

## THREE QUESTIONS ABOUT “STAND YOUR GROUND” LAWS

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In August 2019, Michael Drejka was convicted of manslaughter after a Florida jury rejected his argument that he killed the victim, Markeis McGlockton, in self-defense.<sup>1</sup> In the national media, the case was widely billed as a test of Florida’s “Stand Your Ground” statutes.<sup>2</sup> That description is (at least) extremely misleading. Despite widespread claims to the contrary, the case was *not* a “test of ‘Stand Your Ground.’”<sup>3</sup> Drejka’s self-defense claim did *not* require police, prosecutors, or the jury to accept the defendant’s (alleged) subjective belief that he was in mortal danger at the time he killed McGlockton; in fact, the case did *not* involve a Stand Your Ground defense at all. The Drejka trial did remind many of George Zimmerman’s shooting of Trayvon Martin in 2012—another case which triggered a nationwide debate about Stand Your Ground laws, although the defendant, Zimmerman, (1) did not ask for a Stand Your Ground immunity hearing before trial, (2) did not argue Stand Your Ground as a defense at trial, and (3) was acquitted based on a straight self-defense argument, that when Zimmerman shot Martin he reasonably believed that using deadly force was necessary to prevent his own death or grave bodily

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<sup>1</sup> *Florida Man Guilty of Manslaughter in Test of ‘Stand Your Ground’ Law: Reports*, REUTERS (Aug. 24, 2019), <https://www.reuters.com/article/us-florida-manslaughter/florida-man-guilty-of-manslaughter-in-test-of-stand-your-ground-law-reports-idUSKCN1VE0LB> [hereinafter *Florida Man Guilty of Manslaughter*].

<sup>2</sup> See, e.g., Crime & Justice News, *Trial Begins in New Test of FL ‘Stand Your Ground’ Law*, CRIME REP. (Aug. 20, 2019), <https://thecrimereport.org/2019/08/20/trial-begins-in-new-test-of-fl-stand-your-ground-law/>; *Florida Man Guilty of Manslaughter*, *supra* note 1; Elizabeth Lawrence, *Florida ‘Stand Your Ground’ Trial Begins over Deadly Dispute over Handicapped Parking Spot*, USA TODAY (Aug. 19, 2019), <https://www.usatoday.com/story/news/nation/2019/08/19/florida-stand-your-ground-trial-michael-drejka-begins/204911001/> (stating that the Drejka case had “renewed debate over the state’s ‘stand your ground’ law”).

<sup>3</sup> See *Florida Man Guilty of Manslaughter*, *supra* note 1.

injury.<sup>4</sup> One can disagree with the jury's decision, and many have.<sup>5</sup> But it is just not true that the defenses argued in these cases, or the verdicts, were premised on the Stand Your Ground provisions in Florida law.

The controversy over Michael Drejka's self-defense claim once again draws attention to widespread confusion about what Stand Your Ground statutes mean and how they impact longstanding legal rules governing self-defense. In Florida the confusion appears to have grown in the years since Zimmerman's acquittal. Subsequent actions by the state's supreme court and legislature have significantly changed the procedural rules governing pretrial self-defense immunity hearings;<sup>6</sup> considered the question of whether those new rules should be retroactively applied to cases that originated before the new rules were adopted;<sup>7</sup> and extended self-defense-based immunity protection to cover police officers who use force against suspects during a lawful arrest.<sup>8</sup>

It is important to resolve this confusion. Stand Your Ground laws, and the issues they generate, do raise serious questions about what constitutes justice in cases that give rise to claims of self-defense. In order to resolve those questions, we first need to understand what the self-defense doctrine actually says and how it was designed to work. It is necessary to specify the ways in which Stand Your Ground provisions do, and do *not*, affect that doctrine.

In this Essay I will raise three issues about Stand Your Ground and self-defense. In addressing these issues I will use Florida law as a template because the Stand Your Ground provisions in that state have served as a model for other similar statutes across the country.<sup>9</sup> I will also focus on the rules governing use of *deadly* force, since it is those provisions that have caused most of the controversy.<sup>10</sup>

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<sup>4</sup> See, e.g., Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 14, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html>; *Zimmerman to Argue Self Defense, Will Not Seek 'Stand Your Ground' Hearing*, CNN (May 1, 2013), <https://www.cnn.com/2013/04/30/justice/florida-zimmerman-defense/index.html>.

<sup>5</sup> See, e.g., Alvarez & Buckley, *supra* note 4 (reporting on protests after the Zimmerman verdict).

<sup>6</sup> See *infra* text accompanying notes 99–122 (discussing those procedural changes).

<sup>7</sup> In March 2019, the Florida Supreme Court heard arguments in the case of Tashara Love, raising the issue of whether the new rules governing evidentiary burdens at self-defense immunity hearings should be retroactively applied to cases that originated before the new rules were passed. See, e.g., *Stand Your Ground Debate Renewed in Florida Supreme Court*, TAMPA BAY TIMES (Mar. 7, 2019), <https://www.tampabay.com/florida-politics/2019/03/07/stand-your-ground-debate-renewed-in-florida-supreme-court/> (describing the Love case and delineating some of its possible implications). In December 2019, the Court held that the new rules should apply to immunity hearings held as of the statute's effective date; since Tashara Love's pretrial hearing took place after that date, the Court quashed the lower court ruling in the case and remanded for further proceedings. *Love v. State*, No. SC18-747, 2019 WL 6906479 (Fla. Dec. 19, 2019).

<sup>8</sup> *State v. Peraza*, 259 So. 3d 728 (Fla. 2018).

<sup>9</sup> See, e.g., "Stand Your Ground" Laws, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/> (last visited Oct. 30, 2019).

<sup>10</sup> The rules of self-defense typically set down different standards for justifying a defendant's use of deadly force and nondeadly force. Typically, the rules require self-defense claimants to

**ISSUE 1:** IS “STAND YOUR GROUND” THE SAME THING AS SELF-DEFENSE? (THE ANSWER IS NO)

*A. Self-Defense: The Traditional Elements*

The justification of self-defense has ancient roots in our law. Against a legal background that generally discourages self-help in cases involving physical force, self-defense law specifies the circumstances in which, although a person used deadly force against another in a way that would otherwise be criminal, the person may escape conviction if they used such force only to repel an imminent threat of similar deadly force from another person.<sup>11</sup> The essential elements of the defense were clearly spelled out in the case *United States v. Peterson*<sup>12</sup>:

There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances. It is clear that no less than a concurrence of these elements will suffice.<sup>13</sup>

Under longstanding doctrine, six subsidiary rules follow from these elements. First, a proportionality rule denies the justification to a defendant who uses excessive force against another, even when such force was used in response to a genuine threat.<sup>14</sup> Second, a defendant will not generally be heard on a claim of self-defense if the defendant was the “initial aggressor” who provoked the use of force by the other, even if the other’s use of force otherwise satisfied the elements of the defense (e.g., the other’s use of force posed an “imminent threat” of injury or death to the defendant).<sup>15</sup> Third, an “imminent” threat means a threat that puts the defendant in fear of immediate harm, such that the harm is about to happen and affords the

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satisfy more stringent requirements if they used deadly force than if they used only nondeadly force. *See, e.g.*, FLA. STAT. § 776.012 (2019) (mandating a higher standard when lethal self-defense is used).

11 *See id.*

12 483 F.2d 1222 (1973).

13 *Id.* at 1229–30 (footnotes omitted). Some statutes provide that, in addition to an imminent threat of force or deadly force, a defendant may also assert a claim of self-defense if he or she used deadly force against another to prevent commission of a forcible felony, such as rape, robbery, or homicide of another. *See, e.g.*, FLA. STAT. § 776.012 (“A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to . . . prevent the imminent commission of a forcible felony.”).

14 *See, e.g.*, Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 331 (2006) (“[T]he proportionality standard in self-defense law . . . holds that the prevention of harm cannot be achieved by causing harm that is disproportionate.”).

15 *See, e.g.*, FLA. STAT. § 776.041 (2019) (providing that the justification of self-defense “is not available to a person who . . . [i]nitially provokes the use or threatened use of force against himself or herself,” unless the defendant has satisfied other, more stringent statutory standards, including attempting to retreat from the encounter or communicating to the other party the intent to withdraw and terminate the use of force).

defendant no time to alert law enforcement or call for help.<sup>16</sup> Fourth, the defense does *not* require the defendant's subjective belief that he or she was threatened with force or deadly force to be proved accurate or true. Thus, a defendant may successfully assert self-defense in a case where the person against whom he or she used force or deadly force did not, in fact, pose a threat of any kind—but the defendant honestly and reasonably believed that they did.<sup>17</sup> The standard has both *objective* and *subjective* components, focusing not only on what the defendant thought, but also on what a reasonable person would have thought, and done, under the circumstances. Fifth, the right to defend one's *property* is significantly more limited than the right to defend one's person against physical violence from another. Typically, a person may *not* use deadly force only to protect property from being stolen or otherwise interfered with.<sup>18</sup> Sixth, and perhaps most fundamental, self-defense is premised on the defendant's claim of *necessity*. The defendant's use of force must have been *necessary* under the circumstances—again, against a legal background that normally criminalizes the use of physical force against another person.<sup>19</sup>

Florida's self-defense law closely mirrors the traditional conception. With respect to the use of deadly force, section 776.012(2) of the state criminal code provides:

A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.<sup>20</sup>

The statute clearly specifies the traditional elements: that to justify a use of deadly force against another, the person claiming self-defense must (at the time the person used such force) have had a *reasonable belief* in the *necessity* of using deadly force to repel an *imminent threat of death or great bodily harm* to the defender.

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16 See, e.g., State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989) (discussing the traditional element of “imminence” and refusing to expand it).

17 See, e.g., Oliver Laughland et al., *Cleveland Officer Who Fatally Shot Tamir Rice Will Not Face Criminal Charges*, GUARDIAN (Dec. 28, 2015), <https://www.theguardian.com/us-news/2015/dec/28/tamir-rice-shooting-no-charges-cleveland-officer-timothy-loehmann> (describing case in which police officer claimed self-defense after fatally shooting twelve-year-old Tamir Rice when the officer mistook Rice's toy pellet gun for a real gun).

18 See, e.g., FLA. STAT. § 776.031 (2019) (“A person is justified in using or threatening to use force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to [prevent trespass or other unlawful interference with the person’s property].”).

19 See, e.g., United States v. Peterson, 483 F.2d 1222, 1229 (D.C. Cir. 1973) (“[T]he law of self-defense is a law of necessity;’ the right of self-defense arises only when the necessity begins, and equally ends with the necessity; and never must the necessity be greater than when the force employed defensively is deadly. The ‘necessity must . . . appear to admit of no other alternative, before taking life will be justifiable . . . .’ Hinged on the exigencies of self-preservation, the doctrine of homicidal self-defense emerges from the body of the criminal law as a limited though important exception to legal outlawry of the arena of self-help in the settlement of potentially fatal personal conflicts.” (footnotes omitted)).

20 FLA. STAT. § 776.012(2) (2019).

These provisions constitute (and have long constituted) the basic doctrine of self-defense in Florida and across the country.<sup>21</sup>

#### *B. Stand or Retreat: The Origins of “Stand Your Ground”*

The justification of self-defense has existed in the law for centuries and contains all the elements described above. By contrast, Stand Your Ground (or “no-retreat”) rules are essentially an interpretation of “necessity.” Again, “necessity” in this context allows a claim of self-defense only when a defendant reasonably believes that using deadly force against another is *necessary* to save himself or herself from death or grave bodily injury. One question that arose in the English common-law cases is whether such necessity required the defender to prove that before using deadly force to repel the threat, he or she (1) had attempted to escape the imminent danger by retreating, or (2) could not have retreated in safety.<sup>22</sup>

The English common-law courts enforced a duty of retreat, denying a self-defense claim unless the claimant could prove that his or her back was “to the wall” before responding to a deadly attack by using deadly force.<sup>23</sup> But even early English commentators acknowledged exceptions to the rule requiring retreat. Alongside the retreat rule, the principle of “no retreat” (what we now call Stand Your Ground), though more limited in scope than the rule that developed in the United States, had been identified in English law at least since the works of Sir Matthew Hale and Lord Edward Coke in the seventeenth century.

The earliest American cases endorsed a general duty of retreat, with some exceptions.<sup>24</sup> But in the mid- to late nineteenth century American legal commentators,<sup>25</sup> influential state supreme courts, and (eventually) the United States Supreme Court embraced the Stand Your Ground approach.<sup>26</sup> A prominent case

21 See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973).

22 For a more detailed account of this history, see Cynthia V. Ward, “*Stand Your Ground* and *Self-Defense*,” 42 AM. J. CRIM. L. 89, 96–104 (2015), on which this historical discussion is based.

23 See, e.g., RICHARD MAXWELL BROWN, NO DUTY TO RETREAT 4 (1991) (discussing the English common-law approach); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES \*184–85 (“[T]he law requires that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother’s blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honor: because the king and his courts are the *vindictores injuriarum* [avengers of injuries], and will give to the party wronged all the satisfaction he deserves.”).

24 See, e.g., BROWN, *supra* note 23, at 5–7.

25 See *id.* at 7 (“The first truly original American work on the criminal law was published in 1856 by Joel Prentiss Bishop of Massachusetts. . . . As for the law of homicide and self-defense, Bishop followed Foster and East in the turn away from the duty to retreat.”).

26 See, e.g., *Beard v. United States*, 158 U.S. 550, 563–64 (1895) (holding an instruction endorsing the duty to retreat was erroneous because a person in a place he was entitled to be and who did not provoke the assault was entitled to stand his ground and use force he honestly and reasonably believed necessary to save his life or protect himself from great bodily harm); *Erwin v.*

from that era was *Erwin v. State*, in 1876.<sup>27</sup> There the Ohio Supreme Court explicitly placed the no-retreat doctrine within the framework of necessity:

[A]ll authorities agree that the taking of life in defense of one's person cannot be either justified or excused, except on the ground of necessity; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question, then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? [No.] . . . [A] true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.<sup>28</sup>

The *Erwin* court justified its rejection of the duty to retreat on the basis that the Stand Your Ground rule was “best calculated to protect and preserve human life.”<sup>29</sup>

A year after *Erwin*, the Supreme Court of Indiana rejected the retreat rule and endorsed the no-retreat approach. In *Runyan v. State*,<sup>30</sup> the defendant had shot and killed the deceased. Under trial court instructions that embraced the retreat rule,<sup>31</sup> the jury convicted Runyan of manslaughter. The Indiana Supreme Court reversed, citing prominent authority to the effect that the Stand Your Ground approach “is founded on the law of nature; and is not, nor can be, superseded by any law of society.”<sup>32</sup> The *Runyan* court used language that is echoed in many statutory Stand Your Ground provisions today: “[W]hen a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable.”<sup>33</sup>

Other state court cases in the late nineteenth century echoed *Erwin* and *Runyan*, holding that a person may use deadly force against another, without retreating, if the person is in a place where the person has the lawful right to be and (1) the person is the victim of a deadly and unprovoked attack; (2) the person honestly and reasonably fears death, grave bodily injury, or commission of a serious felony from this attack;

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State, 29 Ohio St. 186, 194–99 (1876) (tracing development of the “retreat to the wall” doctrine in England and noting American divergence from that doctrine).

27 29 Ohio St. 186 (1876).

28 *Erwin*, 29 Ohio St. at 199–200 (emphasis omitted).

29 *Id.*

30 57 Ind. 80 (1877).

31 *See id.* at 82 (citing relevant portion of jury instructions at trial).

32 *Id.* at 84; *see also id.* (“A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence.”).

33 *See id.*

and (3) the person reasonably believes that responding with deadly force is the only available means of repelling the attack.<sup>34</sup>

At the close of the century, in the 1895 case of *Beard v. United States*,<sup>35</sup> the United States Supreme Court embraced the Stand Your Ground approach. In *Beard* the Court held that a defendant who was “where he had a right to be” when attacked, who “did not provoke the assault,” and who reasonably and in good faith believed “that the deceased intended to take his life or do him great bodily harm,” was not obligated to retreat, “nor to consider whether he could safely retreat, but was entitled to stand his ground.”<sup>36</sup>

A quarter century later, in *Brown v. United States*,<sup>37</sup> the Supreme Court offered what has perhaps become the most famous rationale for a no-retreat rule in cases of self-defense. In *Brown*, Justice Oliver Wendell Holmes wrote that the Stand Your Ground approach was more just than the retreat approach because it acknowledged the limitations of human nature:

The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense. That has been the decision of this Court [citing *Beard*]. *Detached reflection cannot be demanded in the presence of an uplifted knife.* Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.<sup>38</sup>

Thus, by the early twentieth century, the historical and normative bona fides of no-retreat rules had been established not by statute, but by a long series of court opinions which foreshadowed the language, elements, and normative justifications of the contemporary approach to Stand Your Ground.

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34 See, e.g., *Beard v. United States*, 158 U.S. 550 (1895), *People v. Lewis*, 48 P. 1088, 1089–90 (Cal. 1897) (citing *Runyan v. State*, 57 Ind. 80 (1877)), and *Erwin*, 29 Ohio St. 186 (1876), for the proposition that the law affirms the right of an innocent person to stand his ground and use deadly force to defend himself against an assailant who intends to kill or gravely injure him); *see also* *Boykin v. People*, 45 P. 419, 422 (Colo. 1896) (“[A] defendant [is not obliged to retreat when he] is where he has a right to be . . . honestly and in good faith believes, and the circumstances being such as would induce a like belief in a reasonable man, that he is about to receive at the hands of his assailant great bodily harm, or to lose his life . . . ”); *State v. Hatch*, 46 P. 708, 708 (Kan. 1896) (“The doctrine that a party unlawfully attacked must ‘retreat to the wall’ before he can be justified in taking the life of his assailant in self-defense, does not obtain in this state.” (citation omitted)); *Page v. State*, 40 N.E. 745, 746 (Ind. 1894) (“[W]here an attack is made with murderous intent . . . the person attacked is under no duty to fly. He may stand his ground, and, if need be, kill his adversary.”).

35 *Beard*, 158 U.S. 550.

36 *Id.* at 564.

37 256 U.S. 335 (1921).

38 *Id.* at 343 (emphasis added).

### C. Modern “Stand Your Ground” Statutes

In the modern era, more than half the states in the United States have passed statutes containing Stand Your Ground provisions.<sup>39</sup> These statutes typically retain the necessity requirement in the rules governing self-defense, as does the statute in Florida.<sup>40</sup> Essentially, these statutes define “necessity” so as to exclude a duty of retreat. Thus, to successfully assert self-defense under the modern statutes, a defender who otherwise satisfies the elements need *not* prove that before using deadly force she first attempted to retreat or that it would have been impossible to retreat with safety. Again, the language in the Florida statute is illustrative:

A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.<sup>41</sup>

In jurisdictions that employ this or similar language to define self-defense, a defender who seeks to claim the justification must fulfill the traditional elements, except that the necessity of using deadly force may be shown even where the defender did not retreat, or attempt to retreat, before using deadly force to repel a deadly threat.

#### ISSUE 2: DOES “STAND YOUR GROUND” NEGATE THE TRADITIONAL CONDITIONS OF SELF-DEFENSE? (AGAIN, NO)

In sum, the elements of self-defense establish a set of conditions that, if fulfilled, allow a defender to claim an exception from the general rule against self-help in personal confrontations. “Stand Your Ground” provisions define one of those conditions—“necessity”—so as to exclude any duty of retreat in cases where the defender is lawfully present at the place where she was attacked and is committing no crime. It is important to keep this clarification in mind, because some recent controversies that have been associated with Stand Your Ground in fact have nothing to do with the requirement of necessity, or with retreat and no-retreat statutory provisions. Instead, such controversies engage other elements of self-defense.

Take the George Zimmerman case, for example. Despite countless headlines depicting Zimmerman’s shooting of Trayvon Martin as a test of Stand Your

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<sup>39</sup> See, e.g., “Stand Your Ground” Laws, *supra* note 9. In jurisdictions that do enforce a retreat rule, that rule is typically limited by the “castle doctrine,” according to which a person does *not* have a duty to retreat if attacked in their own home. See, e.g., N.J. REV. STAT. § 2c:3-4(b)(2) (2018) (“The use of deadly force is not justifiable under this section . . . if . . . (b) [t]he actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . except that: (i) [t]he actor is not obliged to retreat from his dwelling, unless he was the initial aggressor . . . ”).

<sup>40</sup> See *supra* note 20 and accompanying text.

<sup>41</sup> FLA. STAT. § 776.012(2) (2019).

Ground,<sup>42</sup> the case really involved the more traditional elements of self-defense.<sup>43</sup> First, a vigorous dispute concerned Zimmerman’s version of the facts. At the time he shot Martin, was Martin on top of him, bashing Zimmerman’s head against the pavement and preventing him from moving?<sup>44</sup> Zimmerman said that he was (and, as in all homicide cases, the victim was obviously not there to dispute the defendant’s account of the facts).<sup>45</sup> The jury, whose job it is to decide the facts, apparently agreed with Zimmerman.<sup>46</sup> That conclusion is, of course, contestable on the merits, but deciding such questions of fact is the essence of what juries do and has no particular connection to Stand Your Ground provisions in the law. Under Zimmerman’s account of the facts, it is easy to see why the case did *not* involve a Stand Your Ground claim. If Trayvon Martin was in fact on top of Zimmerman and was bashing Zimmerman’s head into the sidewalk, then Zimmerman presumably had no option to “retreat” and the question of retreat or “stand your ground” was therefore irrelevant. Zimmerman did *not* raise a Stand Your Ground claim either before or during trial, and the jury apparently acquitted him because it believed his straight self-defense claim—that at the time he shot Trayvon Martin, he reasonably believed Martin was threatening him with death or grave bodily injury and that shooting Martin was necessary to repel that threat.<sup>47</sup>

Similarly, in the Drejka case, Michael Drejka did not ask for Stand Your Ground immunity from prosecution and did not present a Stand Your Ground defense at trial.<sup>48</sup> Instead, Drejka advanced a straight claim of self-defense: that at the time he shot Markeis McGlockton, he reasonably believed that McGlockton posed an imminent threat of death or serious bodily injury and that using deadly force was necessary to prevent such injurious consequences.<sup>49</sup> The Drejka jury disagreed, and convicted the defendant of manslaughter.<sup>50</sup>

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42 See, e.g., Eyder Peralta, *Trayvon Martin Killing Puts ‘Stand Your Ground’ Law in Spotlight*, NPR (Mar. 19, 2012), <https://www.npr.org/sections/thetwo-way/2012/03/19/148937626/trayvon-martin-killing-puts-stand-your-ground-law-in-spotlight>.

43 Although media stories pointed to the presence of Stand Your Ground language in the instructions to the Zimmerman jury, and after the trial one juror claimed that the jury discussed Stand Your Ground during deliberations, it has never been established that the jury (1) relied upon Florida’s no-retreat rule in reaching its verdict or (2) distinguished Stand Your Ground from other elements of self-defense. See Ward, *supra* note 22, at 109.

44 See *id.* at 110.

45 See *id.*

46 See *id.*

47 See *id.* at 109.

48 See Hannah Knowles, *A White Florida Man Cited ‘Stand Your Ground’ for Shooting a Black Man. A Jury Found Him Guilty.*, WASH. POST (Aug. 25, 2019), <https://www.washingtonpost.com/nation/2019/08/24/white-florida-man-cited-stand-your-ground-shooting-black-man-jury-found-him-guilty/>.

49 See *id.*

50 In October 2019, Michael Drejka was sentenced to twenty years in prison for the killing. See, e.g., 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>.

Other cases which the media have woven into the national Stand Your Ground debate have raised interesting questions about traditional self-defense doctrine—questions that are, however, irrelevant to the issue of “stand” or “retreat.” For example, one non-Stand Your Ground issue raised in the Zimmerman case concerned the “initial aggressor” rule in self-defense law. Standard doctrine provides that to successfully claim self-defense, a defender who provokes the fight must first attempt to retreat and/or communicate his withdrawal to the other.<sup>51</sup> But what qualifies as “provoking” the fight, thereby making someone the “initial aggressor”? Some argued that by initially following Trayvon Martin as Martin walked home, and then asking him what he was doing in the neighborhood, Zimmerman became the “initial aggressor” in the confrontation that ultimately led to Martin’s death.<sup>52</sup> The doctrine does not support that conclusion, and in any event the “initial aggressor” rule is a general doctrine of self-defense law and does not necessarily raise the question of Stand Your Ground.<sup>53</sup>

Second, a number of recent cases have also generated concern about the “reasonable belief” standard—which, again, allows a claim of self-defense in cases where the defendant’s belief in the necessity of using deadly force was reasonable, although assessed ex post, it is clear that the person killed by the defender did *not* in fact pose a threat of imminent harm.<sup>54</sup> The 2014 shooting of twelve-year-old Tamir Rice, in Cleveland, Ohio, is one example.<sup>55</sup> A police officer shot the youth after mistaking his toy gun for a real gun,<sup>56</sup> raising questions about whether the “reasonable belief” rule is too defender friendly.<sup>57</sup> Police in their official capacity

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51 See *supra* note 15 and accompanying text (describing the “initial aggressor rule”).

52 See, e.g., Richard Hornsby, *Legally, Who Was the First Aggressor?*, BLAWG (Apr. 21, 2012), <https://www.richardhornsby.com/blog/2012/04/21/who-was-the-first-aggressor/>.

53 In the Drejka case, some raised the issue of whether Drejka had become the initial aggressor by engaging Britany Jacobs, the victim’s girlfriend, in a verbal argument about a parking space. Legal experts were appropriately dubious on that score. As one attorney expressed it to the *Tampa Bay Times*: “Initiation of conduct that’s offensive, annoying, sticking your nose into somebody else’s business—those actions don’t preclude” a claim of self-defense. Kathryn Varn, *In Latest ‘Stand Your Ground’ Case, a Question: Who Started It?*, TAMPA BAY TIMES (Aug. 2, 2018), [https://www.tampabay.com/news/publicsafety/in-latest-stand-your-ground-case-a-question-Who-started-it-\\_170458779/](https://www.tampabay.com/news/publicsafety/in-latest-stand-your-ground-case-a-question-Who-started-it-_170458779/). And under standard doctrine, Markeis McGlockton’s act of pushing Michael Drejka to the ground might have given Drejka some right to respond with proportional force, but not with excessive force. Thus, the proportionality rule was also involved here. See *infra* text accompanying notes 71–72 (discussing the proportionality rule in the case).

54 See e.g., Leon Neyfakh, *Was the Shooting of Tamir Rice “Reasonable”?*, SLATE (Oct. 14, 2015), <https://slate.com/news-and-politics/2015/10/tamir-rice-shooting-were-officer-tim-loehmanns-actions-reasonable.html>.

55 See *id.*

56 See *id.* The officers were not charged with a crime. Leon Neyfakh, *Tamir Rice’s Killer Went Free Because of the “Reasonableness Test.” It Didn’t Have to Be That Way*, SLATE (Dec. 31, 2015), <https://slate.com/news-and-politics/2015/12/the-legal-reason-tamir-rices-killer-wasn-t-prosecuted.html>. Officer Timothy Loehmann, who shot Tamir Rice, was subsequently fired from the department on other grounds. Melissa Etehad, *Cleveland Policeman Who Shot Tamir Rice Is Fired, but Not Because of the 12-Year-Old’s Death*, L.A. TIMES (May 30, 2017), <https://www.latimes.com/nation/nationnow/la-na-tamir-rice-officer-fired-20170530-story.html>.

57 See, e.g., Neyfakh, *supra* note 56.

do not operate under exactly the same “deadly force” rules as civilians, but the officer who shot Tamir Rice successfully argued self-defense, and was not prosecuted as a result.<sup>58</sup> Other recent cases, involving civilian defenders, have raised the same issue.<sup>59</sup>

The “reasonable belief” standard was also the cause of controversy when local police refused to arrest Michael Drejka after he shot and killed Markeis McGlockton.<sup>60</sup> Briefly, the facts were that McGlockton, his girlfriend Britany Jacobs, and her children drove to a Circle A food store in Clearwater, Florida, where Jacobs parked their car in a handicapped spot and McGlockton went into the store.<sup>61</sup> Jacobs and two children remained in the car.<sup>62</sup> Michael Drejka observed McGlockton’s car parked in a handicapped spot without a decal, approached the vehicle and began arguing with Jacobs.<sup>63</sup> McGlockton walked out to the parking lot and knocked Drejka down.<sup>64</sup> Drejka then pulled a gun and shot McGlockton in the chest, killing him.<sup>65</sup>

The day after the incident, Pinellas County Sheriff Bob Gaultieri announced that Drejka would not be arrested in the shooting.<sup>66</sup> In explanation of that decision, the sheriff invoked the state’s Stand Your Ground law:

The law on Stand Your Ground is clear, and the Florida legislature has spoken on this. And the Florida legislature has created a standard that is a largely subjective standard. This is not an objective “What I would do, what you would do, what the public would do, what somebody else would do.” This is more of a subjective standard.<sup>67</sup>

As a number of observers have pointed out, that statement conflicts with language in the state’s self-defense statute itself.<sup>68</sup> It also conflicts with standard

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58 See *id.*

59 See, e.g., Glenn E. Rice, *Alleged Robber with Toy Gun, Who Got Shot by North KC Clerk, Now Facing Charges*, KAN. CITY STAR (Dec. 6, 2016), <https://www.kansascity.com/news/local/crime/article119151713.html>.

60 John Couwels et al., *Florida Man Found Guilty of Manslaughter in Parking Lot Shooting That Led to ‘Stand Your Ground’ Trial*, CNN (Aug. 23, 2019), <https://www.cnn.com/2019/08/23/us/florida-trial-michael-drejka/index.html>.

61 See *id.*

62 See *id.*

63 See *id.*

64 See *id.*

65 See *id.*

66 Pinellas Sheriff, *Sheriff’s Press Conference—July 20, 2018—Shooting Investigation—Unincorporated Clearwater*, YOUTUBE (July 20, 2018), <https://www.youtube.com/watch?v=MyiMpmZGZEk> [hereinafter Gaultieri]. Sheriff Gaultieri referred the case to the local prosecutor for a final decision, and three weeks later Drejka was charged with manslaughter. See, e.g., Kathryn Varn & Dan Sullivan, *Michael Drejka Convicted of Manslaughter in Markeis McGlockton’s Death*, TAMPA BAY TIMES (Aug. 24, 2019), <https://www.tampabay.com/news/pinellas/2019/08/24/michael-drejka-convicted-of-manslaughter-in-markeis-mcglocktons-death/?comments>.

67 Gaultieri, *supra* note 66, at 10:08.

68 See, e.g., Eric Levenson, *Florida Sheriff Defends His Decision Not to Arrest Shooter in ‘Stand Your Ground’ Case*, CNN (Aug. 2, 2018), <https://www.cnn.com/2018/08/01/us/stand-your-ground-florida-shooting-trnd/index.html>.

self-defense doctrine, which requires not only that a defendant have subjectively believed that the use of deadly force was necessary, but also that that belief have been *reasonable* under the circumstances.<sup>69</sup> The reasonable belief element, in fact, *does* require an objective inquiry into whether a reasonable person under the circumstances would have shared the defendant's belief that deadly force was necessary. Florida's self-defense statute specifically includes the "reasonable belief" standard, thus incorporating an objective test for purposes of claiming self-defense.<sup>70</sup> But again, the "reasonable belief" requirement is a standard element of self-defense doctrine which has no necessary connection to the Stand Your Ground provisions in Florida law. The reasonable belief element is a component of self-defense both in "retreat" and "no-retreat" jurisdictions and is equally relevant and deployable in both.<sup>71</sup>

Third, the Drejka case seemed to invoke the proportionality rule, which (as mentioned above)<sup>72</sup> bars a self-defense claim when the defendant used excessive force to repel a threat. Drejka, who shot an unarmed McGlockton after McGlockton knocked him down, may have had the right to defend himself with similar non-deadly force. But did he have the right under self-defense law to shoot McGlockton dead? The jury may have concluded that he used excessive force and did not, therefore, merit the justification of self-defense.<sup>73</sup>

Finally, recent cases have tested the dimensions of the so-called "castle doctrine," which, in jurisdictions that enforce a general duty of retreat, provides that persons need *not* retreat before using deadly force if attacked in their homes.<sup>74</sup> The trial and conviction of Amber Guyger in Texas offers an illustration. Defendant Guyger, a white former Dallas police officer, testified that on September 6, 2018, she went home after a long shift, got off on the wrong floor of her apartment building, and mistook the apartment of Botham Shem Jean (which was in fact directly above hers) for her own.<sup>75</sup> Jean, a black man, was sitting on his own sofa eating ice cream and watching television when Guyger walked in.<sup>76</sup> Thinking that Jean was a burglar, Guyger shot and killed him.<sup>77</sup> With respect to the castle doctrine,

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69 See *supra* note 13 and accompanying text.

70 See FLA. STAT. § 776.012 (2019).

71 See, e.g., United States v. Peterson, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973) (describing the general requirements of self-defense, including the "reasonable belief" element).

72 *Supra* text accompanying note 14.

73 See, e.g., 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/> (quoting the foreman of Drejka's jury: "I think simply drawing the gun would have been enough. At that point Mr. Drejka had the upper hand.").

74 See *supra* note 39 and accompanying text (using New Jersey as an example).

75 See Erik Ortiz, *Amber Guyger Found Guilty of Murder at Trial in Fatal Shooting of Neighbor Botham Jean*, NBC NEWS (Oct. 1, 2019), <https://www.nbcnews.com/news/us-news/amber-guyger-found-guilty-murder-trial-fatal-shooting-neighbor-botham-n1060506>.

76 See *id.*

77 Daran Simon, *Jurors Can Consider the So-Called Castle Doctrine in the Murder Trial of Ex-Police Officer Amber Guyger*, CNN (Oct. 1, 2019), <https://www.cnn.com/2019/10/01/us/amber-guyger-trial-castle-doctrine/index.html>.

Guyger essentially argued at her murder trial that she had reasonably, though incorrectly, *thought* she was in her own home and should therefore be acquitted on grounds of self-defense.<sup>78</sup> The jury disagreed and found her guilty of murder.<sup>79</sup>

In another recent case in Akron, Ohio, a son visiting his mother at her home shot and killed an intruder who was reportedly trying to break in.<sup>80</sup> The case raised the issue of whether someone could defend a homicide charge under the Castle Doctrine although they used deadly force against an aggressor at someone else’s home, not their own.<sup>81</sup> The Castle Doctrine originated at common law and is rooted in the idea that a person’s “home is his castle” and that, even in jurisdictions that generally enforce a duty to retreat, homeowners are entitled to use deadly force against someone who is unlawfully breaking in, without first attempting to escape.<sup>82</sup> “Stand Your Ground” laws, by contrast, eliminate the retreat rule itself, allowing individuals to claim self-defense, without retreating, if they are in any place where they have the right to be (and satisfy the other conditions for the defense).<sup>83</sup>

In sum, recent cases have raised interesting questions about the traditional elements and scope of self-defense, but many of these issues have addressed rules or elements that do *not* inherently involve Stand Your Ground—that is, they are equally relevant in jurisdictions, or under conditions, where a retreat rule requires that to successfully claim self-defense, a defender must have attempted to retreat before using deadly force if the defender knows they can do so safely.<sup>84</sup>

#### ISSUE 3: ARE THERE VALID CONCERNs ABOUT THE MODERN “STAND YOUR

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78 See *id.*

79 See, e.g., Marina Trahan Martinez et al., *Former Dallas Police Officer Is Guilty of Murder for Killing Her Neighbor*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/us/amber-guyger-trial-verdict-botham-jean.html?module=inline>. Guyger was sentenced to ten years imprisonment. Marina Trahan Martinez et al., *Amber Guyger Is Sentenced to 10 Years for Murder of Botham Jean*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/us/amber-guyger-sentencing.html>.

80 Evan MacDonald, *Akron Shooting of Suspected Intruder Might Be Self-Defense, but Unclear If Castle Doctrine Applies, Experts Say*, CLEVELAND.COM (June 28, 2018), [https://www.cleveland.com/metro/2018/06/akron\\_shooting\\_of\\_suspected\\_in.html](https://www.cleveland.com/metro/2018/06/akron_shooting_of_suspected_in.html).

81 *Id.*

82 Rebekah Skiba, *Returning to the Roots of the Castle Doctrine: Why Recent Stand Your Ground Laws Are in Line With the Natural Law*, 10 S.J. POL’Y & JUST. 71, 77 (2014).

83 See, e.g., FLA. STAT. § 776.012 (2019).

84 The law of Connecticut, for example, requires that to successfully claim self-defense when deadly force was used, a defender must (1) have “reasonably believed” such force was necessary to prevent death or serious injury, and (2) must, if possible, have attempted to retreat from the encounter before using such force. See, e.g., *New Haven Shootings Put Focus on Connecticut’s Self-Defense Law*, NEW HAVEN REG. (Aug. 6, 2014), <https://www.nhregister.com/connecticut/article/New-Haven-shootings-put-focus-on-Connecticut-s-11383722.php> (describing both prongs of the state’s law).

## GROUND” STATUTES? (YES)

*A. Problems of Proof in Cases of Self-Defense*

Having distinguished issues that belong not to the “stand or retreat” debate but to self-defense rules governing reasonable belief, the initial aggressor rule, and the proportionality rule, it becomes easier to see and analyze controversies that *do*, in fact, involve claims of Stand Your Ground.

An important empirical issue concerns the impact of Stand Your Ground provisions on problems of proof in cases involving the arguably criminal use of deadly force. When one participant in a deadly confrontation has been killed, the survivor encounters an obvious temptation to characterize the encounter as one in which the survivor acted in self-defense. Retreat rules offer one way of assessing that claim; in retreat jurisdictions, if a safe retreat was possible and the defender knew about it, then a defender who used deadly force without retreating cannot claim self-defense.<sup>85</sup> In Stand Your Ground jurisdictions, that method of assessing the veracity of the defender’s account is not available. Whatever the reason, some empirical evidence suggests that (1) a significant number of defendants who have been acquitted under Stand Your Ground statutory provisions do not fit the paradigm of the innocent defender compelled by a deadly threat to use deadly force against another, and that (2) confusion about what Stand Your Ground is and how it applies seems to be widespread, not only among the public at large but also among the legal actors charged with making decisions about whether to arrest, charge, and adjudicate cases involving claims of self-defense.<sup>86</sup>

For example, in 2012 the *Tampa Bay Times* newspaper collected and analyzed results from almost 200 Florida Stand Your Ground claims that had been made since the state passed its no-retreat rule in 2005.<sup>87</sup> The *Times* reported a number of serious issues involving the invocation and enforcement of Florida’s Stand Your Ground statute.<sup>88</sup> The evidence indicated that Stand Your Ground claims had produced widely varying results among cases that appeared quite similar;<sup>89</sup> that Stand Your Ground defenses had wrongfully generated acquittals in some cases (for example, cases in which the defendant’s use of deadly force had killed another participant during an illegal drug deal) that clearly seem outside the intent of the statute;<sup>90</sup> and

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85 See, e.g., *id.*

86 See, e.g., 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/>.

87 See Susan Taylor Martin, *Race Plays Complex Role in Florida’s ‘Stand Your Ground’ Law*, TAMPA BAY TIMES (Feb. 17, 2013), <https://www.tampabay.com/news/courts/criminal/race-plays-complex-role-in-floridas-stand-your-ground-law/1233152/>. For a more detailed discussion of the *Times* investigation and its implications for Stand Your Ground, see Ward, *supra* note 22, at 120–22, 131–33.

88 See e.g., Martin, *supra* note 87.

89 See Martin, *supra* note 86.

90 *Id.*

that, despite statutory language prohibiting such a result,<sup>91</sup> defendants had been acquitted based on Stand Your Ground claims although they had in fact provoked (been the “initial aggressor”) in the deadly confrontation.<sup>92</sup>

Indeed, of the seventy-five *Times* cases in which the defendant was acquitted following a determination that his use of deadly force was justified, most did not match the Stand Your Ground paradigm of an innocent defender, threatened with imminent and deadly force from an unprovoked attack, standing his ground and meeting force with force to save his own life.<sup>93</sup> For example, a number of cases involved arguments turned violent, where it was unclear “who started it” or even who first brought a deadly weapon to the fight; domestic disputes turned violent; gang shootouts; killings between drug dealers during a deal gone bad; or killings during the commission of a felony in which both shooter and homicide victim were participating.<sup>94</sup> On the other hand, some Stand Your Ground defenses were brought in cases where, though a Stand Your Ground claim was apparently made during the adjudication process, the defendant could probably have won a self-defense claim even in a retreat jurisdiction—for example, the defendant was faced with deadly force and safe retreat was impossible or the defendant might reasonably have believed retreat was impossible.<sup>95</sup>

In addition, more recent empirical studies suggest that the Stand Your Ground provisions in Florida may be causally linked to an increase in gun violence in the state.<sup>96</sup> And beyond Florida, a 2018 report by the nonpartisan Rand Corporation assessed the effects of gun laws in thirteen States and “concluded that there was ‘moderate’ evidence—the second strongest level of evidence—that these laws are associated with an increase in homicides.”<sup>97</sup>

At the very least, the cases may indicate that in practice, Stand Your Ground provisions lack a limiting principle that clearly demarks the cases to which they should apply and that is intelligible to defendants, lawyers, and judges. In Florida, that problem may have been aggravated by the state legislature’s decision to grant

<sup>91</sup> FLA. STAT. § 776.041(2) (2019) (“The [self-defense justification] is not available to a person who: . . . (2) [i]nitially provokes the use or threatened use of force against himself or herself, unless (a) . . . the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than [deadly force]; or (b) [i]n good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use or threatened use of force, but the assailant continues or resumes the use or threatened use of force.”).

<sup>92</sup> Martin, *supra* note 86.

<sup>93</sup> Ward, *supra* note 22, at 132.

<sup>94</sup> See *id.*

<sup>95</sup> *Id.*

<sup>96</sup> See, e.g., “Stand Your Ground” Laws, *supra* note 9 (“Multiple studies show that Florida’s stand your ground law escalated violence across the state.”); *id.* (“The implementation of Florida’s stand your ground law was associated with a 32% increase in firearm homicide rates and a 24% increase in overall homicide rates.”).

<sup>97</sup> Andrew R. Morral & Rosanna Smart, ‘Stand Your Ground’ Laws May Be Causing More Harm than Good, RAND CORP. (Sept. 12, 2019), <https://www.rand.org/blog/2019/09/stand-your-ground-laws-increase-violence.html>.

immunity from prosecution to defendants who advance a cognizable claim of self-defense.<sup>98</sup>

### B. *Self-Defense and Immunity from Prosecution*

Section 776.032 of Florida's criminal code provides that “[a] person who uses force [in self-defense as defined by state statute] is justified in such conduct and is immune from criminal prosecution and civil action for the use of such force.”<sup>99</sup>

Under the statute, a defendant who claims self-defense may petition the court for a pretrial hearing.<sup>100</sup> At such hearing, the defendant has the burden of producing *prima facie* evidence supporting his or her self-defense claim.<sup>101</sup> At that point the burden shifts to the prosecution to prove, by clear and convincing evidence, that the defendant did *not* act in self-defense.<sup>102</sup> The statutory language indicates that not only Stand your Ground claims in particular, but also self-defense claims generally, may be adjudicated in this way.<sup>103</sup> At the pretrial immunity hearing, if the prosecution cannot prove by clear and convincing evidence that the defendant did not act in self-defense, then the defendant's petition for immunity is granted and the criminal case cannot proceed.<sup>104</sup> In the 2018 case of *State v. Peraza*,<sup>105</sup> the Florida Supreme Court held that police officers are permitted to seek statutory immunity from criminal prosecution in cases that otherwise meet the statutory elements of self-defense.<sup>106</sup>

As noted above, neither George Zimmerman nor Michael Drejka invoked Stand Your Ground, or any other provision of self-defense, at a pretrial hearing.<sup>107</sup> Neither defendant asked for a pretrial hearing; presumably, both thought their self-defense claims would fare best at trial before juries. But as applied to cases of self-defense, this statutory immunity hearing is a curious beast indeed. Traditionally,

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98 See FLA. STAT. § 776.032 (2019) (granting said immunity).

99 *Id.*

100 See e.g., *Dennis v. State*, 51 So. 3d 456, 462–63 (Fla. 2010).

101 FLA. STAT. § 776.032.

102 *Id.* (“[O]nce a *prima facie* claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution . . .”). The Florida legislature adopted this language in 2017, replacing a standard that had required the defendant in an immunity hearing to prove self-defense by a preponderance of the evidence. *See, e.g.*, News Serv. of Fla., *Stand Your Ground Debate Renewed in Florida Supreme Court*, TAMPA BAY TIMES (Mar. 7, 2019), <https://www.tampabay.com/florida-politics/2019/03/07/stand-your-ground-debate-renewed-in-florida-supreme-court/> (describing the legislature’s action). In March 2019, the Florida Supreme Court heard arguments on a case that raises the question of whether the amended immunity procedure should be retroactively applied to cases that originated before the procedure was amended but were still pending at the time of amendment. As of this writing, the Florida Supreme Court has not yet handed down a ruling in that case. *See, e.g., id.*

103 See FLA. STAT. § 776.032.

104 *See id.*

105 259 So. 3d 728 (Fla. 2018).

106 *Id.*

107 *See supra* notes 42–49.

immunity from criminal prosecution is offered to certain government officials, or to citizens performing important roles in the legal process (such as witness in a criminal case), where it might reasonably be argued that society’s interests in protecting such roles and functions outweighs its interest in prosecuting the individual.<sup>108</sup>

That seems quite different from the immunity procedure outlined in Florida’s self-defense law. Under section 776.032, defendants who are planning to claim the justification of self-defense can end the prosecution of that defense, before trial, by making a *prima facie* case in favor of the defense and then forcing the prosecution to prove them wrong.<sup>109</sup> A *prima facie* case is one that is sufficient to raise a presumption in favor of the maker’s argument, and is generally considered to be a low standard of proof, below even the civil preponderance of the evidence threshold.<sup>110</sup> More interesting, though, is what the availability of an immunity hearing that can establish a defendant’s defense before trial suggests about criminal proceedings more generally.

Notice that by logical extension, this type of immunity procedure appears to suggest the following rule: Defendants who are planning to advance *any* defense against a criminal charge may stop the prosecution of such charge in its tracks by producing *prima facie* evidence of their proposed defense, at a pretrial hearing before a judge, if the state cannot convincingly prove otherwise at such hearing. Defenses to a criminal charge are typically divided into two categories: affirmative defenses and defenses “on the elements.” Affirmative defenses include justifications such as self-defense and necessity as well as excuses such as insanity and duress—defenses that can still be brought even when the state is able to prove the mens rea and actus reus of the crime. By contrast, defenses “on the elements” involve claims by a defendant that the government cannot prove the requisite elements of the crime—typically, that the defendant did the act prohibited by the statute with the requisite degree of mental culpability. In Florida, immunity hearings have been extended from their traditional uses to cover the affirmative justification of self-defense.<sup>111</sup> But if such hearings are justified with respect to one defense, are they not also justified with respect to all? No reason for distinguishing self-defense from other defenses is immediately apparent. But such a rule would be a striking procedural departure from the norms of criminal prosecution.

The Florida legislature apparently adopted the self-defense immunity procedure out of concern that defendants who have in fact acted in self-defense should not be forced to endure the hardship of trial in order to prove their cases.<sup>112</sup>

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108 See generally William J. Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System*, 67 J. CRIM. L. & CRIMINOLOGY 143 (1976) (describing statutory immunity).

109 FLA. STAT. § 776.032 (2019).

110 Compare *Prima Facie*, NOLO’S PLAIN ENG. L. DICTIONARY, <https://www.nolo.com/dictionary/prima-facie-term.html>, with *Preponderance of the Evidence*, NOLO’S PLAIN ENG. L. DICTIONARY, <https://www.nolo.com/dictionary/preponderance-of-the-evidence-term.html>.

111 FLA. STAT. § 776.032(4).

112 See, e.g., Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010) (“While Florida law has long recognized that a defendant may argue as an affirmative defense at trial that his or her use of force

In the abstract this is understandable—of course *no one* should be forced to endure a criminal prosecution for a crime he or she did not commit. When an innocent person is charged and tried for a crime, it is a kind of injustice even if the person is ultimately acquitted at trial. The adjudication process itself is a recognition of human imperfection—because we can never have perfect knowledge, we subject our suspicions to the test of a criminal trial (or at least the prospect of a criminal trial) before punishing someone suspected of a crime. Adjudication of the state's proof, under the high standard of beyond a reasonable doubt, is the paradigm test of the state's criminal case; indeed, this is why jury trials (at least theoretically) are a *right* of every defendant. Shortcuts such as immunity hearings might shrink the risk of an unjust prosecution, but might also *raise* the risk that guilty defendants will go free, particularly where (as in Florida) the defendant bears only a minimal evidentiary burden to prove the defense and can then force the state to disprove it by clear and convincing evidence.<sup>113</sup> As noted above,<sup>114</sup> such hearings may also deepen confusion on the part of police and prosecutors over whether they are authorized to arrest a homicide suspect who indicates that he or she plans to argue self-defense.

The Michael Drejka case is a good example. Recall Sheriff Gualtieri's announcement that, initially at least, the police decided not to arrest Drejka after he shot and killed Markeis McGlockton.<sup>115</sup> As noted above, Gualtieri appeared to rely on an interpretation of the self-defense statute that has no basis either in its plain language or in standard self-defense doctrine.<sup>116</sup> But in explaining his decision not to arrest Drejka, the sheriff also invoked two other parts of the Florida statute, sections 776.032(2) and 776.032(3). Under the first former,

[a] law enforcement agency may use standard procedures for investigating the use or threatened use of force as described in subsection (1), but the agency may not arrest the person for using or threatening to use force unless it determines that there is probable cause that the force used or threatened was unlawful.<sup>117</sup>

“Probable cause” is of course the normal standard for making an arrest for any crime. Nonetheless, Sheriff Gualtieri interpreted the statutory language to *preclude* an arrest in the Drejka case.<sup>118</sup> “The immunity that people are granted under the Stand Your Ground law is just not an immunity from being charged, not just an immunity from being convicted, but is an immunity from arrest.”<sup>119</sup>

The sheriff then went on to quote section 776.032(3), which compels state courts to “award reasonable attorney’s fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action

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was legally justified, section 776.032 contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial.”).

113 FLA. STAT. § 776.032(4).

114 *Supra* text accompanying notes 85–95.

115 *Supra* text accompanying notes 66–67.

116 *Supra* text accompanying notes 67–71.

117 FLA. STAT. § 776.032(2).

118 Gualtieri, *supra* note 66, at 11:58 (“So we’re precluded from making an arrest in this type of a situation.”).

119 *Id.* at 11:15.

brought by a plaintiff if the court finds that the defendant is immune from prosecution” under section 776.032(1).<sup>120</sup> As Gualtieri interpreted section 776.032(3), the police could be civilly liable if they were to arrest someone who was later determined to be immune from prosecution under the self-defense statutes.<sup>121</sup> Thus, the immunity provisions of the state’s self-defense law could deter police from making arrests in cases where suspects merely *say* they acted in self-defense, raising the possibility that they might be granted immunity under the statutory procedure in section 776.032(4) and that the police who arrested them might therefore be civilly liable for making the arrest.

If this is a consequence that the Florida legislature desired to achieve when it passed the immunity provision in the statute, then the legislature should make that much clearer in the statute itself. As noted above, the immunity provisions in the state statutes apply not only to the statutory Stand Your Ground language, but to all claims of self-defense. That is, under the terms of the statute, any defendant claiming that justification can ask for an immunity hearing and potentially end the prosecution’s homicide prosecution. But the confusion over the statutory immunity provisions may in part result from, and may also worsen, misunderstandings that are directly related to Stand Your Ground and that may result in the acquittal of some defendants who do not merit the justification of self-defense. Michael Drejka, after all, was ultimately convicted after the jury at his trial rejected his claim of self-defense.<sup>122</sup> Had the state’s attorney followed Sheriff Gualtieri’s interpretation of the statute, he would have accepted Drejka’s own account, that he was subjectively afraid of death or serious bodily injury from McGlockton, and declined to charge Drejka in the shooting. One wonders how many other cases have been dropped by police or prosecutors based on the defendant’s bare claim of subjective fear—a claim that in a Stand Your Ground jurisdiction will not be tested by a retreat requirement.

#### CONCLUSION: CLARIFY THE ELEMENTS OF SELF DEFENSE, INCLUDING THEIR RELEVANCE (OR LACK THEREOF) TO “STAND YOUR GROUND” LAWS

Stand Your Ground provisions may well pose evidentiary issues in some cases where a suspect claims to have used deadly force to repel a deadly threat. But assessing these problems requires, first, that we understand the proper place of Stand Your Ground among the elements of self-defense. Stand Your Ground is *not* synonymous with “self-defense”. On the contrary, the retreat/no-retreat debate concerns the interpretation of one element in the justification of self-defense, the element of necessity. In retreat jurisdictions, meeting the necessity requirement means that before using deadly force, a defender must have first attempted to escape the confrontation if retreat was possible, was safe, and was known to the defendant. In no-retreat—“Stand Your Ground”—jurisdictions, the “necessity” element can be

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120 FLA. STAT. § 776.032(3).

121 Gualtieri, *supra* note 66, at 12:19 (“So, one, we have to follow the law. Two, if we don’t follow the law, we’re civilly liable for not following the requirements of the Florida Stand Your Ground law.”).

122 See *supra* note 49–50 and accompanying text.

met even in situations where a safe retreat existed and was known to the defendant. Many of the recent issues surrounding self-defense law have not concerned Stand Your Ground but instead have arisen around one of the standard elements of the defense, for example the “reasonable belief” standard, the proportionality rule, and the “initial aggressor” rule. Clarifying the issues is a necessary step toward a rational conversation not only about Stand Your Ground, but also about other controversial elements of self-defense.