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THE INALIENABLE RIGHT TO STAND YOUR GROUND

BY

JOSHUA PRINCE, ESQ.¹ AND ALLEN THOMPSON, ESQ.²

“Homicide is enjoined, when it is necessary for the defence of one’s person or house. . . . [I]t is the great natural law of self preservation, which . . . cannot be repealed, or superseded, or suspended by any human institution.” *James Wilson*³

“When seconds count, the police are only minutes or hours away, if they come at all.” *Unknown Author*

I. INTRODUCTION

In 1776, Thomas Jefferson stated what American political and legal thinkers took to be “self-evident”: “that all men . . . are endowed . . . with certain unalienable Rights.”⁴ Among those rights were the right to “Life, Liberty and the pursuit of Happiness.”⁵ English and American common law historically allowed an individual to use reciprocal force to fend off an imminent attack.⁶ It was not until the Victorian Era and then, most forcefully, the Progressive Era, that the right to Self-Defense was limited by the so-called Duty to Retreat.⁷ Around the same time, the United States Supreme Court, in *South v. Maryland*,⁸ held that the police owe citizens no

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3. JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson ed., Lorenzo Press 1804).

4. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

5. *Id.*

6. See *infra* Part III.

7. *Id.*

8. *South v. State of Maryland ex rel. Pottle*, 59 U.S. 396, 403 (1855).

duty of protection.⁹

In March of 2010, the Department of Justice's Bureau of Statistics released its Criminal Victimization in the United States, 2008 Statistical Tables.¹⁰ With updated statistical tables from May of 2011,¹¹ the report reflects that, for violent crimes, the police only respond within five minutes about twenty-eight percent of the time; within six to ten minutes around thirty percent of the time; and within eleven minutes to one hour only one-third of the time.¹² Of course, these numbers only include those incidents where the police *actually responded*. In relation to those violent crimes responded to, police made an arrest less than twelve percent of the time.¹³ Even then, an arrest does not necessarily result in charging or a conviction.¹⁴

This Article seeks to open a dialogue about an individual's inalienable Right to Self-Defense and the interplay between that Right and Stand Your Ground doctrines. In Section II, this Article will present an overview of what, precisely, a Stand Your Ground statute *actually* encompasses and permits, as many misconceptions have arisen as to the effect of a Stand Your Ground law.¹⁵ Due to the position many political groups have taken,¹⁶ as well as inaccurate news reporting by the media, there is a

9. *Id.*; see also Warren v. D.C., 444 A.2d 1, 4 (D.C. Ct. App. 1981) (holding that even where police negligence resulted in three women being repeatedly raped, "courts have without exception concluded that when a municipality or other governmental entity undertakes to furnish police services, it assumes a duty only to the public at large and not to individual members of the community.").

10. U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE U.S., 2008 STATISTICAL TABLES (2011), available at <http://www.bjs.gov/content/pub/pdf/cvus08.pdf>.

11. *Id.* at 116.

12. *Id.* at 115.

13. *Id.* at 117.

14. See, e.g., U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT (2011), available at www.justice.gov/usao/reading_room/reports/asr2011/11statrpt.pdf (providing that only 50.2% of District of Columbia cases in 2011 resulted in conviction).

15. See *infra* Part II (stating that Stand Your Ground statutes do not justify the use of deadly force when limited force was appropriate).

16. See Michael Zalewski, 'Stand Your Ground' Makes One Person Judge, Jury, and Executioner, U.S. NEWS (Mar. 28, 2012, 5:19 PM), <http://www.usnews.com/debate-club/are-stand-your-ground-laws-a-good-idea/stand-your-ground-makes-one-person-judge-jury-and-executioner> [hereinafter, Zalewski, *Stand Your Ground*] (arguing that Stand Your Ground laws may increase violence in a community). See generally Dahlia Lithwick, *Sympathy for the Shooter: How America Has Become a 'Stand Your Ground' Nation*, SLATE (Feb. 25, 2014, 11:46 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/stand_your_ground_nation_from_trayvon_martin_to_jordan_davis_how_our_understanding.html (providing differing views on Stand Your Ground laws and showing concern that these laws make the shooter's word the law). Micheal Zalewski is a member of the Illinois House of Representatives and is critical of

mistaken belief that Stand Your Ground laws allow a shooter to become “judge, jury, and executioner.”¹⁷

In Section III, the Article will seek to explain that, contrary to the contention that there is a “fundamental duty to avoid conflict,”¹⁸ the right to defend oneself—self-preservation—is a Natural Right, not granted to the individual by the state.¹⁹ In that vein, the state cannot abrogate the right of an individual to *defend* himself, which the Duty to Retreat requires.²⁰ Since the legal interpretation dovetails from the Natural Rights analysis, Section III will then explain when and why the Duty to Retreat entered American jurisprudence.²¹ The Duty, rather than being a “fundamental principle of the law,”²² was actually a misreading or misunderstanding of the common law, all too readily expounded upon by the Progressives in the early Twentieth Century.²³

In our conclusion, we ask whether a state Stand Your Ground statute is even required to extinguish the Duty to Retreat, given the inalienable right of the individual to defend himself.²⁴ Correspondingly, the question must be asked as to whether a state is even *authorized* to abrogate the right to self-defense and require an individual to retreat. For if the right to self-preservation is a fundamental, deeply rooted, and inalienable right, the state’s ability to infringe upon it is “off the table.”²⁵

II. WHAT IS A STAND YOUR GROUND STATUTE?

Generally, a Stand Your Ground statute eliminates the duty to retreat.²⁶ Despite the fact that certain media outlets, politicians, and

the Stand Your Ground law. Zalewski, *Stand Your Ground*, *supra*.

17. Zalewski, *Stand Your Ground*, *supra* note 16; *see also* Lithwick, *supra* note 16. Lithwick wrote that “[h]istorically, United States self-defense laws have followed British common law by imposing a duty to retreat, requiring those in a dangerous situation to try to withdraw (if they could do so safely) before resorting to killing.”

18. Zalewski, *Stand Your Ground*, *supra* note 16; Lithwick, *supra* note 16.

19. *See infra* Part III.

20. *See infra* Part III.

21. *See infra* Part III.

22. Zalewski, *Stand Your Ground*, *supra* note 16; Lithwick, *supra* note 16.

23. *See infra* pp. 11–13.

24. *See infra* Part IV.

25. *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (“[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table”); *see also* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1154 (9th Cir. 2014). Of course, *Heller* referred to the Second Amendment clearly enumerated in the Bill of Rights, but as Section III of this Article will demonstrate, the right to Self-Defense, *sans* Duty to Retreat, is a Natural Right, which cannot be abrogated. *Heller*, 554 U.S. at 635; *infra* Part III.

26. *See States That Have Stand Your Ground Laws*, FINDLAW,

political activist groups have predicted a new “Wild West” atmosphere in states that have Stand Your Ground statutes,²⁷ the actual statutes are written quite narrowly. For example, the much-maligned Florida Stand Your Ground statute²⁸ expressly forbids the use of deadly force in the normal course of self-defense.²⁹ The law defines the limited circumstances in which a person is justified in the use of deadly force and does not have a duty to retreat.³⁰ Those limited circumstances are then statutorily defined: When “he or she reasonably believes that . . . 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.”³¹

Likewise, Pennsylvania’s Stand Your Ground statute³² eliminates the Duty to Retreat where the actor is not engaged in criminal conduct, is not in possession of an illegal firearm, is legally allowed to be where he is attacked, *and* the actor believes the use of force is necessary to protect himself or another against death, serious bodily injury, kidnapping, or rape, and the attacker uses a deadly weapon.³³

Without reciting here the statutory provisions of each of the twenty-three so-called “Stand Your Ground” states,³⁴ a Stand Your Ground statute merely eliminates the Duty to Retreat where one is confronted, through no

<http://criminal.findlaw.com/criminal-law-basics/states-that-have-stand-your-ground-laws.html> (last visited Oct. 23, 2014) (explaining that a person can stand his ground instead of retreating). To date, twenty-three states have enacted Stand Your Ground statutes. Other states’ common law provides one the ability to “stand his ground,” but those are not included in the list of twenty-three. Currently, those states with Stand Your Ground statutes are: Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia. *Id.*

27. See, e.g., Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS L.J. & PUB. POL’Y 504, 504 (2007) (explaining that “[c]ritics of [Stand Your Ground] law fear that it goes too far and will turn the state into a modern Wild West”).

28. FLA. STAT. § 776.012 (2014).

29. § 776.012(1) (“A person is justified in using . . . force, *except deadly force*, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself . . . against the other’s imminent use of unlawful force”) (emphasis added).

30. § 776.012(2).

31. *Id.* (emphasis added).

32. 18 PA. CONS. STAT. §§ 505 (b) (2.3)–506(a) (2014). Notably, the Stand Your Ground provision is found under the subsection heading: “Limitations on justifying necessity for use of force.” § 505 (b).

33. 18 PA. CONS. STAT. § 505 (b) (2.3) (i)–(iii).

34. See *States that Have Stand Your Ground Laws*, *supra* note 26 (listing the Stand Your Ground states).

fault of his own, with a potentially deadly situation.³⁵ Stand Your Ground does not—and we would not argue that it should—justify the use of deadly force where it is clear that much more limited force was appropriate.³⁶ Stand Your Ground does not, in other words, authorize one to bring a gun to a fistfight, so to speak.³⁷ Rather, it merely codifies the standard that was in use throughout English and American common law until the Progressive Era of the early Twentieth Century.³⁸

III. SELF-DEFENSE AS A NATURAL RIGHT

The idea of a Natural Law, independent of any civil code, existing apart from the physical realm, but applying to the world nonetheless, can be traced back to Sophocles' *Antigone*.³⁹ Natural law defines how a particular species of being is *supposed* to act.⁴⁰ For humans, this translates very closely to a universal moral code.⁴¹

"[T]he first precept of [natural] law is that good is to be done and pursued, and evil is to be avoided. All the other precepts of the law of nature are based on this"⁴² Because all humans are created equally in the state of nature, the *law* of nature applies equally amongst them.⁴³ In the western Judeo-Christian tradition, this is because God made man in His

35. See, e.g., 18 PA. CONS. STAT. § 505 (b) (2) (i)–(ii) (explaining that the use of deadly force is not justified when the actor invoked the use of force against himself in the same encounter or if the actor knows he can avoid the use of force by retreating to safety).

36. See, e.g., FLA. STAT. § 776.012 (stating that using deadly force is only proper to protect against *deadly* force).

37. See K.L. Jamison, *Disparity of Force*, U.S. CONCEALED CARRY ASS'N (Jan. 6, 2012), <https://www.usconcealedcarry.com/disparity-of-force/>. However, in certain circumstances, dependent on disparity of force, a deadly weapon may be authorized—E.g. if a petite woman were attacked by a muscular man, she may be authorized to use lethal force, absent the man utilizing a weapon, as the disparity of force is such that without a weapon, the man could cause her serious bodily injury or death. Another such example would be where there are multiple assailants, without weapons, where the victim could use lethal force due to the disparity of the situation. *Id.*

38. See Lithwick, *supra* note 16.

39. See JACQUES MARITAIN, *MAN AND THE STATE* (1950), reprinted in ST. THOMAS AQUINAS, *ON POLITICS AND ETHICS* 204–05 (Paul E. Sigmund, ed. & trans., W. W. Norton & Co. 1988). Sophocles said, "Nor did I deem/Your ordinance of so much binding force,/As that a mortal man could overbear/The unchangeable unwritten code of Heaven;/This is not of today and yesterday,/But lives forever, having origin/Whence no man knows" *Id.* at 205 n.3.

40. See *id.* at 206.

41. *Id.*

42. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* (1270), reprinted in ST. THOMAS AQUINAS, *ON POLITICS AND ETHICS* 49 (Paul E. Sigmund, ed., & trans., W. W. Norton & Co. 1988) [hereinafter AQUINAS, *SUMMA THEOLOGIAE*].

43. *Id.* at 49–51.

image, making an affront on another an affront on God.⁴⁴ Regardless of the origin of the equality, Natural Law does not distinguish among station, rank, title, or nobility, which makes it quite amenable and equitable to even the modern reader.⁴⁵

Rather than being a mere anachronism, suitable to the discussions of tenured philosophy and political science professors, Natural Law is the foundation of what we consider to be our fundamental rights and freedoms in America. Thomas Jefferson restates the essence of Natural Law in his venerated passage from the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”⁴⁶ In the *Report of the Committee of Correspondence to the Boston Town Meeting* in November, 1772, none other than Samuel Adams reported on the “Natural Rights of the Colonists as Men.”⁴⁷ Not only did individuals retain their Natural Rights, “[a]ll positive and civil laws should conform, as far as possible, to the law[s] of natural reason and equity.”⁴⁸

Invariably, commentators of Natural Law cited self-defense as the first law of nature.⁴⁹ In his defense of Michael Corbet, who had been impressed by one Lieutenant Pantton, John Adams stated that “[s]elf-preservation is the first law of nature . . . [It is] not only our inalienable right but our clearest duty, by the law of nature.”⁵⁰ His cousin Samuel

44. JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT (1690), *reprinted in* JOHN LOCKE, ON POLITICS AND EDUCATION 78–79 (Walter J. Black, Inc. 1947) [hereinafter LOCKE, SECOND TREATISE].

45. LOCKE, SECOND TREATISE, *supra* note 44, at 78.

46. THE DECLARATION OF INDEPENDENCE para. 2; *see* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 134 (Vintage Books 1997) (noting that by “happiness,” Jefferson most likely intended—and was most likely understood by his contemporaries—as meaning safety or security).

47. SAMUEL ADAMS, THE RIGHTS OF THE COLONISTS, THE REPORT OF THE COMMITTEE OF CORRESPONDENCE TO THE BOSTON TOWN MEETING, NOV. 20, 1772, *reprinted in* 7 OLD S. LEAFLETS NO. 173, 417 (Boston: Directors of the Old South Work, 1906) [hereinafter Samuel Adams, *Rights of the Colonists*], available at <http://history.hanover.edu/texts/adamss.html>.

48. *Id.*

49. E. David Quammen, *The Right to Self-Defense*, TEA PARTY TRIBUNE (Jun. 6, 2013), <http://www.teapartytribune.com/2013/06/06/the-right-to-self-defense/>. *Cf.* William C. Bradford, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?: ‘The Duty to Defend Them’: A Natural Law Justification for the Bush Doctrine of Preventative War*, 79 NOTRE DAME L. R. 1365, 1429–31 (2004) (stating that Thomas Hobbes believed it was a man’s right to use self-defense).

50. JOHN ADAMS, NOTES OF THE ARGUMENT IN DEFENCE, AND STATEMENT OF AUTHORITIES IN THE CAUSE, OF MICHAEL CORBET AND OTHERS, CHARGED WITH THE MURDER OF LIEUTENANT PANTON (1769), *reprinted in* THE WORKS OF JOHN ADAMS, SECOND PRESIDENT

agreed that “the *duty* of self-preservation [is] commonly called the first law of nature.”⁵¹ James Wilson, signer of the Declaration of Independence, Continental Congressman, delegate to the Constitutional Convention of 1787,⁵² law professor, and one of the original six justices of the United States Supreme Court appointed by George Washington, knew that “the great natural law of self preservation . . . cannot be repealed, or superseded, or suspended by any human institution.”⁵³ Indeed, men “cannot, by any compact, deprive or divest their posterity” of the “certain inherent [natural] rights.”⁵⁴

This correlates directly with Natural Law, for according to Locke, while one can dispose of his possessions and property as he pleases, he has a duty *not* to destroy himself.⁵⁵ According to the Founding generation and its view on the Natural Right of self-preservation, the duty extended so far as to *require* one to fight back.⁵⁶ This is certainly not indicative of a long-

OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 530 (Charles Francis Adams, ed., Charles C. Little and James Brown 1850) [hereinafter ADAMS, NOTES]. Adams also states that “[I]f impresses are always illegal, and Lieutenant Panton acted as an impress officer, Michael Corbet and his associates had a right to resist him, and, if they could not otherwise preserve their liberty, to take away his life.” *Id.* at 528. The temptation is great to conclude that this proves a natural duty to retreat. However, the nature of the rights being deprived is not equal. Where one attempts to deprive another of *liberty*, one can certainly resist, but can only resort to homicide when there are no other means. But this does not imply that to resist *homicide*, one must attempt to get away before resorting to taking away the transgressor’s life. Rather, when Lieutenant Panton approached Corbet and fired a shot at him, “Corbet and his associates had a right, *and it was their duty*, to defend themselves.” *Id.* at 532. (emphasis added).

51. Samuel Adams, *Rights of the Colonists*, *supra* note 47, at 417.

52. See *Declaration of Independence, About the Signers*, CONSTITUTION FACTS, <http://www.constitutionfacts.com/us-declaration-of-independence/about-the-signers> (last visited Oct. 16, 2014). Cf. *Milestones 1784–1800, Constitutional Convention and Ratification*, U.S. DEP’T OF STATE, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1784-1800/convention-and-ratification> (last visited Oct. 27, 2014). The Convention of 1787 was not, technically, a constitutional convention, as it was merely intended to rework the Articles of Confederation. *Milestones 1784–1800, Constitutional Convention and Ratification*, *supra*. However, because this is how it has come to be known, we refer to it as such here. See, e.g., *Declaration of Independence, About the Signers*, *supra*.

53. See 3 WILSON, WORKS, *supra* note 3.

54. VIRGINIA DECLARATION OF RIGHTS, § 1 (1776), available at <https://chnm.gmu.edu/revolution/d/270/>.

55. LOCKE, SECOND TREATISE, *supra* note 44 at 77 (“[T]hough man in that state [of nature] have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself.”). See also 1 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 157 (Bird Wilson, ed., Lorenzo Press 1804). Likewise, James Wilson said that because man did not create himself, he could not take his own life: “[I]t was not by his own voluntary act that the man made his appearance upon the theatre of life; he cannot, therefore, plead . . . by his own voluntary act to make his exit.” *Id.*

56. See Samuel Adams, *Rights of the Colonists*, *supra* note 47, at 417 (“the *duty* of self-preservation . . .”) (emphasis added); ADAMS, NOTES, *supra* note 50, at 530 (“[S]elf-preservation

standing duty to *retreat*; if anything, it tends to show that so-called Stand Your Ground laws are superfluous, at best. One wonders what the Adams cousins would think about those laws that criminalize what they—or the rest of the Founding generation, for that matter—considered to be inalienable, permanent rights, unable to be repealed or limited by the government.

Therefore, the question becomes: how does the Founding generation's understanding and codification of our Natural Rights influence and affect our post-modern society and Stand Your Ground laws? Even in 1690, John Locke understood that the idea of an amorphous, unwritten law that dictated a universal course of conduct to all individuals—regardless of where they stood on the social ladder—could be controversial, misunderstood, and rather inconvenient to the powers that be.⁵⁷ In his *Second Treatise on Civil Government*, Locke admitted that “I doubt not but this will seem a very strange doctrine to some men; but before they condemn it, I desire them to resolve me by what right any prince or state can put to death or punish [anyone who commits a crime] in their country?”⁵⁸ Whereas in the state of nature, a man can punish his transgressors freely and—as Rep. Michael Zalewski fears would happen with Stand Your Ground laws—act as judge, jury, and executioner, this is not so in civil society.⁵⁹ For in civil society, the acts of transgression against an individual are adjudicated in courts of law.⁶⁰ Referring once more to Locke: “I easily grant that civil government is the proper remedy for the inconveniences of the state of Nature, which must certainly be great where men may be judges in their own case . . .”⁶¹

Thus, as Jefferson correctly penned in the Declaration of Independence, “to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”⁶² While avoiding a reprisal of high school civics, it is relevant to note that the “Rights” Jefferson was referring to were the Natural Rights of humanity—in the words of his generation, the rights to “Life, Liberty and the pursuit of

[is] not only our inalienable right, but *our clearest duty*, by the law of nature”) (emphasis added).

57. See AQUINAS, *supra* note 39, at 51. Aquinas, several centuries before, said the same: “[W]e must conclude that as far as its general first principles are concerned the natural law is the same for all, both as a standard of right action and as to the possibility that it can be known [by all].” *Id.*

58. LOCKE, *supra* note 44, at 79.

59. See *id.* at 78; see also Zalewski, *supra* note 16, at n.5.

60. See generally LOCKE, *supra* note 44, at 81.

61. *Id.*

62. THE DECLARATION OF INDEPENDENCE, para 2, available at <http://www.archives.gov/exhibits/charters/declaration.html>.

Happiness.”⁶³ And, in order to preserve any one of those Natural Rights, one must be vested with the ability to *defend* those rights. In Locke’s state of nature, each individual was responsible for his own defense—thus, civil governments were formed.⁶⁴ But even in a civil society, in order to effectively preserve those Natural Rights, it was necessary to ensure that those whose rights were to be protected were in charge of electing those who sought to protect them.⁶⁵ The requirement that the government be derived from the consent of the people, then, logically follows.

Thus, the states began adopting language protecting the individual’s right to self-preservation. For example, Pennsylvania’s Constitution, in the very first section of the very first Article, states that “all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty . . .”⁶⁶ Massachusetts’ Constitution declared that “[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties . . . [and] seeking and obtaining their safety and happiness.”⁶⁷ Pennsylvania’s Constitution, in chapter 1, section 13, then provided “ [t]hat the people have a right bear arms for the defence of themselves and the state.”⁶⁸ Vermont, as well, protected the “right to bear arms for the defense of themselves and the State.”⁶⁹ Reaffirming this in 1876 the Vermont Supreme Court held that an individual “had the right to go prepared to defend himself against any assault” that might be made upon him and “if he only intended to use a pistol in such an emergency in

63. *Id.*; see also MAIER, *supra* note 46, at 126-27, 134.

64. See generally LOCKE, *supra* note 44, at 76. “To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit . . .” *Id.* at 76.

65. See generally *id.* at 71 (stating that the people determined the ruler and the government was only the agent to carry out their wishes).

66. PA. CONST. art. I, § 1 (1776).

67. MASS. CONST. art. I (1780).

68. PA. CONST. art. I, § 13 (1776). In 1790, the right to bear arms for the defense of oneself was shifted to article 9, section 21. During the transition, it incorporated the words: “shall not be questioned.” PA. CONST. art. IX, § 21 (1790). Then, in 1874, the right to bear arms for self-defense, among other things, was moved to article 1, section 21, where it can be found in the Pennsylvania Constitution today. See PA. CONST. art. I, § 21 (1874).

69. VT. CONST., Ch. 1, para. 15 (1777). The fact that states were explicitly recognizing their citizens’ right to bear arms in defense of themselves *in addition* to the state, also indicates that the use of deadly force was considered an inalienable right to the extent that it was used to defend oneself. While certainly not dispositive, the fact that the ability to immediately and fully defend oneself was a Natural, unalienable right, tends to point to the fact that one was justified in using deadly force to defend oneself when necessary.

defending his own life, or against the infliction of great bodily harm, the carrying of the pistol for such a purpose would be lawful.”⁷⁰

Quite clearly, there is a Natural Right to Self-Defense. Without it, there is no basis for a neutral civil government, for there is no method for one to defend his Natural Rights without taking matters into his own hands. The question now becomes whether that Natural Right, in a civil society context, confers an *immediate* right to self-defense, *without a duty to retreat*. We contend that it does.⁷¹

Despite statements by U.S. Attorney General Eric Holder⁷² and others⁷³ that the duty to retreat is a long-standing part of the common law, in the annals of legal history the concept is fairly new. The duty to retreat—the belief that one must attempt to flee to safety when assaulted rather than “stand his ground” and defend himself—is born from a misreading of Blackstone’s *Commentaries*.⁷⁴ Blackstone divided homicide in self-defense into two categories: “Justifiable Homicide” and “Excusable Homicide.”⁷⁵

Justifiable Homicide was “the one uniform principle that runs through our own, and all other law: that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting.”⁷⁶ Blackstone cautions, however, that not *all* force may be met with deadly force: “But we must not carry this doctrine to the same visionary length that Mr. Locke does: who holds, ‘that all manner of force without right upon a man’s person, puts him in a state of war with

70. State v. Rosenthal, 55 A. 610, 611 (Vt. 1903)

71. See discussion *infra* Part 0.

72. See Eric Holder, U.S. Att’y Gen., *Remarks on Trayvon Martin at NAACP Convention*, THE WASHINGTON POST, (July 16, 2013), available at http://www.washingtonpost.com/politics/attorney-general-eric-holders-remarks-on-trayvon-martin-at-naacp-convention-full-text/2013/07/16/dec82f88-ee5a-11e2-a1f9-ea873b7e0424_story.html (“There has always been a legal defense for using deadly force if . . . no safe retreat is available”).

73. See generally Richard Maxwell Brown, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY, 3, (Oxford University Press, 1991) (tracing the history of the duty to retreat); *Homicide. Self-Defense. Duty to Retreat*, 7, THE VA. L. REG., 300, (1921) (describing the duty to retreat as “ancient law”); *Criminal Law – Homicide. Self-Defense. Duty to Retreat in Face of Felonious Assault*, 41, COLUM. L. REV., 733, 734–35 (1941) (contrasting the duty to retreat in early English law).

74. See generally William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 934 (1906); V. F. Nourse, *Article: Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1244–46 (2001) (contrasting different interpretations of the “duty to retreat” in Blackstone’s *Commentaries*).

75. See Nourse, *supra* note 74, at 1244 (explaining the two forms of homicide in self-defense as written in Blackstone’s *Commentaries*). See generally Blackstone, *supra* note 74.

76. Blackstone, *supra* note 74, at 931.

the aggressor; and, of consequence, that being in such a state of war, he may lawfully kill him . . .”⁷⁷

As to whether the victim of an attack is required to retreat, Blackstone is not vague: “In [these] cases [of justifiable homicide, a man] *is not obliged to retreat . . .*” and, in fact, may even pursue the initial assailant until the danger has passed.⁷⁸ “[T]he slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, *with commendation* rather than blame.”⁷⁹

On the other hand, an “excusable homicide” occurs when “a man must protect himself from an assault or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him.”⁸⁰ Blackstone explains that where “the slayer has not begun the fight, or (having begun) endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence.”⁸¹ In this case, the person claiming self-defense “should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant . . .”⁸²

The clear distinction here is this: for a homicide to be justifiable, Blackstone would require the “slayer” to bear no fault.⁸³ Where there is no fault, there is no duty to retreat, and the subsequent killing of the initial assailant, regardless of the assailant’s possession of a weapon, is justified and “commendable.”⁸⁴ The duty to retreat arises where there *is* some fault—that is, where one *is* involved in a “brawl or quarrel.”⁸⁵ In those instances, Blackstone, like Locke, insists on turning to the civil magistrate to sort things out and remedy any violations of rights, so long as the attack is not so “sudden and violent” where “waiting for the assistance of the law” would result in death or serious injury.⁸⁶ And therein lies the difference:

77. *Id.* This is because, for non-deadly affronts to the person, we live in a civilized society with redress to the magistrate.

78. *Id.* at n.8 (emphasis added) (“[He] may pursue his adversary until he has secured himself from all danger; and if he kill him in doing so, it is called justifiable self-defence. . .”).

79. *Id.* at 932. (emphasis added).

80. *Id.* at 933. Blackstone describes two species of “Excusable Homicide.” The first is akin to manslaughter and its varying degrees, and will not be discussed here.

81. *Id.* at 934.

82. Blackstone, *supra* note 74, at 931.

83. *Id.* at 932. (“In these instances of *justifiable* homicide, it may be observed that the slayer is in no kind of fault whatsoever . . .”).

84. *Id.*

85. *Id.* at 933.

86. *Id.* at 933. (“[I]nstead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defense, but in sudden and violent cases when certain and immediate suffering

where one is in fear of imminent death or serious harm, he may use deadly force to repel it and defend himself. But where there may be fault with the individual claiming defense, he is obligated to escape, if he can do so safely.⁸⁷

Courts throughout the early United States also found a right to immediately repel deadly force with deadly force; or, in today's modern, more controversial parlance, a right to "stand your ground."⁸⁸ Indeed, John Adams agreed that "[r]esistance to *sudden violence*, for the preservation not only of my person, my limbs and life, but of my property, is an indisputable right of nature which I never surrendered to the public by the compact of society, and which, perhaps, I could not surrender if I would. *Nor is there anything in the common law of England, [] inconsistent with that right.*"⁸⁹ Joel Prentiss Bishop, whose treatise on criminal law may be found throughout criminal jurisprudence, is worth quoting at length on the topic of self-defense and the duty to retreat:

The Rule—is commonly stated in the American cases thus: If one who is assaulted, being himself without fault in bringing on the difficulty, reasonably apprehends death or great bodily harm to himself unless he kills the assailant, the killing is justifiable.

Limit of the Rule—It has been held that this rule cannot be qualified by adding to it, "which [bodily harm] might probably endanger his life;" for one attacked may destroy the assailant's life though no danger, near or remote, threatens his own, but only his safety in a less degree.

. . . **Retreating to the Wall**—If a mere fight or an assault not murderous is followed up till the conflict is for blood, neither party can innocently avail himself of the perfect defence by killing the other until he has endeavored to extricate himself by "retreating to the wall," as the old phrase is.⁹⁰

In 1784, the Philadelphia Court of Oyer and Terminer concluded that not even "elevation, rank, or immunity of character, can abrogate the right of self-defence."⁹¹ In 1790, the Supreme Court of New Jersey held that "[i]n order to excuse a homicide on the ground of self defence, it must clearly appear that it was a necessary act, in order to avoid destruction, or

would be the consequence of waiting for the assistance of the law.").

87. *Id.* at 934.

88. *See, e.g.,* *Republica v. De Longchamps*, 1 U.S. 111, 113 (1784).

89. John Adams, *BOSTON GAZETTE*, Sept. 5, 1763, *reprinted in* JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 438 (Vol. 3 1851)(emphasis added).

90. JOEL PRENTISS BISHOP, *BISHOP ON CRIMINAL LAW* 614, 617 (Vol. 1, 9th ed. 1923).

91. *De Longchamps*, 1 U.S. at 113.

some severe calamity.”⁹² Likewise, New York courts also found that there was no general duty to retreat, although circumstances certainly could create that duty, when one *who is without fault*, is attacked by another in such a manner, or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or do him great bodily harm, and there is reasonable ground for believing the danger imminent, I think he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger.⁹³

Even as late as the 1890’s, courts were recognizing the distinction between self-defense in a sudden attack and self-defense in a “brawl or quarrel.”⁹⁴ Rhode Island’s Supreme Court, in 1889, found that “[g]enerally, a person wrongfully assailed cannot justify the killing of his assailant in mere self-defense if he can safely avoid it by retreating.”⁹⁵ However, “[r]etreat is not always obligatory, even to avoid killing; for, if attack be made with deadly weapons, or with murderous or felonious intent, the assailed may stand his ground, and, if need be, kill his assailant . . . and we know of no case which holds that retreat is obligatory, simply to avoid a conflict.”⁹⁶ The Indiana, Ohio, and Minnesota Supreme Courts agreed.⁹⁷

Then, in *Beard v. United States*, the United States Supreme Court held that:

[w]here an attack is made with murderous intent, there being sufficient

92. *State v. Wells*, 1 N.J.L. 424, 424 (N.J. 1790). Rather than being evidence of a duty to retreat, this language is consistent with the idea that, where one’s life is threatened by a sudden attack, he may act to protect himself to the extent he is required. This is hallmark of a self-defense argument. *Id.*

93. *See Shorter v. People*, 2 N.Y. 193, 193 (1849).

94. *See State v. Cain*, 20 W.Va. 679, 700 (W.Va. 1882); *see also Wheatley v. State*, 93 Ark. 409, 415–16 (Ark. 1910) (recognizing that a person engaged in a brawl may not be entitled to the defense of self-defense).

95. *State v. Sherman*, 18 A. 1040, 1041 (R.I. 1889).

96. *Id.* In so finding, the Rhode Island Supreme Court cited numerous legal treatises and quoted Bishop’s Criminal Law, § 850, which said: “The assailed person is not permitted to stand and kill his adversary, if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of the case, give back blow for blow.” *Id.*

97. *See Runyan v. State*, 57 Ind. 80, 83–84 (Ind. 1877); *Erwin v. State*, 29 Ohio St. 186, 186 (Ohio 1876) (“Where a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted *without retreating, although it be in his power to do so without increasing his danger*, may kill his assailant if necessary to save his own life or prevent enormous bodily harm.”)(emphasis added); *Gallagher v. State*, 3 Minn. 270, 273 (Minn. 1859) (“[T]he party thus assaulted may strike or use a sufficient degree of force to prevent the intended blow, without retreating at all.”). The court in *Gallagher* was concerned about a jury instruction that so much as implied that *any* duty to retreat existed when proportional force is used to defend oneself. *Id.*

overt act, the person attacked is under no duty to fly. He may stand his ground, and, if need be, kill his adversary. And it is the same where the attack is with a deadly weapon, for in this case a person attacked may well assume that the other intends murder, whether he does in fact or not.⁹⁸

As early as the mid-Nineteenth Century, some courts began to lose sight of the “uniform principle” and focus only on the duty to retreat. For example, the District of Columbia required a man to retreat when danger became apparent, but *not* when he feels his life is in danger.⁹⁹ Pennsylvania’s Supreme Court held in 1868 that “[t]o excuse homicide by a plea of self defence, it must appear that the slayer had no other possible or at least probable means of escaping, and that his act was one of necessity.”¹⁰⁰

It was the early Twentieth Century, however, that saw the greatest abrogation of the right to defend oneself without analyzing all avenues of retreat. In 1916, the New Jersey Supreme Court found that “[a]lthough the obligation to retreat, when this can be done safely, is not expressly declared . . . it is, we think, necessarily implied in the declaration that a homicide is not justifiable or excusable, unless the necessity for taking life is apparent as the *only means* by which the slayer can avoid his own destruction or some great bodily injury.”¹⁰¹ Pennsylvania abrogated the ability of an individual to “stand his ground” in 1917: “We affirmed that point [that the defendant was entitled to self-defense when in fear for his life], if there were no other way by resisting or escaping. Killing is the last resort, and, if there were any other way, it was the duty of the defendant to take that way.”¹⁰² In 1929, the Massachusetts Supreme Court took this implied duty

98. *Beard v. United States*, 158 U.S. 550, 563 (1895). The Supreme Court also cited Francis Wharton’s *Treatise on Criminal Law*, which follows Blackstone’s allowance of the pursuit of the transgressor until all danger has passed. *Id.*

99. *United States v. Herbert*, 2 Hay. & Haz. 210 (D.C. 1856). The Court in *Herbert* said that the “moment a man is bound to retreat is that in which the danger becomes apparent.” *Id.* But if the jury believed that the defendant had “good ground to believe that his life was in danger or that he was about to receive some grievous personal harm, and that at the time this danger was apparent and when he fired the pistol he could not safely retreat, it [was] not material that he might have escaped at the commencement of the affray.” *Id.* (emphasis added). While certainly implying *some* duty to retreat, the duty was minimal, at best, and does not require a search for a reasonable escape prior to pulling the trigger in self-defense. *Id.*

100. *Commonwealth v. Drum*, 58 Pa. 9, 10 (Pa. 1868).

101. *State v. Di Maria*, 97 A. 248, 249 (N.J. 1916).

102. *Commonwealth v. Lapriesta*, 101 A. 637, 637 (Pa. 1917); *see also Commonwealth v. Watson*, 233 Pa. 295, 298 (Pa. 1912). It is interesting to note that as late as 1912, the Pennsylvania Supreme Court still recognized Blackstone’s distinction between pure self-defense and the claim of self-defense, “when two men enter into a fight, and one of them secures a knife and kills his adversary . . .” *Watson*, 233 Pa. at 298.

to retreat even further, finding that “[t]he right of self-defense does not accrue to a person ‘until he has availed himself of all proper means in his power to decline the combat.’”¹⁰³

Notably, the Supreme Court of the United States shifted very minimally during this period. After finding no duty to retreat in *Beard*, Justice Oliver Wendell Holmes, writing for the Court, found that the failure of the defendant to retreat could not be dispositive of either guilt or innocence.¹⁰⁴ Rather, it was one factor to consider out of many in determining whether the killing was actually justifiable in self-defense.¹⁰⁵ “Detached reflection cannot be demanded in the presence of an uplifted knife,” wrote Justice Holmes. “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.”¹⁰⁶

IV. CONCLUSION

Contrary to political and moral opponents of Stand Your Ground laws, the right of one to “stand his ground” is the true historic right, rooted in the natural, inalienable right of self-preservation. British commentators have recognized this since at least the Seventeenth Century and American courts have repeatedly upheld the rights of citizens to defend themselves when confronted with deadly peril.¹⁰⁷ This is because, despite the social contract and the resort to the civil magistrate for the arbitration of our differences, the proverbial state of nature occasionally rears its head and reminds us that we can all be equally vulnerable, despite our civil protections. In these instances, the common law has always recognized the inalienable right of the individual to stand his ground and defend his life

103. *Commonwealth v. Trippi*, 167 N.E. 354, 356 (Mass. 1929).

104. *See Brown v. United States*, 256 U.S. 335, 344 (1921).

105. *See id.* at 343.

106. *Id.*; *see Martin v. Ohio*, 480 U.S. 228, 233 (1987) (affirming conviction over self-defense argument when state law apparently required *some* duty to retreat as one of the several elements of the crime); *see also Moran v. Ohio*, 469 U.S. 948, 949 n. 1 (1984). This view on the duty to retreat has remained throughout the 20th Century to the present. *Martin*, 480 U.S. at 233.

107. *See Beard v. United States*, 158 U.S. 550, 562 (1895) (“The weight of modern authority, in our judgment, establishes the doctrine that when 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 the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable.”); *see also* David B. Kopel, Paul Gallant, & Joanna D. Eisen, *The Human Right of Self-Defense*, 22 *BYU J. PUB. L.* 43, 97–98, 73–77, 125–26 (2007) [hereinafter *The Human Right*].

when the civil government cannot—or will not—timely intervene.¹⁰⁸

Like the Bill of Rights, Stand Your Ground laws do not grant positive rights to individuals. In other words, a Stand Your Ground law does not create a new right for an individual to shoot someone whenever he feels the least modicum of anxiety, fear, or danger. Rather, these laws reverse the (relatively) recent legal trend started in the Progressive Era to require a threatened individual to “retreat to the wall,” unless absolutely necessary,¹⁰⁹ rather than immediately defend himself.¹¹⁰

It is unfortunate that a Stand Your Ground statute is needed at all. The right of an individual to defend himself in case of attack is inalienable; it cannot be rightly separated from him, be it attempted by the state or another individual.¹¹¹ But, to the extent nearly half the states in the Union have codified the natural right, applause are in order. All states should be so cognizant of the individual, natural rights of their citizens.

108. See *The Human Right*, *supra* note 107, at 97 (explaining that “[e]very man has a right to defend himself or his property, or even to defend others, where there is not time or opportunity to call in aid the civil power. The reason is obvious; for if it were not so, men would find themselves in a worse condition in those cases, under civil government, than they would be in if they were living in a mere natural society without any civil government.”). “[H]umans have ‘the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.’” *Id.* at 126. (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 142, available at <http://www.gutenberg.org/files/30802/30802-h/30802-h.htm>).

109. See *Weiand v. Florida*, 732 So.2d 1044, 1049 (Fla. 1999) (holding that whether the force was absolutely necessary was a question for the jury); accord *Little v. Florida*, 111 So.3d 214 (2d DCA 2013). The definition of “absolutely necessary” is to be determined, of course, by individuals who were not present at the scene and are able to view the situation with the calm and collected vantage point of hindsight.

110. See Michelle Jaffe, *Up in Arms Over Florida’s New “Stand Your Ground” Law*, 30 NOVA L. REV. 155, 170, 174 (2005) (discussing the retreat requirement prior to the “Stand Your Ground” law).

111. See Christopher Schmidt, *An International Human Right to Keep and Bear Arms*, 15 WM & MARY BILL RTS. J. 983, 994 (2007) “The Framers likely did not believe they were creating new rights when they ratified the Second Amendment and the rest of the Bill of Right. They were recognizing rights already part of English constitutional heritage that were derived from natural law. The Framers believed individual self-defense was an inalienable natural right.” *Id.* at 994.