 42 AM. J. CRIM. L. 89, 107 (2015).

<sup>25</sup> See *id.* at 109–11.

deadly force.”<sup>26</sup> The judge told the jurors that he could not explain his instructions any further: “They are what they are.”<sup>27</sup>

This reasonableness standard is the tallest “hurdle” to clear in stand-your-ground cases. This Note argues that by removing the duty to retreat, stand-your-ground laws have seriously muddled the reasonable person standard, an already murky principle, so that self-defense has become a windfall to otherwise culpable offenders.<sup>28</sup> In Part I, this Note explores a brief history of self-defense theory, from its origins in English common law to its current statutory form in American jurisdictions. More specifically, Part I aims to trace the historical application of the duty to retreat in American self-defense doctrine. Part II discusses the reasonable belief element of self-defense doctrine and American law’s back-and-forth between an objective and subjective standard. Part II further analyzes how stand-your-ground laws severely hinder the reasonable belief inquiry to the point that it loses any meaningful objectivity. Finally, Part III explains how the “lethal weapons” provision in Pennsylvania’s stand-your-ground statute provides a practical solution to the issues discussed in Part II, and why it should serve as a model for other states.

## I. A BRIEF EXAMINATION OF THE EVOLUTION OF SELF-DEFENSE THEORY

### A. *Origins in English Common Law*

The origins of American self-defense doctrine derive from English common law, which gave weight to both the duty to retreat and to stand-your-ground approaches.<sup>29</sup> English common law split self-defense into two distinct categories: justifiable homicide and excusable homicide.<sup>30</sup> Early American criminal law reflected this same distinction,<sup>31</sup> and linguistic remnants of this divergence are

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<sup>26</sup> Kathryn Varn & Dan Sullivan, *Michael Drejka Convicted of Manslaughter in Markeis McGlockton’s Death*, TAMPA BAY TIMES (Aug. 23, 2019), <https://www.tampabay.com/news/pinellas/2019/08/24/michael-drejka-convicted-of-manslaughter-in-markeis-mcglocktons-death/> (last updated Aug. 24, 2019).

<sup>27</sup> *Id.*

<sup>28</sup> See generally Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137 (2008).

<sup>29</sup> Ward, *supra* note 24.

<sup>30</sup> Darrell A.H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS. 85, 88 (2017).

<sup>31</sup> *Id.* at 92.

evidenced in many state statutes even today.<sup>32</sup> Justifiable homicide was considered faultless and necessitated an acquittal; excusable homicide presumed fault but permitted an appeal to the sovereign's mercy.<sup>33</sup> Justifiable homicide was limited to actions taken essentially on behalf of the King—such as executing a death sentence or committing a homicide in the course of arresting a felon.<sup>34</sup> Our modern conception of self-defense falls more in line with excusable homicide—killing in self-defense or in defense of property.<sup>35</sup> In early self-defense doctrine, a person who killed in self-defense had to seek a pardon from the King, similar to the way a self-defender today must be vindicated in the eyes of the law.<sup>36</sup>

Like self-defense, the duty to retreat doctrine originates in early English common law. Some of the earliest doctrinal work on self-defense involving the duty to retreat comes from Matthew Hale, an influential seventeenth-century English judge and lawyer.<sup>37</sup> Hale defines homicide *se defendendo* (self-defense) as, “the killing of another person in the necessary defense of himself against him that assaults him.”<sup>38</sup> He explains that “[r]egularly it is necessary, that the person that kills another in his own defense, fly as far as he may to avoid the violence of the assault before he turn upon his assailant.”<sup>39</sup> Hale further developed the idea of a duty to retreat through a series of hypothetical situations. Consider the following: “[t]here is malice between A. and B. [T]hey meet casually; A. assaults B. and drives him to the wall; B. in his own defense kills A. [T]his is *se defendendo*, and shall not be [heightened] by the former malice into murder or homicide at large. . . .”<sup>40</sup> While Hale does not explicitly

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<sup>32</sup> For example, Florida has on its books both Justifiable Use of Deadly Force, FLA. STAT. § 782.02 (2019), and Excusable Homicide, FLA. STAT. § 782.03 (2019). Similarly, California has both Justifiable Homicide, Any Person, CAL. PENAL CODE § 197 (2019), and Excusable Homicide, CAL. PENAL CODE § 195 (2019). Most states' penal laws make the same distinction.

<sup>33</sup> Miller, *supra* note 30.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 91 (“The persistence of the distinction between justified self-defense and excusable self-defense at common law only makes conceptual sense if one understands that the homicide is justified when the slayer acts in some sense on behalf of the state. It is merely excused when the slayer acts solely on his own behalf.”).

<sup>36</sup> *Id.* at 89.

<sup>37</sup> See 1 MATTHEW HALE, THE HISTORY OF PLEAS TO THE CROWN (1800) (ebook), [https://books.google.com/books/about/The\\_History\\_of\\_the\\_Pleas\\_of\\_the\\_Crown.html?id=u1FDAAAACAAJ](https://books.google.com/books/about/The_History_of_the_Pleas_of_the_Crown.html?id=u1FDAAAACAAJ).

<sup>38</sup> *Id.* at 478.

<sup>39</sup> *Id.* at 480.

<sup>40</sup> *Id.* at 479.



effectuate the duty to retreat in this scenario, by including the detail that A has driven B to the wall he seems to recognize the duty as an implicit condition to self-defense. This becomes clearer when Hale distinguishes between self-defense and manslaughter:

A. assaults B. and B. presently thereupon strikes A. without flight, whereof A. dies[;] this is manslaughter in B. and not *se defendendo* . . . . [B]ut if B. strikes A. again, but not mortally, and blows pass between them, and at length B. retires to the wall; and being pressed upon by A. gives him a mortal wound, whereof A. dies, this is only homicide *se defendendo*, altho [sic] that B. had given divers [sic] other strokes, that were not mortal before he retired to the wall, or as far as he could.<sup>41</sup>

He does note, however, certain exceptions to the general rule that one must retreat as far as he can before he may use deadly force.<sup>42</sup> The most well-known and widely accepted exception to the duty to retreat is the Castle Doctrine, first explained by Sir Edward Coke.<sup>43</sup> In *Semayne's Case* in 1604, Coke wrote, “the house of every one is to him as his Castle and Fortress as well for defence [sic] against injury and violence, as for his repose.”<sup>44</sup> Thus, under the Castle Doctrine, an individual in his or her own home has no duty to retreat from a trespasser or attacker. The reasoning behind this rule is that the home is sacred, and there is no safer place to which a person can retreat.<sup>45</sup> The inability to safely retreat acts as a logical limit on the duty to retreat, and it applies even beyond one's home. For example, Hale speaks of an exception in which the assault by A upon B is done “so fiercely” that B cannot retreat,

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 480–81.

<sup>43</sup> *Castle Doctrine*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/castle\\_doctrine](https://www.law.cornell.edu/wex/castle_doctrine) (last visited Aug. 1, 2020) (“The castle exception states that if a defendant is in his home, he is not required to retreat prior to using deadly force in self-defense.”).

<sup>44</sup> 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 135 (Steve Sheppard ed., 2003).

<sup>45</sup> *E.g.*, *People v. Riddle*, 649 N.W.2d 30, 44 (Mich. 2002) (“The rule has been defended as arising from ‘an instinctive feeling that a home is sacred, and that it is improper to require a man to submit to pursuit from room to room in his own house’ . . . . Moreover, in a very real sense a person's dwelling is his primary place of refuge. Where a person is in his ‘castle,’ there is simply no safer place to retreat.”) (quoting *People v. Godsey*, 220 N.W.2d 801 (Mich. App. 1974)); *Commonwealth v. Childs*, 142 A.3d 823 (Pa. 2016) (citing Dennis M. Drake, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 ST. MARY'S L.J. 573, 584 (2008)) (“The ideological foundation for the castle doctrine is the belief that a person's home is his castle and that one should not be required to retreat from his sanctum.”).

or falls to the ground during the attack, and as a result B may lawfully defend himself.<sup>46</sup> In such a case, the person being attacked is “not bound to give back, but may kill the assailant, and it is not felony.”<sup>47</sup> This seems to be a reiteration of the idea that the assailed must be able to *safely* retreat from his attack, and falls in line with the modern duty to retreat doctrine. Hale further explains that the necessity for B to kill A, caused by the severe nature of A’s attack, shall be interpreted by the law as flight to give B the “advantage of *se defendendo*.”<sup>48</sup>

William Blackstone, perhaps the most influential English jurist on early American law,<sup>49</sup> also identifies self-defense as a type of excusable homicide in that it arises out of the need to protect oneself in the event of a sudden attack, as opposed to killing on behalf of the crown.<sup>50</sup> Like Hale, Blackstone distinguishes between self-defense and manslaughter to explain what is required for self-defense—namely, the duty to retreat.<sup>51</sup> Because the law serves as an “avenger of injuries,” and because the preservation of human life should take precedence, the law requires that a self-defender “flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him.”<sup>52</sup> Further, for a killing to be in self-defense it must occur during the assault, for if the self-defender attacks after the assault is over, or once his attacker has retreated, it can no longer be considered self-defense.<sup>53</sup>

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<sup>46</sup> HALE, *supra* note 37, at 479.

<sup>47</sup> *Id.* at 481.

<sup>48</sup> *Id.* at 482.

<sup>49</sup> *Sir William Blackstone*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/William-Blackstone#accordion-article-history> (last visited Aug. 1, 2020); *see also* Jessie Allen, *Reading Blackstone in the Twenty-First Century and the Twenty-First Century Through Blackstone*, in REINTERPRETING BLACKSTONE’S COMMENTARIES 215, 216 (Wilfrid Prest ed., 2014) (detailing the U.S. Supreme Court’s history of relying on Blackstone).

<sup>50</sup> WILLIAM BLACKSTONE, *Of Homicide*, in COMMENTARIES ON THE LAWS OF ENGLAND (Lonang Institute 2005) (1765–1769) (ebook), <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-414/>.

<sup>51</sup> *Id.* (“But the true criterion between [self-defense and manslaughter] seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun to fight . . . and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense.”).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

The core of American self-defense doctrine is firmly rooted in early English law, which established the duty to retreat as the boundary between permissible and impermissible self-defense.<sup>54</sup> Still, early American courts had several important modifications to make to self-defense principles before arriving at the modern standard.

*B. The Duty to Retreat in Early American Self-Defense Law*

While early American law borrowed a great deal from English common law, it was not long before American jurisprudence departed from its predecessor. By the second half of the nineteenth century, American jurists had begun to modify traditional self-defense requirements, leaving the likes of Blackstone and Hale behind. The distinction between excusable homicide and justifiable homicide had become muddled as courts were regularly applying the duty to retreat, originally required only in *se defendendo* (excusable) cases, to prevention of felony (justifiable) cases.<sup>55</sup> However, as justifiable and excusable homicide converged, the applicability of the duty to retreat diverged into roughly three separate versions of law: (1) some states required that the assailed retreat as far they could before killing their attacker; (2) others provided for an exception to the duty to retreat (not including in one's own home) when the assailed's peril was so imminent as to make retreat unsafe; and (3) still others enforced no duty to retreat at all.<sup>56</sup>

However, by the turn of the twentieth century, a majority of states had implemented some version of the duty to retreat.<sup>57</sup> Only nine states opted for stand-your-ground laws.<sup>58</sup> The existence of this small minority of stand-your-ground states in the early twentieth century shows that the stand-your-ground doctrine is hardly a brand-new concept, despite its widespread codification beginning in 2005.<sup>59</sup> Interestingly, twenty-two states employed what the American Law Report ("ALR")

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<sup>54</sup> Ward, *supra* note 24, at 96–97.

<sup>55</sup> Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 487 (1987).

<sup>56</sup> *Homicide: Duty to Retreat When Not on One's Own Premises*, 18 A.L.R. 1279 (1922).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See "Stand Your Ground" Laws, *supra* note 2.

deemed an “intermediate view,” enforcing no duty to retreat when “the assault is felonious, producing imminent peril of death or great bodily harm.”<sup>60</sup>

Although the ALR distinguishes its intermediate view from a pure duty to retreat, the intermediate view is directly in line with our modern concept of the duty to retreat.<sup>61</sup> Retreat is required only when the assailed can *safely* do so without creating more danger to themselves.<sup>62</sup> For example, an assailant threatening the imminent use of a deadly weapon would present a situation where fleeing is unlikely to be a safe option, and thus the assailed would lawfully be able to stand their ground and use deadly force if necessary to repel the assailant.<sup>63</sup> It should come as no surprise that this intermediate view, as described above, seemed to arise due to the advent of the common use of guns.<sup>64</sup> An assailant with a gun poses an imminent threat of serious bodily harm even from far away, meaning that the mere presence of a gun may negate any opportunity to safely retreat from danger.<sup>65</sup> Accordingly, the law shifted, resulting in the intermediate view.<sup>66</sup>

The rationale behind the intermediate view is simply to prioritize the safety of the assailed over that of the assailant. Consider a United States Supreme Court case in which the defendant shot his assailant after the latter suddenly lunged at him with a knife and cut his face twice.<sup>67</sup> The defendant appealed his conviction of manslaughter, alleging that a jury instruction regarding self-defense law, which

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<sup>60</sup> *Homicide: Duty to Retreat When Not on One’s Own Premises*, *supra* note 56, § 3.

<sup>61</sup> See *Retreat Rule Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/r/retreat-rule/> (last visited Aug. 1, 2020) (“Retreat rule is a principle of criminal law that a victim of a murderous assault can choose a safe retreat instead of resorting to deadly force in self-defense, unless the victim is at home or in his or her place of business . . .”).

<sup>62</sup> *Id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *State v. Gardner*, 104 N.W. 971, 975 (Minn. 1905) (“The doctrine of ‘retreat to the wall’ had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use, and to the type of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand-to-hand encounter with fists, clubs, and even knives, as a condition of justification for killing in self-defense, while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or to do great bodily harm. What might be a reasonable chance for escape in the one situation might, in the other, be certain death.”).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Rowe v. United States*, 164 U.S. 546, 547–48 (1896).

stated that the defendant must have retreated or non-fatally wounded his assailant, was erroneous.<sup>68</sup> The Supreme Court agreed with the defendant, explaining that he had a right to “remain where he was” and to resist the attack with whatever means were reasonably necessary.<sup>69</sup> The Court clarified that “[i]t was error to make the case depend, in whole or in part, upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant, without more seriously wounding him.”<sup>70</sup> Thus, where retreating (protecting the assailant) would only put the assailed in more danger, the assailed is permitted to use deadly force without first retreating.

Accordingly, by the end of the nineteenth century, most American courts had settled on including the duty to retreat in self-defense law.<sup>71</sup> And as the duty to retreat grew more entrenched in the law, the distinction between justifiable homicide and excusable homicide grew less relevant.<sup>72</sup> As a result, courts turned to other issues of self-defense theory as the law developed. The most notable of such issues was by what standard a self-defense claim should be judged.

## II. CHOOSING AN OBJECTIVE OR SUBJECTIVE STANDARD AND HOW STAND-YOUR-GROUND LAWS MUDDLE THE REASONABLE BELIEF INQUIRY

### A. *Settling on a Quasi-Objective Standard*

Because American jurists collapsed all self-defense cases into *se defendendo*, they began to consider how to treat the defendant who mistakenly believed that the use of deadly force was necessary. Essentially, the question was this: which standard, objective or subjective, is appropriate to determine whether a defendant can make a self-defense claim? Initially, it was generally accepted that self-defense claims were to be considered under an objective reasonableness standard, i.e., would a reasonable person in the defendant’s position have deemed that such force was necessary.<sup>73</sup> Yet,

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<sup>68</sup> *Id.* at 549.

<sup>69</sup> *Id.* at 558.

<sup>70</sup> *Id.*

<sup>71</sup> See Ward, *supra* note 24, at 96–103.

<sup>72</sup> See Miller, *supra* note 30, at 89 (“In practice, the facts that distinguished private vengeance, excusable self-defense, and justifiable killing remained, as they are today, notoriously fuzzy and contingent.”).

<sup>73</sup> Singer, *supra* note 55, at 488. Just as the “intermediate” view of self-defense could be attributed to the rising commonality of guns, so too could the gravitation toward the objective standard. *Id.*

by the early twentieth century, courts had shifted to a quasi-objective, quasi-subjective test when it came to evaluating how a reasonable person would have acted under the same circumstances as the defendant.<sup>74</sup> Courts took issue with the “notion that the criminal law should punish persons who are not morally blameworthy or, alternatively, should punish the negligent equally as the intentional actor.”<sup>75</sup> Accordingly, courts began to factor the defendant’s subjective characteristics into their reasonableness standards, including differences in size between the defendant and deceased, the defendant’s disability, the defendant’s age, and the defendant’s knowledge about the deceased’s violent character.<sup>76</sup>

Perhaps the most notorious case in the late twentieth century involving the debate on the proper application of self-defense was *People v. Goetz*.<sup>77</sup> In *Goetz*, the defendant was a middle-aged white man who carried an unlicensed gun for protection because he had been mugged in the past.<sup>78</sup> He boarded a New York City subway train upon which a group of four African-American teenagers was also riding.<sup>79</sup> Without displaying a weapon, two of the four teenagers approached him, and one of them instructed Goetz to give him five dollars.<sup>80</sup> Goetz responded by standing up, drawing his gun, and shooting four times, once in the direction of each teenager.<sup>81</sup> No one died, but one of the teenagers suffered a severed spinal cord injury.<sup>82</sup> In later statements, Goetz claimed that he intended to murder the four young men and that had he had more bullets, he would have shot them “again, and again,

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<sup>74</sup> *Id.* at 491.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 491–92.

<sup>77</sup> *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986); *Bernhard Goetz Shoots Four Youths on the Subway*, HISTORY, <https://www.history.com/this-day-in-history/the-bernhard-goetz-subway-shooting> (last updated Dec. 18, 2019).

<sup>78</sup> *Goetz*, 497 N.E.2d at 43–44; *Bernhard Goetz Shoots Four Youths on the Subway*, *supra* note 77. Note that New York still enforces the duty to retreat.

<sup>79</sup> *Id.* at 43.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

and again.”<sup>83</sup> A grand jury indicted Goetz on criminal possession of a weapon but dismissed the charge of attempted murder.<sup>84</sup>

The case focused predominantly on the proper standard of reasonableness regarding the use of deadly force.<sup>85</sup> Goetz argued that it should be a purely subjective view and that any introduction of an objective element was erroneous.<sup>86</sup> The New York Court of Appeals disagreed, finding that New York’s law<sup>87</sup> called for a predominantly objective standard, though the background and characteristics of a particular actor may be considered.<sup>88</sup> As a result, the court settled on a mixed objective and subjective standard of reasonableness in considering cases of self-defense.<sup>89</sup> Ultimately, Goetz was convicted of illegally possessing a gun but was acquitted of murder and assault charges.<sup>90</sup>

Several states follow an approach similar to New York’s, based primarily on objectivity, but allowing for considerations of the circumstances and the actor’s characteristics.<sup>91</sup> The Model Penal Code (“MPC”), which has been adopted at least in part by a majority of states,<sup>92</sup> reflects this middle-ground approach. It instructs that a person is justified in using force when “the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of

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<sup>83</sup> *Id.* at 44.

<sup>84</sup> *Id.* at 44–45.

<sup>85</sup> *Id.* at 101 (“The credibility of witnesses and the reasonableness of defendant’s conduct are to be resolved by the trial jury.”).

<sup>86</sup> *Id.* at 45–46.

<sup>87</sup> N.Y. PENAL LAW § 35:15(2) (McKinney 1987) (“A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless: (a) He reasonably believes that such other person is using or about to use deadly physical force.”).

<sup>88</sup> *Goetz*, 497 N.E.2d at 51–52.

<sup>89</sup> *Id.* at 52.

<sup>90</sup> *Bernhard Goetz Shoots Four Youths on the Subway*, *supra* note 77.

<sup>91</sup> J. Dave Williamson, *Untying the Hands of Prosecutors in “Stand Your Ground” States: Rethinking the Jury Charge on Reasonableness for Altercations Occurring Outside One’s Home*, 6 J. MARSHALL L.J. 243, 261 n.101 (2012).

<sup>92</sup> Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007). Courts also regularly rely on the Model Penal Code as persuasive authority. *Id.* at 327.

unlawful force.”<sup>93</sup> Thus, the MPC initially calls for determining the actor’s actual (subjective) belief that they are in imminent danger and the use of deadly force is necessary.<sup>94</sup> But, it further provides that use of deadly force is not justified if “the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take.”<sup>95</sup> Initially, the MPC appears to provide a simple reformulation of a subjective standard, but because the MPC incorporates the duty to retreat, it allows for an objective analysis.<sup>96</sup>

### B. *How Stand-Your-Ground Laws Muddle Objectivity*

Without the duty to retreat requirement, the objective standard is severely weakened to the point that it is hardly useful. Therein lies the fundamental issue with stand-your-ground laws. The problem is not that stand-your-ground statutes do not call for an objective standard on their face; they still require that the person claiming self-defense reasonably believe that use of deadly force is necessary to protect themselves.<sup>97</sup> But these statutes make it far easier for the actor to “prove” their actions were reasonable, both by removing the ability to retreat from analysis and by granting civil and criminal immunities—Florida’s stand-your-ground law is the seminal example of such immunities.<sup>98</sup> The Florida Supreme Court decided in 2010 that a defendant’s claim of self-defense under the stand-your-ground statute amounted to essentially a pretrial motion, decided on a preponderance of the evidence standard, because it is legislatively-granted immunity as opposed to an

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<sup>93</sup> MODEL PENAL CODE § 3.04(1) (AM. LAW INST. 1981).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* § 3.04(2)(b)(ii). Note that the MPC provides narrow but commonly accepted exceptions to this limitation, like when a person is defending themselves in their home or workplace. *Id.*

<sup>96</sup> See Williamson, *supra* note 91, at 262.

<sup>97</sup> See, e.g., FLA. STAT. § 776.012 (2017); TEX. PENAL CODE ANN. § 9.32 (West 2017); MICH. COMP. LAWS § 780.972 (2017).

<sup>98</sup> FLA. STAT. § 776.032(1) (2017) (“A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened [other than police officers performing official duties] . . . . As used in this subsection, the term ‘criminal prosecution’ includes arresting, detaining in custody, and charging or prosecuting the defendant.”); see also ARIZ. REV. STAT. ANN. § 13–413 (2019).



affirmative defense.<sup>99</sup> In effect, Florida's statute allows defendants to prove their use of self-defense in a pre-trial evidentiary hearing by a preponderance of the evidence, a weaker standard than beyond a reasonable doubt, as is typical in criminal cases.<sup>100</sup>

Immunity from civil and criminal liability is certainly an alarming feature of stand-your-ground statutes, the dangers of which have been written about extensively.<sup>101</sup> But for the purposes of discussing the reasonableness standard as applied to self-defense, it is the omission of the duty to retreat from these statutes that is more relevant. Stand-your-ground statutes effectively prevent jurors from considering whether the defendant could retreat; otherwise, the statutes simply would not have teeth. In fact, some states, like Texas, have statutorily prohibited fact-finders from considering the defendant's ability to retreat.<sup>102</sup> Yet, retreat is a crucial part of self-defense analysis and is necessary to reach just outcomes.

Consider the example of Markeis McGlockton and Michael Drejka, discussed in the introduction of this Note.<sup>103</sup> Based on the video evidence depicting the altercation that led to Drejka firing his gun, Drejka was arguably not in danger of death or serious bodily injury.<sup>104</sup> McGlockton shoved Drejka quite forcefully,

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<sup>99</sup> Hunter G. Cavell, *Reasonable Belief: A Call to Clarify Florida's Stand Your Ground Laws*, 50 CRIM. L. BULL. 1 (2014).

<sup>100</sup> *Id.*

<sup>101</sup> See, e.g., Victoria Bell, Note, *The "White" to Bear Arms: How Immunity Provisions in Stand Your Ground Statutes Lead to an Unequal Application of the Law for Black Gun Owners*, 46 FORDHAM URB. L.J. 902, 918–21 (2019); Daniel Sweeney, Note, *Standing up to "Stand Your Ground" Laws: How the Modern NRA-Inspired Self-Defense Statutes Destroy the Principle of Necessity, Disrupt the Criminal Justice System, and Increase Overall Violence*, 64 CLEV. ST. L. REV. 715, 731–33 (2016); Jennifer Randolph, Comment, *How to Get Away with Murder: Criminal and Civil Immunity Provisions in "Stand Your Ground" Legislation*, 44 SETON HALL L. REV. 599, 616–21 (2014).

<sup>102</sup> TEX. PENAL CODE ANN. § 9.32(d) (West 2017) ("For purposes of Subsection (a)(2), in determining whether an actor described by Subsection (c) reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat."); see also MISS. CODE ANN. § 97–3–15(4) (2016) ("A person who is not the initial aggressor and is not engaged in unlawful activity shall have no duty to retreat before using deadly force under subsection (1)(e) or (f) of this section if the person is in a place where the person has a right to be, and no finder of fact shall be permitted to consider the person's failure to retreat as evidence that the person's use of force was unnecessary, excessive or unreasonable.").

<sup>103</sup> Wootson, *supra* note 1.

<sup>104</sup> Generally, "serious bodily injury" is defined as, "bodily injury which involves substantial risk of death, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ or mental faculty." See *Serious Bodily Injury Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/s/serious-bodily-injury/> (last visited Aug. 1, 2020).

knocking him hard on his backside.<sup>105</sup> Drejka was likely in shock to a certain extent and rightfully scared. However, fear does not justify taking the life of another person. McGlockton did not further pursue Drejka after shoving him; he shuffled on his feet a few times but did not close the distance between himself and Drejka after Drejka fell to the ground.<sup>106</sup> Drejka immediately drew his gun, prompting McGlockton to step backward and raise his arms with his palms facing up, a classically understood signal of surrender.<sup>107</sup> Drejka did not shoot immediately after drawing his gun, but instead hesitated for a few seconds, possibly weighing whether or not to shoot.<sup>108</sup> That sort of consideration is a good indication that shooting McGlockton was not necessary. Further, McGlockton was coming to the defense of his girlfriend and children.<sup>109</sup> It seems unlikely that he would have used such force so as to threaten Drejka's life in the presence of his children (though it is impossible to determine what McGlockton would have felt was necessary). It is also unlikely McGlockton was going to inflict serious bodily harm upon Drejka to the point Drejka reasonably had to fear for his life since the altercation took place in a busy convenience store parking lot in broad daylight.<sup>110</sup>

Again, there are plausible arguments for why Drejka had reason to fear for his life and, admittedly, this scenario is hardly cut and dry. However, this example is significant because everything was recorded on camera, and it was *still* hotly debated whether Drejka acted lawfully in self-defense.<sup>111</sup> This fact is important because cases are often pieced together from eye-witness testimony, which is unreliable and fraught with biases.<sup>112</sup> And, the most important testimony in every self-defense case is that of the defender.<sup>113</sup>

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<sup>105</sup> Wootson, *supra* note 1.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

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

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See Greg Hurley, *The Trouble with Eyewitness Identification Testimony in Criminal Cases*, NAT'L CTR. FOR ST. CTS. (Mar. 2017), <https://www.ncsc.org/trends/monthly-trends-articles/2017/the-trouble-with-eyewitness-identification-testimony-in-criminal-cases>.

<sup>113</sup> See, e.g., *Did the Dude Deserve to Die: Trying a Self Defense Homicide*, WIS. ST. PUB. DEFENDERS, <https://www.wispd.org/index.php/legal-resources/specialty-practices/homicide-practice-group/self-defense-cases> (last visited Aug. 1, 2020) (“[I]n a self defense homicide (and many other cases as well),

Consequently, it is difficult to imagine that a person claiming self-defense could not convince a fact-finder that they actually believed their life was in danger if they do not have the burden to prove they could have safely retreated. Because self-defense analysis most often includes consideration of the person's subjective state of mind, the reasonable belief of imminent harm element of self-defense is virtually satisfied by default in stand-your-ground states.<sup>114</sup> Essentially, stand-your-ground laws act as a sort of license to kill, by giving individuals a great deal of discretion to take another's life. Fortunately, Drejka was brought to justice for killing Markeis McGlockton. But it is important to note that he was not even arrested until weeks after the incident when video evidence emerged.<sup>115</sup> Ultimately, the court found that Drejka did not have a reasonable belief of imminent harm despite not having a duty to retreat, but the fact that Drejka (and the county sheriff) firmly believed he acted lawfully gives rise to the serious concerns that stand-your-ground laws endorse the unreasonable fears some individuals harbor as grounds for self-protection.<sup>116</sup> Without video evidence of the altercation between Drejka and McGlockton, it is easy to imagine the case could have been resolved in favor of Drejka, or may never have been brought at all.

*C. Empirical Studies Have Revealed that Stand-Your-Ground Laws Have Detrimental Effects*

Numerous studies indicate that stand-your-ground laws allow unreasonable fears to factor into reasonable belief analysis.<sup>117</sup> In 2015, the American Bar Association released the report of a task force of public and private criminal law attorneys, law professors, judges, and scholars who conducted a years-long study on the effects of stand-your-ground laws.<sup>118</sup> The task force found that stand-your-ground laws are applied unevenly and unpredictably and have increased homicide rates in the states that employ them.<sup>119</sup> Accordingly, the task force recommended that

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the greatest moment of drama in the courtroom is when your client takes the stand . . . [A] persuasive direct will be the *piece de resistance* that wins the case for your client.”)

<sup>114</sup> Often, it is very easy to establish a *prima facie* claim of self-defense. See *infra* note 162.

<sup>115</sup> Horton & Wootson, *supra* note 22.

<sup>116</sup> Hutchinson, *supra* note 21; Horton & Wootson, *supra* note 22.

<sup>117</sup> See ABA, National Task Force on Stand Your Ground Laws: Final Report and Recommendations 2 (2015) [hereinafter Nat'l Task Force].

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 2.

states repeal such laws.<sup>120</sup> To support its conclusions, the task force report cited several notable studies that indicated stand-your-ground laws encourage violent behavior, instead of suppressing it.<sup>121</sup> For example, a Georgia State University study concluded that the homicide rate in stand-your-ground states increased by 7.1 percent after the passage of those laws.<sup>122</sup> Similarly, a Texas A&M University study reported that homicide rates increased by eight percent after the enactment of stand-your-ground laws, equating to 600 additional homicides per year.<sup>123</sup>

Newspapers have also reported their own studies. In 2012, the *Tampa Bay Times* conducted a study after the highly publicized death of Trayvon Martin, in an attempt to determine whether Florida's stand-your-ground law was effective in preventing violence.<sup>124</sup> Strikingly, the study found that the law worked to the benefit of habitual violent offenders by repeatedly granting them immunity from punishment.<sup>125</sup> The *Tampa Bay Times* study also found that nearly seventy percent of individuals who invoked a stand-your-ground defense received no punishment and that factually similar cases often yield inconsistent results.<sup>126</sup> Numerous other studies conducted after the release of the task force report reinforce the general conclusion that stand-your-ground laws increase violence, particularly firearm homicides.<sup>127</sup>

Additionally, there is significant empirical evidence that stand-your-ground laws have unfair impacts along racial lines. Dr. John Roman of the Urban Institute isolated the race factor while studying the impact of stand-your-ground laws between 2005 and 2010.<sup>128</sup> Specifically, the data collected from the study showed that the “rate [of likelihood of being found to be justified] is significantly higher, such that a

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<sup>120</sup> *Id.* at 2–3.

<sup>121</sup> *Id.* at 10–11.

<sup>122</sup> *Id.* at 11.

<sup>123</sup> *Id.*

<sup>124</sup> See *id.* at 13–14; see also 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, 893 (2015).

<sup>125</sup> Nat'l Task Force, *supra* note 117, at 13.

<sup>126</sup> *Id.* at 13–14.

<sup>127</sup> See *Fact Sheet: Stand Your Ground Laws*, GVPEDIA (July 26, 2018), [https://www.gvpedia.org/wp-content/cache/page\\_enhanced/www.gvpedia.org/white-paper-stand-ground-laws/\\_index.html\\_gzip](https://www.gvpedia.org/wp-content/cache/page_enhanced/www.gvpedia.org/white-paper-stand-ground-laws/_index.html_gzip).

<sup>128</sup> See JOHN K. ROMAN, URBAN INST., RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA (2013).

white shooter who kills a [B]lack victim is 350 percent more likely to be found to be justified than if the same shooter killed a white victim.”<sup>129</sup> Roman’s research showed that if stand-your-ground laws provide the assailed with a license to kill, it is primarily a license to kill Black people.

Moreover, the racial impacts of stand-your-ground laws extend beyond disparate prosecutorial results; there is also an indication that racial biases play a significant factor in shaping the perceived reasonableness of an actor’s decisions.<sup>130</sup> For example, many people believe that racial biases played a major role in George Zimmerman’s killing of Trayvon Martin.<sup>131</sup> While Zimmerman’s defense team worked hard to paint Martin as a thug, it seemed that Zimmerman’s fears were “steeped in racial stereotypes of African American men, rather than based on a reasonable assessment of the situation.”<sup>132</sup> To compound the situation, the initial decision by local police not to arrest Zimmerman signified that “the legal system was sanctioning his fears and actions, thereby endorsing the very stereotypes that Zimmerman relied upon.”<sup>133</sup> Fast forward to the Drejka-McGlockton case six years later, where local police again decided not to arrest the killer, and it becomes apparent that the same concerns persist. The Trayvon Martin and Drejka-McGlockton cases highlight a dangerous flaw with stand-your-ground laws—they permit racial biases to color reasonableness analyses, thereby justifying seemingly unjust and unnecessary invocations of self-defense. The duty to retreat thus comes into focus as a crucial screen needed to maintain the integrity of self-defense theory.

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<sup>129</sup> Nat’l Task Force, *supra* note 117, at 13. *See also* Jeannine Bell & Mona Lynch, *Cross-Sectional Challenges: Gender, Race, and Six-Person Juries*, 46 SETON HALL L. REV. 419, 430–32 (2016) (commenting further on Roman’s study and supplying anecdotal evidence to support the study’s findings).

<sup>130</sup> Markovitz, *supra* note 124, at 890.

<sup>131</sup> *Id.* at 894. Zimmerman, a neighborhood watch captain, grew suspicious of Martin as the seventeen-year-old was returning home from a nearby convenience store. *Id.* at 877–78. Zimmerman called the police to report Martin’s “suspicious activity” and the police told him not pursue Martin. *Id.* Zimmerman ignored the police’s instructions and confronted Martin, leading to a physical altercation which ended with Zimmerman shooting Martin in the chest. *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

### III. HOW PENNSYLVANIA’S “LETHAL WEAPONS” PROVISION PROVIDES A WORKABLE SOLUTION TO THE STAND-YOUR-GROUND PROBLEM

The question that remains, then, is how states should fix stand-your-ground laws to curb the broad spectrum of reasonableness such laws endorse. Repealing them would likely be ideal; stand-your-ground laws are essentially a “solution” to a problem that never actually existed.<sup>134</sup> However, the outright repeal of these laws seems unlikely, given that a solid majority of states now have them on their books.<sup>135</sup> This section will begin by briefly exploring a few proposed reforms before explaining why legislators ought to explicitly curb the scope of stand-your-ground laws to establish a clear limitation on what is reasonable. Specifically, this Note suggests that the “lethal weapons” provision in Pennsylvania’s stand-your-ground statute should serve as a model for other states to follow.

#### A. *A Brief Look at Some Suggested Solutions and Why They Will Not Work*

Several reforms have been suggested to fix stand-your-ground laws. For example, some critics have called for a clarification of what exactly “reasonable belief” means.<sup>136</sup> Legislatures rarely, if ever, define the term, leaving the legal system to its own interpretations.<sup>137</sup> Thus, it has been suggested that implementing a uniform understanding of what constitutes a reasonable belief would allow for a more even-handed application of self-defense law.<sup>138</sup> But such a solution is rather impractical in application. The reasonable person standard is an intentionally malleable one; its purpose is to provide a broad basis on which to judge a virtually limitless range of factual possibilities.<sup>139</sup> Instituting a precise definition, if one were even feasible, destroys the function of the reasonable person standard. As an analytical tool for judging human behavior, it is far from perfect. But attempting to improve it by

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<sup>134</sup> See *infra* note 162.

<sup>135</sup> See “Stand Your Ground” Laws, *supra* note 2.

<sup>136</sup> Cavell, *supra* note 99, at 256–57.

<sup>137</sup> *Id.* at 257–58.

<sup>138</sup> *Id.*

<sup>139</sup> See Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 SAN DIEGO L. REV. 651, 654 (2013) (“The reasonable person ‘inhabit[s] every nook and cranny of the common law’; he is a character who has found a place in tort law’s negligence, affirmative defenses in criminal law, Miranda jurisprudence, the Establishment Clause, and even habeas proceedings, along with a host of others.”).

confining reasonableness to a single set of parameters is foolish, and likely impossible.

Reformulating jury instructions is another popular proposed solution to the issues with stand-your-ground instructions.<sup>140</sup> As contradictory as stand-your-ground laws are to legal scholars, it follows that they are equally as confusing to jurors. It hardly helps that jury instructions in stand-your-ground states likely have jurors performing mental gymnastics just to determine what details are most important. For example, consider Alaska's recommended jury instructions regarding self-defense.<sup>141</sup> After discussing the actor's reasonable belief of imminent serious bodily injury, the instruction provides: "[A] defendant may not use deadly force in self-defense if the defendant knows that, with complete personal safety and with complete safety as to others being defended, the defendant can avoid the necessity of using deadly force by leaving the area of the encounter."<sup>142</sup> Then, it goes on, in complete contradiction of itself, to say: "However, a defendant does not have a 'duty to leave the area' if . . . the defendant is in any . . . place where the defendant has a right to be."<sup>143</sup> It is no wonder jurors have trouble deciphering what the law is.

That being said, there is no easy fix for clearly instructing jurors on how to evaluate self-defense claims under stand-your-ground laws, largely because the ability to retreat is inherently part of a reasonableness analysis.<sup>144</sup> One proposed solution is to clearly instruct jurors to "consider extrinsic circumstances, such as the defendant's ability to walk away or whether the defendant could have taken . . . steps to diffuse the confrontation."<sup>145</sup> But, such a jury instruction would render stand-your-ground statutes virtually pointless. Allowing jurors to consider whether a defendant's failure to walk away made his actions unreasonable defeats the purpose of there being no legal requirement to do so. Finding a defendant guilty because he did not

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<sup>140</sup> See Williamson, *supra* note 91, at 264.

<sup>141</sup> Alaska Crim. Pattern Jury Instr. § 11.81.335 (2014); *cf.* Mich. Crim. Jury Instr. § 7.16 (2019).

<sup>142</sup> Alaska Crim. Pattern Jury Instr. § 11.81.335 (2014).

<sup>143</sup> *Id.*

<sup>144</sup> See Daniel Sweeney, *Standing Up to "Stand Your Ground" Laws: How the Modern NRA-Inspired Self-Defense Statutes Destroy the Principle of Necessity, Disrupt the Criminal Justice System, and Increase Overall Violence*, 64 CLEV. ST. L. REV. 715, 721 (2016) ("Supporters of the 'duty to retreat' argue that it is an essential component of the necessity element. If one is confronted with deadly force, but knows for certain that he can escape the altercation, then using deadly force against his attacker is not truly necessary.").

<sup>145</sup> See Williamson, *supra* note 91, at 264.

retreat when he could have contravenes any stand-your-ground law.<sup>146</sup> Such a result highlights the major flaw in the application of stand-your-ground laws: they separate from the reasonableness analysis a crucial factor that most people are inclined to include in that analysis. In asking whether a reasonable person would have killed their assailant in self-defense, it is natural to ask oneself whether a reasonable person could have or would have safely walked away or utilized some other method of avoidance. Stand-your-ground laws effectively remove that very important inquiry from the fact-finder's purview.

*B. Pennsylvania's "Lethal Weapons" Provision is Better-Suited to Successfully Reform Stand-Your-Ground Laws*

Instead of re-defining the reasonableness standard or changing jury instructions, the solution should lie within the law itself. Legislatures ought to explicitly limit the scope of stand-your-ground laws to prevent confusion and ambiguity in reasonableness inquiries. Pennsylvania's "lethal weapons" provision proves particularly useful in doing so without altering the general statutory structure of typical stand-your-ground laws.

Pennsylvania's stand-your-ground provision is couched within a broader statutory scheme of self-defense laws.<sup>147</sup> As a baseline, the scheme imposes the duty to retreat—the use of deadly force is not justifiable unless the actor retreats as far as safely possible, except when attacked at home or their place of work.<sup>148</sup> The law proceeds, however, to eliminate the duty to retreat in places outside the home or workplace, subject to three conditions: (i) the actor must be in a place where they have a right to be; (ii) the actor must believe the use of deadly force is "immediately necessary to protect [themselves] against death, serious bodily injury, kidnapping or sexual intercourse by force or threat"; and (iii) the attacker must use or display a firearm or replica of a firearm or any other deadly weapon.<sup>149</sup> The stand-your-ground provision is also prefaced by the qualifier that the actor must not be engaged in any illegal conduct, and they must not be in possession of an illegal firearm.<sup>150</sup> This

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<sup>146</sup> Further, some states, like Texas and Mississippi, have even gone so far as to statutorily prohibit jurors from considering whether the defendant could have walked away. *See* TEX. PENAL CODE ANN. § 9.32(d) (West 2017); *see also* MISS. CODE ANN. § 97-3-15(4) (2016).

<sup>147</sup> 18 PA. CONS. STAT. § 505 (2011) ("Use of force in self-protection").

<sup>148</sup> 18 PA. CONS. STAT. § 505(b)(2)(ii) (2011).

<sup>149</sup> 18 PA. CONS. STAT. § 505(b)(2.3) (2011).

<sup>150</sup> *Id.*



qualifier is fairly standard of stand-your-ground laws, as are the first two conditions required by the provision.

Importantly, the statute specifically provides that “a person employing protective force may estimate the necessity thereof under the circumstances *as he believes them to be* when the force is used.”<sup>151</sup> While the statutory definition of “believes” is “reasonably believes,” this provision introduces at least some subjectivity into the analysis of whether an actor believes they must use deadly force.<sup>152</sup> The actor’s reasonable belief is expressly allowed, by the stand-your-ground provision, to be colored by the actor’s subjective perception, background, and biases.<sup>153</sup>

Accordingly, it is relatively easy to establish a claim of self-defense in Pennsylvania. A defendant needs only to introduce “some evidence to justify a finding of self-defense,” and once a self-defense claim is established, the burden is on the Commonwealth to disprove it beyond a reasonable doubt.<sup>154</sup> A defendant’s testimony can easily constitute the “some evidence” needed to put the issue before the fact-finder.<sup>155</sup> Further, “[w]hen the defendant’s own testimony is the only evidence of self-defense, the Commonwealth must still disprove the asserted justification and cannot simply rely on the jury’s disbelief of the defendant’s testimony.”<sup>156</sup> The ease of establishing a self-defense claim, coupled with the subjectivity of the reasonable belief standard, raises concerns about Pennsylvania’s and other stand-your-ground statutes becoming a windfall for wrongful actors.

What differentiates the Pennsylvania statute from all others is its third requisite condition to justify the use of deadly force: the attacker displays or uses “a firearm or replica of a firearm . . . or any other weapon readily or apparently capable of lethal use.”<sup>157</sup> This is an extremely important limitation given that the belief inquiry, as provided by the statute, is partly subjective. Without such limitation, disputing the

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<sup>151</sup> 18 PA. CONS. STAT. § 505(b)(3) (2011) (emphasis added).

<sup>152</sup> 18 PA. CONS. STAT. § 501 (2011).

<sup>153</sup> *See id.*

<sup>154</sup> *Commonwealth v. Miller*, 172 A.3d 632, 640 (Pa. Super. Ct. 2017) (citing *Commonwealth v. Torres*, 766 A.2d 342, 345 (Pa. 2001)).

<sup>155</sup> *See, e.g., id.* (“In this case, we conclude that Appellant’s testimony—that Murray attacked him first using the weapon—provided ‘some evidence’ to support a finding of self-defense.”).

<sup>156</sup> *Commonwealth v. Smith*, 97 A.3d 782, 788 (Pa. Super. Ct. 2014).

<sup>157</sup> 18 PA. CONS. STAT. § 505(b)(2.3)(iii) (2011).

reasonableness of the defendant's perceived need to use deadly force can be extremely difficult. Strikingly, no other stand-your-ground state has any provision like Pennsylvania's weapon display requirement.<sup>158</sup>

Even with the inclusion of the "lethal weapons" provision, opponents of Pennsylvania's stand-your-ground bill raised concerns as the bill made its way through the Commonwealth's legislature. Edward Marsico, then-president of the Pennsylvania District Attorneys Association ("PDAA") commended Governor Ed Rendell's veto of the bill's initial version in 2010.<sup>159</sup> Marsico argued that the law would create a "shoot first, ask questions later environment" and would "give thugs a new line of defense to escape the law."<sup>160</sup> He further noted that, at the time, prosecutors rarely charged people who were legitimately defending themselves, while states like Florida and Ohio were already reporting that their stand-your-ground laws were being exploited by people making suspect self-defense claims.<sup>161</sup> Robert Long, the PDAA's then-executive director, echoed that same sentiment, explaining that "there weren't a lot of cases of it in Pennsylvania before the law was changed in 2011, so our association's position was always that the current law that we had up to 2011 was sufficient . . ."<sup>162</sup> Given the extensive research on the negative effects on stand-your-ground laws, it is safe to say the PDAA's concerns were well-founded.<sup>163</sup>

Fortunately, the "lethal weapons" provision seems to have quelled some of those concerns. By serving as a hard limit on reasonable behavior, the provision helps to shrink the range of circumstances under which deadly force is allowed and thus the number of self-defense claims. The next section examines crime statistics and a handful of cases in the years after Pennsylvania's stand-your-ground law was passed to demonstrate how Pennsylvania's unique "lethal weapons" provision has correlated to better results than other stand-your-ground states.

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<sup>158</sup> *But see* 18 PA. CONS. STAT. § 505(b)(2.3) (2011).

<sup>159</sup> *PA District Attorneys Issue Statement on Governor's Veto of H.B. 192* (sic), PA. DISTRICT ATT'YS ASS'N (Nov. 29, 2010), <https://www.pdaa.org/pa-district-attorneys-issue-statement-on-governors-veto-of-h-b-192/>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Ann Marie Awad, *Like Fla., Pa. Has "Stand Your Ground" Law*, NBCPHILADELPHIA (July 16, 2013), <https://www.nbcphiladelphia.com/news/local/zimmerman-trayvon-pennsylvania-stand-your-ground/1963990/>.

<sup>163</sup> *See* Nat'l Task Force, *supra* note 117.

C. *Pennsylvania has Fared Better Than Other Stand-Your-Ground States*

For all the concerns surrounding the passage of a stand-your-ground law, it appears that Pennsylvania has avoided the increases in crime that have plagued other stand-your-ground states.<sup>164</sup> Data collected by the Pennsylvania Uniform Crime Reporting System showed that during the three calendar years following the enactment of Pennsylvania's stand-your-ground statute, violent crime decreased by about five percent each year.<sup>165</sup> Granted, violent crime had been steadily decreasing since about 2007, so this trend cannot be attributed to the 2011 stand-your-ground law alone.<sup>166</sup> That said, violent crime rates had plateaued in 2010 and 2011, so one can infer at least some correlation between the enactment of Pennsylvania's stand-your-ground law and further decreases in violent crime rates.<sup>167</sup>

Thus, when compared with national data, it would seem that Pennsylvania has fared better than other stand-your-ground states.<sup>168</sup> Arguably, such a result is thanks to the "lethal weapons" provision, given that the rest of the law is similar to typical stand-your-ground statutes. And such an effect would logically follow, especially considering prominent concerns over the encouragement of a "shoot first, ask questions later" mentality. The ultimate goal of self-defense is to strike a balance between the necessity and destructive nature of defense. A law that causes citizens to question their legal right to defend themselves may be detrimental to our notion of justice, but a law that emboldens citizens to use deadly force as a first-resort response is dangerous and irresponsible. Pennsylvania's statute, particularly its "lethal weapons" limitation, has struck a workable balance between the two ends of the spectrum by reassuring citizens that their right to self-defense is as strong as ever, while also warning would-be abusers of the law that they cannot expect to use a justification defense at their own discretion. For that reason, Robert Long, former

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<sup>164</sup> *See id.* at 10–11.

<sup>165</sup> *Crime in Pennsylvania (2000-2018) Summary*, OFF. OF ATT'Y GEN. COMMONWEALTH OF PA., <https://www.attorneygeneral.gov/open-data-urc-crimes-overview/> (last visited Aug. 1, 2020).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *See Nat'l Task Force, supra* note 117, at 10–11.

executive director of the PDAA, has referred to Pennsylvania's law as the gold standard for stand-your-ground laws.<sup>169</sup>

While there have not been many Pennsylvania stand-your-ground cases since Pennsylvania's law was passed in 2011, aside from more traditional Castle Doctrine cases, examining some of the Pennsylvania court opinions that have come down reveals that the lethal weapon requirement is a useful guidepost for courts when considering whether a stand-your-ground defense is available. *Commonwealth v. Williams* is not a stand-your-ground case *per se*, but it is still helpful in illuminating the usefulness of the "lethal weapons" provision.<sup>170</sup> In *Williams*, the defendant, Williams, claimed self-defense after he shot the victim in the chest from close range.<sup>171</sup> Williams alleged that the victim and another individual provoked him to use his gun in self-defense by attacking him; specifically, he alleged that the victim attempted to use a knife against him.<sup>172</sup> Williams was not entitled to a stand-your-ground defense as a matter of law because he illegally possessed the firearm he used against the victim.<sup>173</sup> Still, he made a sufficient self-defense claim, meaning the prosecution had the burden of disproving it beyond a reasonable doubt.<sup>174</sup>

With respect to whether Williams's use of deadly force was reasonable, the Pennsylvania Superior Court adopted the reasoning of the trial court, which relied heavily on the fact that, although the victim possessed a knife, he did not use it against the defendant.<sup>175</sup> The trial court explained that the jury's verdict was based, in part, on evidence that "the knife was found in the victim's pocket and testimony from the Commonwealth's witnesses that the victim did not have a knife in his hand, which showed that Appellant was not confronting deadly force but, at most, a punch

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<sup>169</sup> Rebecca Addison, *The State's 'Stand-your-ground' Law Has Failed to Make Waves, but Activists and Experts Say Pennsylvanians Shouldn't Forget About It*, PITTSBURGH CITY PAPER (Oct. 18, 2017), <https://www.pghcitypaper.com/pittsburgh/the-states-stand-your-ground-law-has-failed-to-make-waves-but-activists-and-experts-say-pennsylvanians-shouldnt-forget-about-it/Content?oid=4776620>.

<sup>170</sup> *Commonwealth v. Williams*, 176 A.3d 298 (Pa. Super. Ct. 2017).

<sup>171</sup> *Id.* at 304, 307–08.

<sup>172</sup> *Id.* at 310.

<sup>173</sup> *Id.*; see also 18 PA. CONS. STAT. § 505(b)(2.3) (2011) (making it a condition to having the right to stand one's ground that they not be in illegal possession of a firearm).

<sup>174</sup> *Williams*, 176 A.3d at 309–10.

<sup>175</sup> *Id.* at 311.

with a closed fist.”<sup>176</sup> In essence, because the victim did not threaten Williams with a deadly weapon, Williams’s self-defense claim failed as a matter of law. Clarifying the severity of the threat to a defendant in a stand-your-ground case is crucially important, as it draws a clear boundary between what is reasonable and what is not, and in turn, signifies more clearly when the duty to retreat is required. In *Williams*, the fact that the victim did not display or otherwise use a deadly weapon helped draw that boundary simply and definitively.<sup>177</sup>

Another helpful example of the application of the “lethal weapons” provision is *Commonwealth v. Riera*.<sup>178</sup> *Riera* involves a stand-your-ground claim, offering insight into how Pennsylvania courts use the “lethal weapons” provision in a reasonableness analysis.<sup>179</sup> Roger Mitchell Riera shot Andrew Gula after the two had an altercation outside a bar.<sup>180</sup> Following a heated verbal exchange, they were separated, and Riera began to walk away as Gula was held back by a third party.<sup>181</sup> Once Gula was released, he ran after Riera while shouting at him, at which point Riera drew his gun and shot Gula in the chest.<sup>182</sup> Riera claimed that he saw Gula reach for something in his pocket as he ran at him and thought he was attempting to draw a weapon.<sup>183</sup> However, multiple witnesses said they never saw Gula reach for anything and never saw anything in Gula’s hands as he approached Riera.<sup>184</sup> On appeal, the Pennsylvania Superior Court found that defendant was properly denied a stand-your-ground jury instruction because Riera and Gula had not previously engaged in a physical altercation and because Gula never displayed a weapon.<sup>185</sup>

Judge Mundy, dissenting in *Riera*, raised a few points worth mentioning. Ultimately, she asserted that the court improperly removed a factual determination

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<sup>176</sup> *Id.* (emphasis added).

<sup>177</sup> *Id.* at 310.

<sup>178</sup> *Commonwealth v. Riera*, 2014 Pa. Super. Unpub. LEXIS 2640, at \*26–27 (Pa. Super. Ct. Aug. 25, 2014).

<sup>179</sup> *Id.* at \*26–32.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at \*27, \*38.

<sup>183</sup> *Id.* at \*43.

<sup>184</sup> *Id.* at \*28–29, \*38.

<sup>185</sup> *Id.* at \*55.

from the purview of the jury.<sup>186</sup> Judge Mundy read Section 505(b)(2.3) (the requirements to establish a stand-your-ground defense) in conjunction with Section 505(b)(3), which states that a defendant may “estimate the [necessity of deadly force] under the circumstances *as he believes them to be* when the force is used, without retreating.”<sup>187</sup> She contended that the court improperly rejected Riera’s claim “based on the circumstances *as they actually were*,” not as he perceived them to be.<sup>188</sup> Thus, what mattered to Judge Mundy is that Riera estimated, in accordance with the statute, that Gula was reaching for a gun or knife.<sup>189</sup>

While it is certainly prudent to give defendants flexibility in formulating beliefs as to the severity of the threat they are facing, it is erroneous to conclude that Section 505(b)(3) informs the “lethal weapons” requirement in Section 505(b)(2.3).<sup>190</sup> The latter explicitly requires that “the person against whom the [deadly] force is used displays or otherwise uses” a firearm or other deadly weapon.<sup>191</sup> The problem with Judge Mundy’s analysis is that Gula never had a weapon, and one cannot use a weapon if one does not have one on his person.<sup>192</sup> Perhaps if Riera had seen Gula with a weapon earlier or if Gula had a reputation for carrying a weapon, Judge Mundy’s conclusion would hold weight, because even pretending to reach for a weapon could be interpreted as using it. But simply because a person could estimate the necessity for deadly force cannot possibly mean that later legal analysis may be skewed by a purely hypothetical weapon. Still, this discussion raises the question of what it means to “use” a weapon—a question this Note will not attempt to answer.

What is important here is how the “lethal weapons” provision informed the court’s analysis of reasonableness. The court rejected a stand-your-ground instruction because Riera “did not need to use deadly force, did not see Gula with a weapon, and could have avoided the necessity of using deadly force.”<sup>193</sup> The court’s first two reasons follow the statutory structure of Pennsylvania’s stand-your-ground

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<sup>186</sup> *Id.* at \*65 (Mundy, J., dissenting).

<sup>187</sup> *Id.* at \*73–74 (quoting 18 PA. CONS. STAT. § 505(b)(3) (2011)).

<sup>188</sup> *Id.* at \*74.

<sup>189</sup> *Id.*

<sup>190</sup> *See* 18 PA. CONS. STAT. §§ 505(b)(2.3) and (3).

<sup>191</sup> 18 PA. CONS. STAT. § 505(b)(2.3) (2011).

<sup>192</sup> *See Riera*, 2014 Pa. Super. Unpub. LEXIS 2640, at \*43. One witness knew Gula and said he never knew him to carry a weapon. *Id.* at \*28.

<sup>193</sup> *Id.* at \*55.

provision.<sup>194</sup> While the court seems to be slightly misguided in incorporating the duty to retreat into its analysis, it is evident how the specific inquiry as to whether a weapon was displayed affected the court's conclusion.<sup>195</sup> Yet, while the defendant's belief that deadly force was immediately necessary to defend himself is a separate inquiry from whether the victim displayed a weapon, the two are closely, if not interdependently, tied. In this case, specifically, but perhaps also in general, the court concluded that it is unlikely that the defendant sincerely believed his life was in danger to the point that it was reasonably necessary to shoot his attacker.<sup>196</sup> This is not to say that *unless* an attacker displays a weapon, the person who uses deadly force in self-defense acts unreasonably *per se*; it merely means that the duty to retreat remains in place. That is, if an avenue of safe retreat exists, the defendant must use it. If no such safe avenue exists, then he may defend himself with the level of force he perceives to be reasonably necessary.

Let us return one last time to the Drejka-McGlockton incident, this time applying Pennsylvania's "lethal weapons" provision. The result is very clear, and easy to reach, based on one simple fact: McGlockton was unarmed.<sup>197</sup> He possessed no weapon and made no gesture to indicate he intended to use a weapon.<sup>198</sup> After McGlockton shoved Drejka to the ground, the threat to Drejka abated as McGlockton declined to approach him any further.<sup>199</sup> Drejka would have had a duty to retreat and that would have been the end of the analysis under Pennsylvania law.

That is the genius of the "lethal weapons" provision in Pennsylvania's law. It provides a bright-line limitation which jurors, litigators, and judges may refer to when conducting their reasonableness analysis.<sup>200</sup> Yet, it still allows room for an *ad hoc* determination based on the circumstances and the defendant's perspective, without the concern of an "anything goes" result that so many lawmakers have feared.

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<sup>194</sup> See 18 PA. CONS. STAT. §§ 505(b)(2.3)(ii)–(iii) (2011).

<sup>195</sup> The third reason—avoiding the necessity of using deadly force—seems to be an invocation of the duty to retreat, which should not be an inquiry when considering whether a stand-your-ground defense is applicable, given that the right to stand one's ground effectively removes the duty to retreat.

<sup>196</sup> *Riera*, 2014 Pa. Super. Unpub. LEXIS 2640, at \*55.

<sup>197</sup> Varn & Sullivan, *supra* note 26.

<sup>198</sup> Wootson, *supra* note 1.

<sup>199</sup> *Id.*

<sup>200</sup> 18 PA. CONS. STAT. § 505(2.3) (2011).

#### IV. CONCLUSION

Ultimately, there is no single solution to the complex issues created by stand-your-ground laws. The desire for strong self-defense rights is understandable, and this Note does not dispute that they are a fundamental and necessary part of our society. Rather, this Note urges a serious rethinking of the usefulness of stand-your-ground laws in light of their detrimental effects. If our goal as a society is to reinforce the right of an individual to defend himself in the face of an impending attack, there are better ways to effectuate such a policy than emboldening people to kill their alleged attackers as a first response.

The duty to retreat has been sorely misperceived as a requirement that innocent people give way to people engaged in illegal activity. Yet the duty to retreat requires no such thing; it already permits a person to stand their ground if it is not safe to walk away from the situation. The ability to stand one's ground existed long before stand-your-ground statutes purported to grant it. If stand-your-ground statutes are to remain, and it looks as though they are, lawmakers should be turning to Pennsylvania's statute as a model version of the law. Perhaps if Florida had a similar version, Markeis McGlockton's family would have had a less uncertain path to justice. Or perhaps Michael Drejka never would have shot him in the first place.



