

# EXAMINING THE RACE EFFECTS OF STAND YOUR GROUND LAWS AND RELATED ISSUES



U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING  
REPORT



FEBRUARY 2020

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- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
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<sup>1</sup> 42 U.S.C. §1975a.

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# Examining the Race Effects of Stand Your Ground Laws

Briefing before  
The United States Commission on Civil Rights  
Held in Orlando, FL

Briefing Report

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## UNITED STATES COMMISSION ON CIVIL RIGHTS

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### Letter of Transmittal

February, 2020

President Donald J. Trump  
Vice President Mike Pence  
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our materials from our briefing on Stand Your Ground laws. These materials are also available in full on the Commission’s website at [www.usccr.gov](http://www.usccr.gov).

The purpose of the Commission’s briefing was to determine whether there is a possible racial bias in the assertion, investigation, or enforcement of justifiable homicide laws in states with Stand Your Ground provisions. In the transcript of our briefing, you will find expert testimony from state legislators, academic researchers, and advocates, as well as testimony on the personal impact of these laws.

We at the Commission are pleased to share these materials to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,

A handwritten signature in blue ink, appearing to read "C. Lhamon".

Catherine E. Lhamon

Chair

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## COMMISSIONERS' STATEMENTS

### Statement of Commissioner Michael Yaki

#### INTRODUCTION

The shooting death of Trayvon Martin on February 26, 2012, and later that year, on November 12<sup>th</sup>, the shooting and killing of Jordan Davis triggered a national controversy over the legislated criminal defense called “stand your ground.” These laws expanded the self-defense principles of the castle doctrine to situations and areas outside the curtilage of a home. It also expanded the principle of self-defense to a lesser justification standard than that of justifiable homicide.

The United States Commission on Civil Rights opened its own inquiry on the subject in May 2013, and in October 2014, held a hearing in, Florida. The transcript of that hearing forms the main body of that report. Unlike other hearings or briefings, the work of the Commission was conceived as an investigation, on a bipartisan vote made possible by the vote of then-Vice-Chair Abigail Thernstrom.<sup>1</sup>

We are here presented with only the testimony heard in Florida five years ago, as well as research and public information subsequent, but that does not prevent members of this Commission to state their observations on an issue that continues to trouble our nation to this day. And so my statement begins.

The question we asked then, and we ask now, continues to be: do Stand Your Ground laws<sup>2</sup> have an unacceptable racial bias in their application in the criminal justice system. What we do know, and what we cannot ignore, is that the same racial biases that have permeated our criminal justice system cannot be separated from this issue. When you consider the racial disparities in selective prosecution and sentencing that have been amply documented in the literature<sup>3</sup> is it any wonder

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<sup>1</sup> Through no fault of the Commission and its staff, the lack of resources – both fiscal and personnel – hampered the ability of the Commission to engage in the type of fact-finding this matter deserved. Because of the way that data is recorded in Stand Your Ground shootings – or, more accurately, was not recorded, as will be discussed later – the intensive investigative resources that would have been required to be dedicated proved to be beyond the reach of the Commission. However, I want to acknowledge the immense contributions of Commission staff in providing the research enabling this Statement. In particular, I want to acknowledge their major contributions in Sections I, IV, and V.

<sup>2</sup> Throughout the text of this Statement, Stand Your Ground and its abbreviation, SYG will be used interchangeably.

<sup>3</sup> See, e.g., Marc Mauer (2010) “Justice for All? Challenging Racial Disparities in the Criminal Justice System,” Human Rights, Volume 37, Number 4, Fall 2010.

that a law like Stand Your Ground, which in effect grants both powers to an individual under the guise of self-defense would suffer similar maladies?

First, though, it is important to understand the background of Stand Your Ground laws.

## I. THE RISE AND EVOLUTION OF STAND YOUR GROUND LAWS

### A. The inception of Stand Your Ground

Florida passed the first “Stand Your Ground” law in 2005. The law extended the common-law “castle doctrine,” embedded in most state laws, to go beyond the confines of one’s home and into any area where a person “has a right to be” in defense of their person or property.<sup>4</sup>

Under the common law, the use of deadly force in the exercise of self-defense was justified in the case of a person defending their home.<sup>5</sup> Until then, the “rule of retreat” dictated that a person had a duty to remove themselves from perceived harm. This was modified under early American jurisprudence to include any situation in which the defendant was in reasonable fear of imminent death or severe bodily harm.<sup>6</sup>

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<sup>4</sup> Fl. Statutes 771.012: (1) 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 defend himself or herself or another against the other’s imminent use of unlawful force. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force.

(2) A person is justified in using or threatening to use deadly force only if he or she reasonably believes that such conduct is necessary to prevent the imminent commission of a forcible felony. 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.

Fl. Statutes 776.031: (1) 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 or terminate the other’s trespass on, or other tortious or criminal interference with, either real property other than a dwelling or personal property, lawfully in his or her possession or in the possession of another who is a member of his or her immediate family or household or of a person whose property he or she has a legal duty to protect. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force.

(2) A person is justified in using or threatening to use deadly force only if he or she reasonably believes that such conduct is necessary to prevent the imminent commission of a forcible felony. 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>5</sup> See Christine Catalfamo, Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century, 4 RUTGERS J. L. & PUB. POL’Y 504.

<sup>6</sup> *Id.*

Florida's law removed the duty to retreat and extended the right of deadly force to protect other persons<sup>7</sup>, property outside the home<sup>8</sup>, as well as reduced the threshold in both statutes from "reasonable fear of imminent death or severe bodily injury" to the broader "imminent commission of a forcible felony."<sup>9</sup> In essence, the Florida law created innumerable and moving "castles" that allowed the use of deadly force wherever a person had "a right to be," effectively abrogating the duty to retreat in any place or circumstance.<sup>10</sup>

The National Rifle Association, in crafting the Florida legislation,<sup>11</sup> wanted the legal equivalent of *carte blanche* for the exerciser of a Stand Your Ground right. First, under the original version of the statute<sup>12</sup> the person making the claim that they acted in accordance with the Stand Your Ground law was *immune* to criminal and civil prosecution if they are deemed justified in their use of deadly force.<sup>13</sup> In addition, and most confusing to law enforcement,<sup>14</sup> the police "may not arrest the person for using or threatening to use force unless it determines that there is probable cause that the force that was used or threatened was unlawful."<sup>15</sup> In 2017, the statute was amended<sup>16</sup> to shift the burden to the prosecution to overcome a Stand Your Ground claim by clear and convincing evidence<sup>17</sup>, which has further confused prosecutors.<sup>18</sup>

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<sup>7</sup> FL. Statutes 776.012(1).

<sup>8</sup> FL. Statutes 776.031(1).

<sup>9</sup> "Forcible felony" means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual." FL. Statutes 776.08

<sup>10</sup> See Catalfamo, *supra* note 5, at 526.

<sup>11</sup> See Mike Spies (2018) "The N.R.A. Lobbyist Behind Florida's Pro-Gun Policies," The New Yorker, March 5, 2018, at <https://www.newyorker.com/magazine/2018/03/05/the-nra-lobbyist-behind-floridas-pro-gun-policies>.

<sup>12</sup> The statute has since been changed to make it even more difficult to charge someone using a Stand Your Ground defense, as will be discussed, *infra*. However, this section remains in the law.

<sup>13</sup> FL. Statutes 776.032(1).

<sup>14</sup> See Susan Taylor Martin, Tampa Bay Times, *Florida 'stand your ground' law yields some shocking outcomes depending on how law is applied*, <http://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133> (hereafter "Tampa Bay Times").

<sup>15</sup> FL. Statutes 776.032(2).

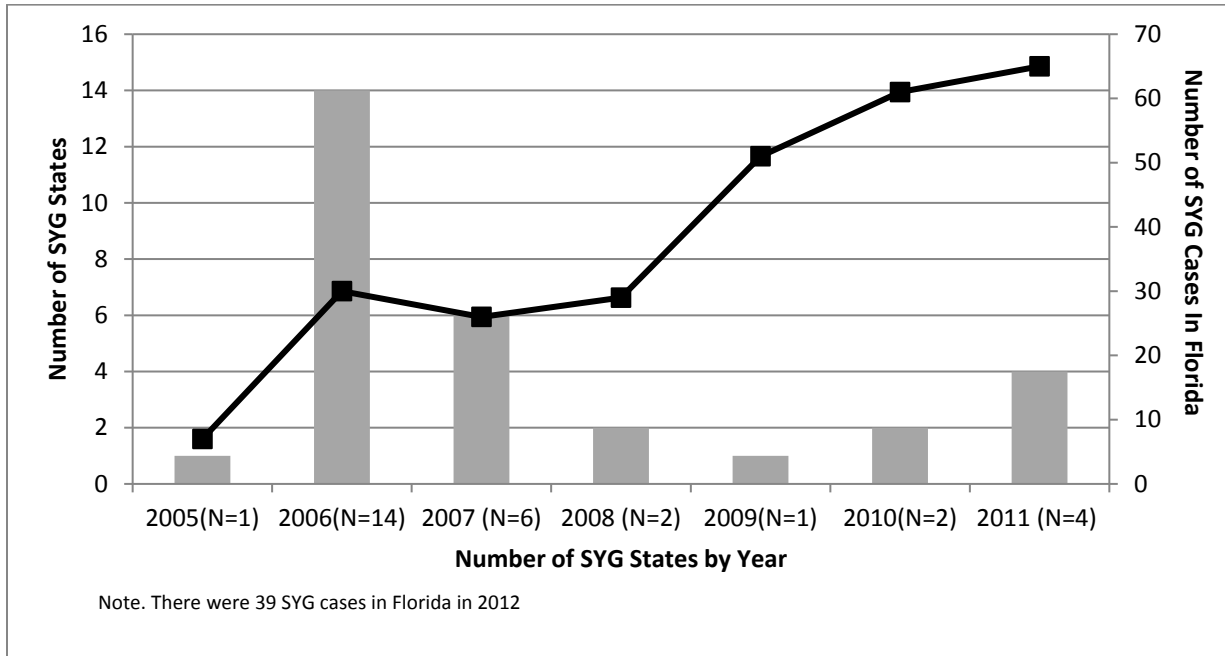
<sup>16</sup> The Florida Supreme Court in 2015, after years of watching courts wrestle with interpreting the statute, created a court rule that required a defendant to establish at a pre-trial hearing their claim under the SYG statute by a preponderance of the evidence. See <https://www.miamiherald.com/news/politics-government/state-politics/article142992234.html> The National Rifle Association then worked to pass the change in the legislature, finally succeeding in 2017. See Spies, *supra*.

<sup>17</sup> FL. Statutes 776.032(4).

<sup>18</sup> <https://www.wtsp.com/article/news/local/pascocounty/trial-of-curtis-reeves-postponed-due-to-confusion-about-stand-your-ground-law/67-587350524>.

The Florida “Stand Your Ground” law has been emulated, in one form or another, in over two dozen states,<sup>19</sup> the most recent in 2018.<sup>20</sup> As Table 1 illustrates, 2006 was a watershed year for SYG expansion as 14 states followed Florida by enacting similar legislation—AL, AK, AZ, GA, ID, IN, KS, KY, LA, MI, MS, OK, SC, and SD (see Table 1).

**FIGURE 1.** Number of SYG cases in Florida by SYG expansion nationwide, 2005–2011.



Source: USCCR analyses of SYG statutes for each state and SYG cases in Florida between 2005 and 2011.

The number of states reported as SYG states ranges between 22 and 33, depending on the criteria considered by a particular organization. For instance, considering only states that “allow a person to use deadly force where the shooter has a right to be, even when there is a clear and safe opportunity to avoid a dangerous situation,” the Mayors Against Illegal Guns reported 22 SYG states in their study.<sup>21</sup> The Association of Prosecuting Attorneys (APA) reported 31 states in their report based on the following criteria: (1) whether states expanded the Castle doctrine to

<sup>19</sup> The states that adopted a Florida-style law that removes the duty to retreat include Alabama, Alaska, Arizona, Georgia, Idaho, Iowa, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia.

<sup>20</sup> NRA-backed Stand Your Ground Bill Becomes Law in Wyoming, March 15, 2018, at <https://www.nra.org/articles/20180315/nra-backed-stand-your-ground-bill-becomes-law-in-wyoming>. In addition, a good summary of Stand Your Ground laws can be found on the Rand Corporation website, The Effects of Stand-Your-Ground Laws, at <https://www.rand.org/research/gun-policy/analysis/stand-your-ground.html>.

<sup>21</sup> Mayors Against Illegal Guns, 2013, “Shoot First: ‘Stand Your Ground’ laws and their effect on violent crime and the criminal justice system” (hereafter Mayors).

areas outside the home; (2) diminished or eliminated the “duty to retreat;” (3) changed the burden of proving reasonableness to a presumption; and (4) providing blanket civil and criminal immunity.<sup>22</sup> The American Bar Association (ABA) counted 33 states based on their analysis of statutory law and case law (including California and Illinois).

One state is one state too many. But Florida, the so-called Sunshine state<sup>23</sup>, is the incubator for National Rifle Association laws<sup>24</sup> that have brought darkness into the homes of Trayvon Martin, Jordan Davis, and countless others. Yet proponents continue to claim that SYG is doing what it is intended to do. That, too, is called into question.

## B. Stand Your Ground Laws Impact on Crime Reduction/Deterrence

Since the passage of the Florida statute and its progeny, there has been controversy over its efficacy and collateral consequences. The NRA has consistently trumpeted Stand Your Ground laws as expanding the “constitutional right to self protection.<sup>25</sup> In contrast, the Brady Center to Prevent Gun Violence, dubbed it the “Shoot First” law, and noted that the “sensible requirements” of self-defense law to “minimize conflict and protect life” were undermined by Stand Your Ground laws.<sup>26</sup> However, it seems that the legislative history of the Florida law is rooted more in curbing “overzealous states attorneys” rather than any genuine concern rooted in safety.<sup>27</sup> Even then, however, there was scant evidence supporting that claim.<sup>28</sup> Nevertheless, for the purposes of this discussion, we will focus on the perceived benefits – deterrence and crime reduction.

### 1. National Studies – Increase in Homicides in States with Stand Your Ground Laws

A study by Cheng & Hoekstra examined state-level crime data from 2000 to 2010 from the FBI Uniform Crime Reports to analyze the effects of Stand Your Ground laws nationally on two types

<sup>22</sup> Association of Prosecuting Attorneys, available at <http://www.apainc.org/self-defense-policy/>.

<sup>23</sup> Because of its role in being a leader in new gun laws, Florida has picked up another moniker. See, e.g. Tess Owens (2018) How Gov. Rick Scott helped make Florida the “Gunshine State” Vice News, Aug. 28 2018, at [https://news.vice.com/en\\_us/article/j5nzd3/how-gov-rick-scott-helped-make-florida-the-gunshine-state](https://news.vice.com/en_us/article/j5nzd3/how-gov-rick-scott-helped-make-florida-the-gunshine-state).

<sup>24</sup> “Florida is often the first place the N.R.A. pursues specific gun rights protections . . . to set a precedent that can then be exported to other states,” quoting David Cole in Spies, *supra*. See also Adam Weinstein, *How the NRA and Its Allies Helped Spread a Radical Gun Law Nationwide*, Mother Jones, June 12, 2012 <https://www.motherjones.com/politics/2012/06/nra-alec-stand-your-ground/>.

<sup>25</sup> <https://www.nra.org/articles/20180315/nra-backed-stand-your-ground-bill-becomes-law-in-wyoming>.

<sup>26</sup> SYG Briefing, Testimony of Elizabeth Burke, Vol. 3, page 5.

<sup>27</sup> Spies, *supra*, characterizing the NRA as stating that innocent people were “being arrested, prosecuted, and punished for exercising self-defense that was lawful under the Constitution and Florida law.”

<sup>28</sup> *Id.*

of outcomes – crime deterrence and homicide reduction.<sup>29</sup> Contrary to proponent’s predictions, the study instead found “no evidence of deterrence effects on burglary, robbery, or aggravated assault” but did find significant evidence that the laws lead to more homicides” and estimated that “the laws increase homicides by a statistically significant 8 percent” or “an additional 600 homicides per year” in states that adopted “Stand Your Ground” laws.<sup>30</sup> Indeed, the study found that the Stand Your Ground law enactments across the country resulted in the largest divergence between SYG and non-SYG states in 40 years in terms of the rate of homicide increase in SYG states.<sup>31</sup> The study concluded that it found “compelling evidence that by lowering the expected costs associated with using lethal force, [SYG] laws induce more of it.”<sup>32</sup>

Another study by McClellan and Tekin used the U.S. Vital Statistics database to conduct a similar examination of the impact of Stand Your Ground laws.<sup>33</sup> The researchers raised “serious doubts about the claim that SYG laws make America safer.”<sup>34</sup> Indeed, this study also tracked the Cheng & Hoekstra study by showing that having a SYG law is associated with a 6.8 percent increase in the firearms-related homicide rate.<sup>35</sup> In contrast, states with self-defense provisions but retaining the duty to retreat (as contrasted with SYG’s removal of the duty as long as someone has a “right to be” in the location) showed no statistical increase.<sup>36</sup> Thus, the study concluded that the removal of the duty to retreat caused the increase in homicides. They stated that their findings seemed to undermine argument that the stand your ground laws serve as a deterrent for crime.<sup>37</sup>

Under both the increased deterrence and decrease in homicide policy rationales, Stand Your Ground in practice appears to fail miserably on the national level.

## 2. Florida Study – Increase in Homicides Associated with Stand Your Ground

Due to Florida’s status as the leader in Stand Your Ground legislation, a group of doctors published a paper in 2017 in the *Journal of the American Medical Association – Internal Medicine* analyzing

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<sup>29</sup> Cheng Cheng, Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime Or Escalate Violence? Evidence From Castle Doctrine*, National Bureau of Economic Research, Working Paper 18134, <http://www.nber.org/papers/w18134>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at p.4.

<sup>32</sup> *Id.*

<sup>33</sup> Chandler B. McClellan, Erdal Terkin, *Stand Your Ground Laws, Homicides, and Injuries*, National Bureau of Economic Research, Working Paper 18187 at p. 7, <https://www.nber.org/papers/w18187.pdf>.

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

<sup>35</sup> *Id.* at p. 20.

<sup>36</sup> *Id.* at p. 22. The study also showed a correlation between states that adopted Stand Your Ground and higher emergency room visits and hospitalizations due to firearms-related injuries.

<sup>37</sup> *Id.* at 32.

the impact of Florida's SYG law by studying homicide rates between 1999 and 2014. It found that the implementation of Florida's SYG law was associated with "an abrupt and sustained increases in homicides, showing a 24.4% increase in homicide and a 31.6% increase in firearm-related homicide."<sup>38</sup> The study also found further evidence that Florida's stand your ground law has been associated with increases in both unlawful and justifiable homicides, including a 75% increase in determined justifiable homicides since the law passed.<sup>39</sup>

A different 2014 study by Albert McCormick buttressed many of these findings.<sup>40</sup> In examining over 300 SYG cases in Florida, despite the claims by the NRA that Stand Your Ground was to protect law-abiding citizens,<sup>41</sup> the study found that over 50% of the claimants (those asserting the defense) had criminal records, and almost one-third had criminal backgrounds involving at least one violent offense.

Indeed, the McCormick study showed that the "triggering event" precipitating the incident for which SYG was claimed was not, as proponents argued, a fear of violence.<sup>42</sup> Instead, in 69% of the cases, the most likely incident trigger was an argument or dispute that then escalated to threat or violence. Defense against forcible felonies only comprised 27% of the triggering events.<sup>43</sup> In other words, SYG laws have been used to protect the use of violence or deadly force for nearly 70% of confrontations that did not begin as a forcible felony or threatening act. Rather, they help escalate a dispute into an incident with deadly consequences.<sup>44</sup>

### C. Other Stand Your Ground Concerns

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<sup>38</sup> David K. Humphreys, PhD., Antonio Gasparrini, PhD., and Douglas J. Wiebe, PhD, *Evaluating the Impact of Florida's "Stand Your Ground" Self-defense Law on Homicide and Suicide by Firearm: An Interrupted Time Series Study*, January 2017, at <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2582988>

<sup>39</sup> David K. Humphreys, PhD., Antonio Gasparrini, PhD., and Douglas J. Wiebe, PhD, *Association Between Enactment of a "Stand Your Ground" Self-defense Law and Unlawful Homicides in Florida*, August 2017 at <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2648742>. See also <https://www.reuters.com/article/us-health-homicides-standyourground/murders-surge-in-florida-in-decade-after-stand-your-ground-law-idUSKCN1AU1QL>

<sup>40</sup> Albert E. McCormick Jr., *The Enforcement of Florida's "Stand Your Ground" Law: Preliminary Findings*, *The Journal of Public and Professional Sociology*, Volume 6, Issue 1, Article 1, February 2014.

<sup>41</sup> *NRA-Backed Stand Your Ground Becomes Law in Wyoming*, NRA Institute for Legislative Action, March 15, 2018, <https://www.nraila.org/articles/20180315/nra-backed-stand-your-ground-bill-becomes-law-in-wyoming>.

<sup>42</sup> Among the precipitating events were arguments or disputes over money or property, relationships (e.g., jealousy or love triangles), domestic disputes, complaints (e.g., speeding through a neighborhood, barking dog), situations where the claimant intervened between two other disputing parties, road rage incidents, and revenge-motivated incidents. See McCormick, *supra*, at p. 12.

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

<sup>44</sup> SYG Briefing, Testimony of Senator Chris Smith, *supra*, at p. 11

There are also concerns expressed by critics over the broad application of SYG laws on law enforcement, the courts, and, most disturbingly of all, who should “benefit” from the law.

In 2013, the American Bar Association convened a Task Force to examine and report on the potential effects Stand Your Ground laws “may have on public safety, individual liberties, and the criminal justice system.”<sup>45</sup> Of particular concern are provisions in many of the SYG laws that do not allow law enforcement to arrest an individual asserting SYG unless “probable cause” exists to overcome that assertion. As stated in the report:

Police officers report varying degrees of confusion regarding how to properly apply Stand Your Ground laws. Most Florida police officers now defer decisions to arrest on Stand Your Ground cases to the prosecutor’s office to make. This may be an unintended consequence of the law, as some Stand Your Ground statutes explicitly state in their language that the police should not vary from normal investigation procedures in Stand Your Ground cases. However, in jurisdictions with immunity from prosecution statutes, “criminal prosecution” is defined to include “detention, arrest, and charging.” This broad definition leaves police officers unsure about when they can and should arrest suspects.<sup>46</sup>

The confusion was also documented by the Tampa Bay Times in a study of nearly 200 cases in Florida where Stand Your Ground defenses were documented. The paper noted that the “law has allowed drug dealers to avoid murder charges and gang members to walk free. It has stymied prosecutors and confused judges.”<sup>47</sup>

“In Daytona Beach, for example, police Chief Mike Chitwood used the ‘stand your ground’ law as the rationale for not filing charges in two drug deals that ended in deaths. He said he was prevented from going forward because the accused shooters had permits to carry concealed weapons and they claimed they were defending themselves at the time. ‘We’re seeing a good law that’s being abused,’ Chitwood told a local paper.”<sup>48</sup>

The inanity of the legislation is legend. In 2006, a Miami man avoided prosecution after spraying a car filled with gang members with 14 bullets. In 2008, a 15-year-old Tallahassee boy was killed in a shoot-out between rival gangs; two of the gang members successfully used Stand Your Ground to protect themselves from prosecution.<sup>49</sup> As one law enforcement official stated, “Stand your ground” laws provide safe harbors for criminals and prevent prosecutors from bringing cases

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<sup>45</sup> American Bar Association, p. iii.

<sup>46</sup> *Id.* at p. 27.

<sup>47</sup> See Tampa Bay Times, *supra*.

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

<sup>49</sup> See Weinstein, *supra*.



against those who claim self-defense after unnecessarily killing others.<sup>50</sup> The Tampa Bay Times analysis is replete with further examples of this “safe harbor” consequence:

One man killed two unarmed people and walked out of jail. Another shot a man as he lay on the ground. Others went free after shooting their victims in the back. In nearly a third of the cases the *Times* analyzed, defendants initiated the fight, shot an unarmed person or pursued their victim — and still went free. . . . During an argument at a 2009 party in Fort Myers, Omar Bonilla fired his gun into the ground and beat Demarro Battle, then went inside and gave the gun to a friend. If Battle feared for his life, he had time to flee. Instead, he got a gun from his car and returned to shoot Bonilla three times, including once in the back. Battle was not charged in the slaying.<sup>51</sup>

The 2017 amendments to the Florida law, opposed by prosecutors, have not resulted in any clarity.<sup>52</sup> The Tampa Bay Times has noted that “confusion” has resulted in two different appeals courts rendering two different opinions on the application of the law to cases pending at the time the law was enacted.<sup>53</sup> One of these cases involved a 75-year old retired police captain shooting a man in a movie theater after popcorn was thrown at him.<sup>54</sup>

In addition, the Tampa Bay Times article noted:

Critics contend the shift in the law will have its biggest impact before stand your ground hearings even occur. They say the amendment could have a “chilling effect” on authorities, who will think twice before bringing cases that should reasonably go before a judge. The immunity offered by stand your ground is broad, said University of Miami law professor Mary Anne Franks, and “the statute suggests the person ... would actually be able to sue everybody” if a judge dismisses the charge. Stand your ground does not mention the specific process for filing a civil suit. But it does state that defendants are immune from an arrest, language that could later bolster a claim of wrongful arrest or imprisonment. “You have basically cowed law

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<sup>50</sup> David LaBahn, (2013) “Stand Your Ground Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force,” October 29, 2013. Testimony before the Committee of the Judiciary, Subcommittee on the Constitution, Civil Rights, and Human Rights of the United States Senate, Serial No. J-113-35, p. 15.

<sup>51</sup> *Id.*

<sup>52</sup> “In the summer of 2015, the Florida Supreme Court addressed one of Stand Your Ground’s core provisions, which provides a path to immunity from the legal proceedings that typically follow a charge of murder or assault. Under the law, a defendant is entitled to a special pretrial hearing, during which a judge can dismiss the case. The court ruled that in these hearings the burden of proof was on the person claiming the statute’s protections. To shift the onus in the other direction, the court said, would essentially require prosecutors to prove a case twice.” *See Spies, supra.*

<sup>53</sup> Kathryn Varn and Zachary T. Sampson, *Think you know stand your ground? The recent Clearwater case tells us you’re probably wrong*, Tampa Bay Times, August 17, 2018.

<sup>54</sup> Aaron Mesmer, *Deputy who witnessed theater shooting takes stand*, FoxNews13, March 1, 2017, at <http://www.fox13news.com/news/local-news/deputy-who-witnessed-theater-shooting-takes-stand>

enforcement in saying you need to be very careful proceeding in these cases," Franks said. "They're being asked to adjudicate something that should be brought out during the trial. It's cart before horse."<sup>55</sup>

The "bewildering" rules governing the presumption of justified use of deadly force, especially the roles of the police and prosecutors, resulting in attempts to repeal or weaken the law in Florida – all of which failed.<sup>56</sup>

#### D. Has Stand Your Ground Increased Safety

The principle rationale propelling Stand Your Ground is that it makes us safer. Our safety is increased. Is that true?

In a study of the Florida SYG cases collected by the Tampa Bay Times, the answer would be no. If safety is defined as loss of life, SYG encounters have a mortality rate of 60%. If increases in the homicide rate, as documented above, means decreased safety, the answer would be no. If a fight breaks out between two people, are you – as a bystander – safer if neither are armed, one is armed, or both are armed?

David LaBahn, the President of the Association of Prosecuting Attorneys, expanded on this theme:

By expanding the realm in which violent acts can be committed with the justification of self-defense, Stand Your Ground laws have negatively affected public health and undermined prosecutorial and law enforcement efforts to keep communities safe.<sup>57</sup>

Proponents of Stand Your Ground continue to argue that possibility that someone is armed will increase the fear in a criminal and deter crime. Based on the testimony and examples in the literature, it is difficult to believe anything other than the fear of law-abiding citizens that untrained, unqualified people with concealed handguns are walking the streets will increase.

And for African Americans and other minorities, do they feel safer and experience less fear knowing that a wrong look, an honest dispute, or even an issue that rises to an argument can end with their life being taken? A recent killing in Florida reinforces that rather than protecting the innocent, Stand Your Ground continues to resonate in tragedy.

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<sup>55</sup> *Id.*

<sup>56</sup> SYG Briefing, Testimony of Senator Chris Smith, Vol. 1, pp. 13-15.

<sup>57</sup> David LaBahn, (2013) "Stand Your Ground Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force," October 29, 2013. Prepared Statement for the Committee of the Judiciary, Subcommittee on the Constitution, Civil Rights, and Human Rights of the United States Senate, Serial No. J-113-35, p. 66.

### E. The Killing of Markeis McGlockton

On July 19, 2018, a dispute over a parking space at a convenience store in Clearwater, Florida turned deadly. Michael Drejka, after being shoved to the ground, pulled his weapon and fired once into the chest and killed Markeis McGlockton, who had pushed Drejka but started to back off, according to video surveillance.<sup>58</sup> The Sheriff for the jurisdiction – Pinellas County -- refused to prosecute, citing his interpretation of Florida's SYG law. In statements to the press, the Sheriff reiterated that the "Florida Legislature had created a 'subjective standard' for determining whether the person who used force was in fear of bodily harm, but suggested that his hands were tied because his department could be sued if it failed to follow the law's requirements."<sup>59</sup>

In later statements, the Sheriff doubled down on his statement, saying "The law has taken away law enforcement discretion to arrest unless there is no 'stand your ground' as a matter of law . . . it must be so clear that as a matter of law 'stand your ground' does not apply in any way to the facts and circumstances that you're presented with. That is not the situation here. The facts are not so clear that this is absolutely outside the boundaries of 'stand your ground.'"<sup>60</sup>

Three weeks later, the Pinellas-Pasco State Attorney filed manslaughter charges against Drejka.<sup>61</sup>

Many critics have described the push for "Stand Your Ground" laws as a solution in search of a problem.<sup>62</sup> Others have noted that the law pours accelerant on seemingly minor incidents as above – a shove, a look – and converts them into something much more serious – deadly serious.<sup>63</sup> As noted above, studies do not bear out any deterrent impact of the law, and in fact shows a strong correlation in the rise of the firearms-related deaths. Law enforcement is uncertain how to investigate and prosecute these cases. And, of most interest to the Commission, this last act involved a white shooter – Drejka – and an African American victim – McGlockton.

<sup>58</sup> Gina Martinez (2018) *A Fatal Shooting Is Sparking New Debate About Florida's Stand Your Ground Law. It Could Be Even Harder to Prosecute This Time*, Time Magazine, July 25, 2018, at <https://time.com/5346981/florida-stand-your-ground-markeis-mcglockton/>.

<sup>59</sup> Julia Jacobs (2018) *'Stand Your Ground' Cited by Florida Sheriff Who Declined to Arrest Suspect in Killing*, New York Times, July 21, 2018, at <https://www.nytimes.com/2018/07/21/us/florida-stand-your-ground.html>.

<sup>60</sup> Bill Hutchinson (2018) *Sheriff says he made 'correct' decision in Florida 'stand your ground' shooting of unarmed*, Jul 31, 2018, ABC News at <https://abcnews.go.com/US/sheriff-made-correct-decision-florida-stand-ground-shooting/story?id=56937230>.

<sup>61</sup> Kathryn Varn and Zachary T. Sampson (2018) *Shooter charged with manslaughter in Clearwater stand your ground case*, Tampa Bay Times, August 13, 2018, at [http://www.tampabay.com/news/publicsafety/Shooter-charged-with-manslaughter-in-Clearwater-stand-your-ground-case\\_170853729](http://www.tampabay.com/news/publicsafety/Shooter-charged-with-manslaughter-in-Clearwater-stand-your-ground-case_170853729).

<sup>62</sup> See, e.g., American Bar Association at p. ; Arkadi Gerney and Chelsea Parsons (2013) *License to Kill, How Lax Concealed Carry Laws Can Combine with Stand Your Ground Laws to Produce Deadly Results*, Center for American Progress, September 2013, p. 6, at <https://cdn.amgt.wouldericprogress.org/wp-content/uploads/2013/09/StandYrGround.pdf>.

<sup>63</sup> SYG Briefing, Testimony of Senator Chris Smith, *supra*.

The recent shooting of Markeis McGlockton brings us full circle to the crux of the hearing, and of this Statement – the role that racial bias plays in the deadly manner in which Stand Your Ground laws play out. And it begins with two young African Americans – Trayvon Martin and Jordan Davis. And, as you will see, the confluence of all the issues raised heretofore are represented, in full, in the deaths of these two young men.

## II. TRAYVON MARTIN AND JORDAN DAVIS

### A. Trayvon Martin

Trayvon Martin was born in February 1995. He lived with his mother, Sybrina Fulton, in Miami Gardens, but was visiting his father, Tracy Martin, in nearby Sanford on February 27, 2012. During a break in a televised basketball game, he left his father's home to buy some Skittles and iced tea at a nearby convenience store. On his way back, he was followed by George Zimmerman, who belonged to a neighborhood watch program, ironically, for the neighborhood where Trayvon's father lived.

Zimmerman was a part-time student, and carried a concealed semi-automatic for which he had a permit. From the previous August to February, he had called the police several times to report on "suspicious" persons, all of whom were black.

Zimmerman called the police while following Trayvon in his car, reporting that there was a suspicious person in his neighborhood. The dispatcher at the time instructed Zimmerman to remain in his car and await the arrival of the police. Zimmerman disregarded this, and continued his pursuit of Trayvon.<sup>64</sup>

At some point, Trayvon called his girlfriend and told her he was being followed, and he began to run.

What happened next has been the crux of examination and a trial. Witnesses heard shouts of help. Shots were fired. When police arrived on the scene minutes later, they found Trayvon face down, shot in the chest, dead. Zimmerman was at the scene, bleeding from the head.

Police took Zimmerman into custody, but released him from the station without any charges. Among the reasons later given by the Police Chief was language taken from the Stand Your

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<sup>64</sup> See <https://www.miamiherald.com/news/state/florida/article135413214.html>.

Ground statute<sup>65</sup> stating that he was prohibited from arresting Zimmerman and that it could have held the city liable.<sup>66</sup>

It was only after Trayvon's parents began questioning his release and contacted attorney Benjamin Crump, that the Florida criminal justice began to pay attention.

On March 12 – 2 weeks after Trayvon's death – the local Police Chief who had refused to charge Zimmerman turned over the investigation to the State's Attorney office. Zimmerman was charged with second-degree murder on April 11, 2012. The trial began on June 24, 2013, after the selection of an all-female jury. The following month, on July 13, 2013, the six-member jury acquitted Zimmerman of murder.

Throughout the murder trial, some commentators sought to distance the trial from the Stand Your Ground law.<sup>67</sup> That flies in the face of the jury instructions and the plain law. Stand Your Ground is not a separate section of the law. It was part of the self-defense instructions sought by the Zimmerman team and read by the judge.<sup>68</sup>

Perhaps the best summation of the application of Stand Your Ground in the Zimmerman trial was made by Arkadi Gerney and Chelsea Parsons:

The Stand Your Ground provision of Florida's self-defense law cannot be severed from the other elements of that body of law; it has become part of the overall conception of what constitutes justifiable use of force in that state. Stand Your Ground expands upon the traditional concept of self-defense by allowing the use of deadly force in self-defense, even when lesser means of force would suffice or safe escape is possible. All the elements of Florida's expansive body of self-defense law come into play when a person claims their use of deadly force was justified, even if the

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<sup>65</sup> The relevant sections of FL. Statutes 776.031: (2) 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 that was used or threatened was unlawful. (3) *The court shall 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 brought by a *plaintiff if the court finds that the defendant is immune from prosecution* as provided in subsection (1). (emphasis added).

<sup>66</sup> Trymaine Lee (2012) Trayvon Martin Case: Police Chief Bill Lee Under Fire With 'No Confidence' Vote, Huffington Post, Mar 22, 2012, at [https://www.huffpost.com/entry/trayvon-martin-case-george-zimmerman-bill-lee\\_n\\_1371635](https://www.huffpost.com/entry/trayvon-martin-case-george-zimmerman-bill-lee_n_1371635).

<sup>67</sup> Jacob Sullum (2013) Sorry, the Zimmerman Case Still Has Nothing to Do With 'Stand Your Ground' Reason, July 14, 2013, at <https://reason.com/2013/07/14/sorry-the-zimmerman-case-still-has-nothi>.

<sup>68</sup> Ta-Nehisi Coates (2013) How Stand Your Ground Relates To George Zimmerman, The Atlantic, July 16, 2013, at <https://www.theatlantic.com/national/archive/2013/07/how-stand-your-ground-relates-to-george-zimmerman/277829/>.

defendant does not seek to use Stand Your Ground to avoid arrest or prosecution or directly invoke it as part of their formal defense.

The Zimmerman trial provides an example of this. Although Zimmerman did not seek a Stand Your Ground hearing and his attorneys did not directly invoke this law as part of the formal defense, the expanded notion of one's right to use lethal force in self-defense was part of the judge's instructions to the jury. The judge instructed the Zimmerman jury on all aspects of the state's expansive self-defense laws, which include a person's right to use deadly force even when safe retreat is an option. It is in the context of this entire body of law that the jury was asked to evaluate Zimmerman's conduct and ultimately found his conduct to be justified. In fact, both of the jurors who have spoken out since the trial indicated that the Stand Your Ground law played a role in their deliberations.<sup>69</sup>

Interestingly, it was brought out at trial that Zimmerman knew exactly how Stand Your Ground worked.<sup>70</sup>

Sybrina Fulton and Tracy Martin established the Trayvon Martin Foundation after Trayvon's death. In 2018, *Rest in Power: The Trayvon Martin Story*, aired on BET and the Paramount Network. It traced the life of Trayvon Martin and the legacy from his death, which included giving rise to the Black Lives Matter movement.<sup>71</sup>

## B. Jordan Davis

Jordan Davis was also a 17-year old high school student on November 23, 2012. He liked roller skating and playing video games. His mom, Lucy McBath, lived in Atlanta, and his dad, Ron Davis lived in Jacksonville, Florida. Just 18 months previously he had moved to Jacksonville to live with his dad.<sup>72</sup>

The day after Thanksgiving, he and three friends pulled up to a convenience store, and one of his friends went into the store. Michael Dunn and his girlfriend parked in the adjacent space, and

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<sup>69</sup> Arkadi Gerney and Chelsea Parsons (September 2013) "License to Kill: How Lax Concealed Carry Laws Can Combine with Stand Your Ground Laws to Produce Deadly Results", Center for American Progress, p. 5.

<sup>70</sup> Barbara Liston (2013) Zimmerman studied Florida's 'Stand Your Ground' law: witness, Reuters, July 3, 2013, at <https://www.reuters.com/article/us-usa-florida-shooting/zimmerman-studied-floridas-stand-your-ground-law-witness-idUSBRE9620RL20130703>.

<sup>71</sup> Jessica Guyn (2015) "Meet the Woman Who Coined #BlackLivesMatter," USA Today, March 4, 2015, <https://www.usatoday.com/story/tech/2015/03/04/alicia-garza-black-lives-matter/24341593/>.

<sup>72</sup> Mike Hayes (2014) "The Life And Last Days Of Jordan Davis," BuzzFeed News, March 31, 2014, at <https://www.buzzfeednews.com/article/mikehayes/the-life-and-last-days-of-jordan-davis>.

Dunn began complaining about the loud rap music coming from Davis' car while his girlfriend went into the store.

At some point, an argument erupted between the Dunn and the occupants of the other car, and then Dunn, who had a concealed weapons permit, took out a gun from his glove compartment and began shooting into the other car, and continued shooting as the car backed out and pulled away.<sup>73</sup>

Jordan Davis, hit several times, was dead. Dunn, after the shooting, drove to a hotel and ordered pizza. He never contacted the police until he was arrested.<sup>74</sup>

Dunn was tried and convicted of first-degree murder in 2014, and is serving a life sentence.<sup>75</sup> During the trial proceedings, his lawyers argued that he was acting in self-defense, both in jury arguments, instructions, and in their appeal arguing that the prosecution had not overcome the presumption that he had acted in self-defense. Throughout, they referenced the Stand Your Ground statute.<sup>76</sup>

Jordan's mother, Lucy McBath, became an anti-gun advocate, as well as an advocate against Stand Your Ground laws. In November 2018, she was elected to the United States Congress.<sup>77</sup>

Unlike the Trayvon Martin killing, there were plenty of witnesses, including Davis' friends and Dunn's girlfriend. There was no dispute that both parties were in their cars at the time the shooting started, that Davis and his friends had no weapons, and that Dunn had left his car to continue shooting even after the teenagers' fled the scene.

Both Trayvon Martin and Jordan Davis deserved to be living full lives at the time of our hearing and of this statement. Trayvon had dreams of being a pilot. Jordan was just a lively, "mouthy" kid hanging out with his new friends. Neither had a chance to see where their lives would take them.

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<sup>73</sup> The Guardian (2014) "Michael Dunn sentenced to life without parole for killing of Florida teenager" <https://www.theguardian.com/us-news/2014/oct/17/michael-dunn-sentenced-life-without-parole-florida>.

<sup>74</sup> Katie McDonough (2014) *Jordan Davis' father on Michael Dunn verdict: We do not accept a law that views our children as "collateral damage"*, Salon, February 16, 2014, [https://www.salon.com/2014/02/16/jordan\\_davis\\_father\\_on\\_michael\\_dunn\\_verdict\\_we\\_do\\_not\\_accept\\_a\\_law\\_that\\_views\\_our\\_children\\_as\\_collateral\\_damage/](https://www.salon.com/2014/02/16/jordan_davis_father_on_michael_dunn_verdict_we_do_not_accept_a_law_that_views_our_children_as_collateral_damage/).

<sup>75</sup> Jasper Scherer, Fla. (2016) 'Loud Music' murder: Firing into car full of teens playing rap music not 'self-defense,' court rules, Washington Post, November 18, 2016, at [https://www.washingtonpost.com/news/morning-mix/wp/2016/11/18/fla-loud-music-murder-firing-into-car-full-of-teens-playing-rap-music-not-self-defense-court-rules/?utm\\_term=.c73782e9068c](https://www.washingtonpost.com/news/morning-mix/wp/2016/11/18/fla-loud-music-murder-firing-into-car-full-of-teens-playing-rap-music-not-self-defense-court-rules/?utm_term=.c73782e9068c).

<sup>76</sup> Nicole Flatow (2014) "Juror: Some On Panel Thought The Killing Of Unarmed Teen Jordan Davis Was 'Justified'" ThinkProgress, February 20, 2014, at <https://thinkprogress.org/juror-some-on-panel-thought-the-killing-of-unarmed-teen-jordan-davis-was-justified-33df7991e1f3/>.

<sup>77</sup> <https://mcbath.house.gov/>.

### III. DISPROPORTIONALITY IN APPLICATION OF STAND YOUR GROUND LAWS

The studies that found that SYG laws were associated with higher homicide rates and, to the ability that they were able, to identify the broad ethnicities of the people involved in SYG incidents.

First, the McClellan and Terkin's national studies that the greatest increase in homicide rates was for or white males (17.1%). For firearms-related homicides, the increase in white males was 11.6%. They found no statistically significant increase for black males or the African-American population.<sup>78</sup>

The Humphries et al. study found similar in homicide rates when just studying Florida. When differentiating for firearms-related homicides, their findings "suggested a statistically significant increase in homicide by firearm" for whites (45.1%); African Americans (22.9%); those 20 to 34 years (35.8%); those 35 years and older (21.5%); and males (31.8%).<sup>79</sup>

These studies, therefore, do not show a disproportionate increase in the deaths of protected classes as a result of SYG laws. The vast majority of concealed weapon permit holders are white,<sup>80</sup> the largest increases in firearms-related homicides are white. As a matter of impact on death rates, there does not appear to be any statistically significant disparity that would imply that Stand Your Ground results in more deaths of African Americans.

However, that does not begin to end the analysis. It is here that all the issues relating to the fairness of the American justice system on black Americans come to the fore, for in studying the parties to an SYG confrontation, this pattern emerged:

In homicides where the shooter is black and the victim is white, those are ruled to be justified 1.2 percent of the time. In cases where the shooter is white and the victim is black those are ruled to be justified 11.2 percent of the time. Ten times more likely if the shooter is white and the victim is black, than if the shooter is black and the victim is white.<sup>81</sup>

In fact, despite the fact that a racial disparity already existed in justified shootings, i.e., if the shooter was white and victim black it was ruled to be justified 9.5% of the time, and the inverse was 1.1%., the *disparity grows when Stand Your Ground is enacted*.<sup>82</sup>

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<sup>78</sup> McClellan and Terkin, *supra*, pp. 21-23.

<sup>79</sup> Humphries et al, *supra*.

<sup>80</sup> John Lott, *Concealed Carry Permit Holders Across the United States: 2018*, August 2018, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3233904](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3233904).

<sup>81</sup> SYG briefing, Testimony of John Roman, Vol. 1, p. 25.

<sup>82</sup> *Id.* (emphasis added).



In other words, if you are a black American, the chances of your death being ruled “justified” and, therefore, immune to prosecution increases if you die in a Stand Your Ground state.<sup>83</sup> The chance of your family being able to seek justice goes down if you are killed in a Stand Your Ground state. That chance that your killer gets off scot-free increases if you are black and your killer is white in a Stand Your Ground state.

In an especially telling summation, Professor John Roman – who testified at our hearing – also wrote an article that describes the statistical probabilities of the outcome of an individual fitting the profiles of the Trayvon Martin proceeding. In relevant part:

Table 3 describes the likelihood a homicide is ruled justified when there is a single victim and single shooter, they are both male, they are strangers, and a firearm is used. In the six years of FBI data, this fact pattern occurred in 2,631 cases.

**Table 3. Percentage of Homicides Ruled Justified, Martin Case Attributes, 2005-2010**

|                | Total | Non-Stand<br>Ground states | YourStand Your Ground<br>states |
|----------------|-------|----------------------------|---------------------------------|
| White on white | 16.28 | 12.95                      | 23.58**                         |
| White on black | 42.31 | 41.14***                   | 44.71***                        |
| Black on white | 8.57  | 7.69**                     | 11.10                           |
| Black on black | 10.14 | 10.24***                   | 9.94***                         |
| Total          | 14.90 | 2.15***                    | 3.67                            |

*Source:* 2005-10 FBI Supplementary Homicide Reports.

\*  $p < 0.05$ ; \*\* $p < 0.01$  \*\*\*;  $p < 0.001$

Overall, the rate of justifiable homicides is almost six times higher in case with attributes that match the Martin case. Racial disparities are much larger, as white-on-black homicides have justifiable findings 33 percentage points more often than black-on-white homicides. Stand Your Ground laws appear to exacerbate those differences, as cases overall are significantly

<sup>83</sup> The racial disparity in treatment of “justified” killings is not new. The Marshall Project conducted a study of FBI datasets and came to this conclusion: “When a white person kills a black man in America, the killer often faces no legal consequences. In one in six of these killings, there is no criminal sanction, according to a new Marshall Project examination of 400,000 homicides committed by civilians between 1980 and 2014. That rate is far higher than the one for homicides involving other combinations of races. In almost 17 percent of cases when a black man was killed by a non-Hispanic white civilian over the last three decades, the killing was categorized as justifiable, which is the term used when a police officer or a civilian kills someone committing a crime or in self-defense. Overall, the police classify fewer than 2 percent of homicides committed by civilians as justifiable. The disparity persists across different cities, different ages, different weapons and different relationships between killer and victim.” See <https://www.themarshallproject.org/2017/08/14/killings-of-black-men-by-whites-are-far-more-likely-to-be-ruled-justifiable>.

more likely to be ruled justified in SYG states than in non-SYG states ( $p = 0.02$ ).<sup>84</sup>

The data used by Professor Roman in both his oral and written testimony, as well as his research, came from the Federal Bureau of Investigations Supplementary Homicide Report (SHR), the only dataset that includes information about the disposition of a proceeding, including whether a homicide was deemed justified.<sup>85</sup> This information showed that, the, controlling for variables, the odds a white-on-black homicide being found justified is *281 percent greater* than the odds a white-on-white homicide is found justified.<sup>86</sup> This is an extremely sobering, and powerful, statistic. Ironically, Professor Roman's data does not include the state of Florida because Florida does not participate in the FBI's Supplementary Homicide Report database.<sup>87</sup> However, a team of health scientists studied the Tampa Bay Times data of 237 cases from 2012-2013 and updated all the unresolved case statuses for their analysis in 2015.<sup>88</sup> They then applied traditional and accepted social scientist analytical techniques to the data and their conclusion was no less startling than that of Roman: "SYG legislation in Florida has a quantifiable racial bias that reveals a leniency in convictions if the victim is non-White, which provides evidence towards unequal treatment under the law."<sup>89</sup>

Their examination of the data also confirmed that a suspect was twice as likely to be convicted if the victim were white, versus non-white, where an SYG defense was asserted. This confirms the shift that Roman saw in the national data. It means that if you are an African American asserting an SYG defense where a white person was killed, under their analysis you have double the chances of being convicted as opposed if the victim were black. If the victim were African American, and the alleged killer asserting the SYG defense were white, he also better than double the odds of being let go.

The combination of these two social scientists' studies – one nationally, one focused on Florida – provide a compelling case that there is racial bias in the application of SYG laws that tilt against justice for African American victims, and bias in the application of justice depending on whether you are an African American or white person accused of shooting another white person. Stand Your Ground, in other words, is a perfect illustration of the disparity in the administration of justice

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<sup>84</sup> John K. Roman, Ph.D. (2013) Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data, The Urban Institute, July 2013, at p. 9 (emphasis in blue added to Table).

<sup>85</sup> *Id.* at p.2.

<sup>86</sup> *Id.* at p. 9.

<sup>87</sup> [https://www.ojjdp.gov/ojstatbb/ezashr/asp/off\\_display.asp](https://www.ojjdp.gov/ojstatbb/ezashr/asp/off_display.asp).

<sup>88</sup> Nicole Ackermann, Melody S. Goodman, Keon Gilbert, Cassandra Arroyo-Johnson, Marcello Pagano, *Race, law, and health: Examination of 'Stand Your Ground' and defendant convictions in Florida*, *Social Science & Medicine* 142 (2015) 194-201.

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

if you are an African American – whether a victim, or unable to assert a successful Stand Your Grand challenge.

#### IV. THE IMPACT OF CONCEALED CARRY LAWS

The confluence of Stand Your Ground and concealed-carry laws<sup>90</sup> is, to even the casual observer, an invitation to use deadly force. Seven years after Stand Your Ground passed in Florida, the number of concealed carry permits tripled.<sup>91</sup> In 2019, Florida leads the country by far with nearly 2 million permits issued for a state population of nearly 22 million – nearly 1 in 10 Floridians carry concealed weapons. Florida is, to no one's surprise a state that is a “shall issue” state with regard to concealed carry weapon permits. Indeed, of the states associated with Stand Your Ground laws, almost all are “shall issue” or permitless states. According to one pro-gun website, there are over 17 million concealed carry permits issued across the country.<sup>92</sup>

Civil immunity and concealed carry laws in the context of SYG were addressed a number of times during the Commission's briefing. Panelists expressed concern about the “very dangerous” and often lethal circumstances created by the combined effects of concealed carry laws and “shifting” civil immunity.<sup>93</sup> Most SYG states have provisions that protect SYG claimants from civil law suits with varying degrees.<sup>94</sup> Over half of these SYG states provide what is considered “blanket” immunity, which prohibits anyone from bringing law suits against SYG claimants—including injured bystanders and their dependents (AL, AZ, FL, KS, KY, LA, MS, NC, OK, SC, and TX).<sup>95</sup> Other states offer partial immunity that prohibits only the aggressor or related party from bringing a civil suit (AK, GA, MI, MT, NH, PA, TN, and WV).<sup>96</sup>

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<sup>90</sup> “Concealed-Carry” laws refers to Of the 35 states that generally require a CCW permit in order to carry concealed weapons in public, eight states and the District of Columbia have “may issue” laws, which grant the issuing authority wide discretion to deny a CCW permit to an applicant if, for example, the authority believes the applicant lacks good character or lacks a good reason for carrying a weapon in public. 14 “shall issue” states provide the issuing authority a limited amount of discretion, and 13 “shall issue” states provide no discretion to the issuing authority. Nearly every state places some restrictions on where concealed firearms may be carried, such as restrictions on carrying in bars, schools, and hospitals, and at public sporting events.

<sup>91</sup> Tampa Bay Times, *supra*.

<sup>92</sup> <https://crimeresearch.org/2018/08/new-study-17-25-million-concealed-handgun-permits-biggest-increases-for-women-and-minorities/>.

<sup>93</sup> See SYG Briefing. Elizabeth Burke, p. 86. She discusses in detail consequences presented by the intersection of conceal carry laws and civil immunity.

<sup>94</sup> Civil immunity, in the context of SYG, shields a person who invokes SYG from liability in a civil law suit. Generally, when a person is tried on a criminal matter, the aggrieved party also seeks to sue the defendant in civil court to recover monetary damages.

<sup>95</sup> Mayors Against Illegal Guns, 2013, “Shoot First: 'Stand Your Ground' laws and their effect on violent crime and the criminal justice system” (hereafter Mayors).

<sup>96</sup> *Id.* However, in these states, injured bystanders or their family members can bring civil suits.

The deadly cocktail of Stand Your Ground and concealed-carry is a license to kill. As one advocate stated, “[i] encourages vigilante law. . . So one of the critical problems with the Stand Your Ground law is that before, that person would have had the impetus to leave, to go away. . . . But the Stand Your Ground laws allow people to stand, shoot, and murder with no consequences.”<sup>97</sup>

It cannot be understated that concealed-carry makes it possible for Stand Your Ground to be deadly. Over two-third of the cases in the Tampa Bay Times studies involved guns.<sup>98</sup> But of those cases, in 60% of the cases the person claiming the benefit of SYG was armed with a gun, whereas over 60% of the victims were unarmed.<sup>99</sup> And it is not surprising that nearly 60% of the persons who were the “assailant” in an SYG situation died.<sup>100</sup>

It is no coincidence that the intersection between “shall issue” and “no permit required” states and states with Florida-style SYG laws is almost a 1:1 match. And, therefore, it should come to no one’s surprise that states with Florida-style “shall issue” permit laws were significantly associated with increases in their homicide rates, with 6.5% higher total homicide rates, 8.6% higher firearm homicide rates, and 10.6% higher handgun homicide rates.<sup>101</sup> It was entirely expected that Florida experienced the surge in homicide rates after the adoption of Stand Your Ground, as documented in Section I of this statement.

As the study of Stand Your Ground, weapon availability, and race continues, it would be a critical area of study to understand whether there is any racial bias in the granting or rescinding of concealed carry gun permits. It would be a critical area of study to determine the application of conditions, even in “shall issue” states like Florida, that would enable a state to deny someone with a clear history of disturbing behavior to be denied the right to carry a gun. It has been a source of continual puzzlement that George Zimmerman even had a concealed weapons permit, given his history of assaulting a police officer and history of domestic violence. In 25 other states, this could have resulted in the denial of his application for a carry permit.<sup>102</sup> In Florida, no such bar existed. In fact, years later, and numerous other run-ins with the law, Zimmerman has yet to lose his permit.<sup>103</sup>

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<sup>97</sup> ABA Report, p. 26 (quoting Eva Jefferson Patterson).

<sup>98</sup> Tampa Bay Times, *supra*.

<sup>99</sup> McCormick, *supra*, at pp. 14-16.

<sup>100</sup> *Id.* at 17.

<sup>101</sup> Michael Siegel et al. “Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States”, *American Journal of Public Health* 107, no. 12 (December 1, 2017): pp. 1923-1929.

<sup>102</sup> Arkadi Gerney and Chelsea Parsons, *supra*, at p. 15. According to the authors, Florida would have required to have been convicted of a violent crime within the last 3 years to have been denied a permit. *Id.*

<sup>103</sup> George Zimmerman's Stalking Victim Demands His Concealed Weapon License be Revoked (November 2018) <https://theblast.com/george-zimmerman-stalking-victim-demands-his-concealed-weapon-license-be-revoked/>

## V. IMPLICIT BIAS AND THE “REASONABLE BELIEF” STANDARD

A thread that continues throughout any analysis of Stand Your Ground is the presence within its legislative language that a person using deadly force must *reasonably believe* that that using “such force is necessary to prevent imminent death or great bodily harm . . . or to prevent the imminent commission of a forcible felony.”<sup>104</sup>

What constitutes reasonable belief? We have seen that law enforcement officials in Florida have used an extremely broad, subjective standard. This is due, in no small part, to the deliberate omission of any criteria for what constitutes a reasonable belief, either from the Legislature or the courts.<sup>105</sup> According to one commentator, the statute instead created a “presumption of fear”<sup>106</sup> that moves with the individual, creating an arena of lethal force that is already presumed to be legal, notwithstanding whether the force was really proportional to the apparent threat.<sup>107</sup>

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Zimmerman received a one-year probation sentence for stalking, and the person stalked has requested that Florida revoke his license. It is unknown whether any action has been taken or reported.

<sup>104</sup> FL. Statutes 776.012(2).

<sup>105</sup> See Texas Penal Code Sec. 9.32.(b) The actor's belief under Subsection (a)(2)(B) [to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery] that the deadly force was immediately necessary as described by that subdivision is ***presumed to be reasonable if the actor:***

- (1) knew or had reason to believe that the person against whom the deadly force was used:
  - (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;
  - (B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or
  - (C) ***was committing or attempting to commit an offense*** described by Subsection (a)(2)(B);
- (2) ***did not provoke*** the person against whom the force was used; and
- (3) ***was not otherwise engaged in criminal activity***, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.
  - (c) A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section.

<sup>106</sup> Kathryn Russell-Brown, 2014, “Go Ahead and Shoot, The Law Might Have Your Back: History, Race, Implicit Bias, and Justice in Florida’s Stand Your Ground Law,” in D. Johnson, Y.P. Warren, and A. Farrell, eds., *Deadly Injustice: Trayvon Martin, Race, and the Criminal Justice System*, (New York University Press 2015).

<sup>107</sup> Ronald Sullivan, (2013) “Stand Your Ground Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force,” October 29, 2013. Testimony prepared for the Committee of the Judiciary, Subcommittee on the Constitution, Civil Rights, and Human Rights of the United States Senate.

In the absence of an objective reasonable person standard, the person inserting themselves into a situation where they will eventually claim a Stand Your Ground defense is allowed to import their own biases to color the lens through which they view a situation. It is what they believe. In other words, Stand Your Ground legitimizes a person's implicit bias. The challenge is that the data is implied – it relies on social science into the type of racism that is not overt, but which taints the entire criminal justice ecosystem.

This Commission and many social science researchers, along with racial crime statistics reported by state and federal agencies, allows an understanding of how negative perceptions of racial minorities' criminality lead to uneven racial treatment in the criminal justice system, which in turn implicitly drives feelings of racial bias and discrimination.

David Harris, in his testimony to the Commission, talked about this at length. In shorthand, he called it, in essence, a mental rule of thumb. In psychological terms, he credited that rule of thumb as a "heuristic."<sup>108</sup> Both Harris, in his written testimony, and Kathryn Russell-Brown, in an article we were provided, refer to what to the "suspicion heuristic"—which describes the psychological process through which many people link blackness with criminality.<sup>109</sup> Mr. Harris stated how this suspicion heuristic works:

You have a negative view of blacks for the most part, implicit. This leads to beliefs that blacks are prone to criminality. That they are violent. And there is a lot of other research besides Mr. Goff's that goes in this same direction. So what you get is an automatic very rapid association between blacks, that is not just about negativeness, but also about violence and criminality . . . . [I]n the specific context of stand your ground laws what this will mean is that more people will think of black people they meet as dangerous, as criminal, and as violent. And that is going to result in more blacks being the victims in stand your ground shootings. It has the other effect of when a white person or somebody goes to court and says, "I stood my ground," and the victim is black, the jury harboring those very same biases will be more inclined to acquit when the victim is black.<sup>110</sup>

In other words, implicit bias, including a suspicion heuristic about African-Americans, becomes a means of justifying killing them.

Ms. Russell-Brown has written of the importance of examining the historical roots of the association of race with certain criminal laws and criminal justice polices that exist today. She explains:

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<sup>108</sup> SYG Briefing, Testimony of David Harris, Vol. 2, pp. 9-10.

<sup>109</sup> Ms. Russell-Brown specifically attributed the "suspicion heuristic" to the work of L. Song Richardson & Phillip Goff, 2012, *Self Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 295.

<sup>110</sup> Harris testimony, *supra*, at pp. 10-11.

We must examine the historical relationship between the law and African Americans and how the law has been utilized to respond to racialized threats. These images drive our perceptions of which groups are to be feared, who is fearful, the appropriate responses to fear, and whether that fear is justified under the law....<sup>111</sup>

She further states:

For decades, scholars have identified laws and legal practices that have created stark racial disproportionality within the justice system, including the war on drugs, racial profiling by law enforcement, mandatory-minimum sentences, felony disenfranchisement, and mass incarceration.<sup>112</sup>

Similarly, Khalil Gibran Muhammad has developed a discussion of how the perception of criminality in the black community began in early nineteenth century practices of using racial crime statistics to support discriminatory public policies. This manifested in the “negro criminal” discussed in his book, *Condemnation of Blackness*, where he argues:

Beginning in the late nineteenth, statistical rhetoric of the “Negro criminal” became a tool to shield white Americans from the charge of racism when they used black crime statistics to support discriminatory public polices and social welfare.<sup>113</sup>

Harris, Russell-Brown, Goff, Richardson and Muhammad did not develop their positions in a vacuum. Beginning in the 1990s, it became apparent that racial crime statistics reported by some state and federal officials showed an uneven criminal justice response to racial minorities’ criminality. Traffic stop data shows that blacks are stopped considerably more often than whites, yet are less likely to be found with contraband.<sup>114</sup> “Driving while black” became a staple of conversation and debate that continues to this day.<sup>115</sup> The Department of Justice (DOJ) Office of Juvenile Justice and Delinquency (OJJDP) Relative Rate Index (RRI) shows that minorities are disproportionately over-represented at each stage of case processing (e.g., arrests, sentencing, placement in secure facilities, etc.), except for diversion programs.<sup>116</sup>

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<sup>111</sup> Russell-Brown, *supra*.

<sup>112</sup> *Id.*

<sup>113</sup> K.G. Muhammad, 2010, *Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*, Cambridge, MA: Harvard University Press.

<sup>114</sup> 2013 Missouri Vehicle Stops Executive Summary, available at <https://ago.mo.gov/divisions/litigation/vehicle-stops-report/vehicle-stops-report---2013-executive-summary>.

<sup>115</sup> Excellent discussions of the “driving while black” phenomenon can be found in David A. Harris (1997) “‘Driving While Black’ and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops,” 87 J. Crim. L. & Criminology 544; David Harris (1999) “The Stories, the Statistics, and the Law: Why ‘Driving While Black’ Matters,” 84 Minnesota l. Rev. 365.

<sup>116</sup> Relative Rate Index (RRI), DOJ OJJDP.

Pretextual traffic stops and other manifestations of racial profiling essentially treat race as evidence of crime, targeting certain segments of the population as potential criminal offenders solely by virtue of their race. Thus, through racial profiling, American's law enforcement officials not only "racialize" crime by assuming most crimes are committed by minorities, they also "criminalize" race. In so doing, they place the primary burden of law enforcement on the backs of innocent minorities who are the victims of racial and ethnic stereotyping. Innocent minorities are harassed more than innocent white Americans, and wrongdoing by minorities is punished more harshly than wrongdoing by whites.<sup>117</sup>

A number of prominent research studies also demonstrate that the negative portrayal of minorities in the criminal justice system creates and perpetuate the "suspicion heuristic" that trigger racial disparities.<sup>118</sup> In perhaps the most extreme and chilling example, a research study analyzed bias on perceived weapon holders by police officers. In the test, black and white subjects were holding harmless objects. The analysis revealed race effects that led to (1) black subjects being incorrectly shot at more than Whites: (2) a perceptual sensitivity effect (when held by black subjects guns were less distinguishable from harmless objects) and (3) a response bias effect (objects held by the black subjects were more likely to be treated as guns).<sup>119</sup>

The above shows how the passage and institutionalization of SYG law are inevitably influenced by mainstream narratives of race and crime. For these reasons, as David Harris pointed out to the Commission<sup>120</sup>:

The combined potential impact of implicit bias against blacks and the suspicion heuristic on the use of SYG laws is potentially catastrophic. SYG laws lower the potential cost of engaging in deadly violence; one can use deadly force in any public place, even when avoiding violence is possible, and still use the SYG defense to argue that the jury should not convict. Implicit bias against blacks, especially seeing blacks as likely to be violent or dangerous, increases the likelihood that people with weapons will shoot them; armed people are more likely to feel fear, and therefore to shoot. And when the victim is black, members of juries—also infected with the same implicit bias—are more likely to sympathize with the shooter.

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<sup>117</sup> Ronald H Weich, Carlos T Angulo, Leadership Conference on Civil Rights & the Leadership Conference Education Fund (200) *Justice on Trial: Racial Disparities in the American Criminal Justice System* (Collingwood Press), p. 7.

<sup>118</sup> From Ackerman, et. al, supra, at p. 199: "Whites still have limited social cues to tell differences among Black men's professional status (e.g., criminal, janitor, teacher, physician) in the 21st century and often assume the worse. Feagin states, "Many Whites have fearful reactions to a Black man encountered on streets, in public transport, and in elevators" (Feagin, 2010, p.108). There are also many negative perceptions about the character and behaviors of Black men, such as Whites' perceptions that Black men as more violent, unpleasant, promiscuous, unintelligent, and less ambitious and nurturing (McConaughy and White, 2008).

<sup>119</sup> Anthony G. Greenwald, Mark A.Oakes, Hunter G.Hoffman (2003) "Targets of discrimination: Effects of Race on Responses to Weapons Holders", *Journal of Experimental Social Psychology* Volume 39, Issue 4, July 2003, Pages 399-405.

<sup>120</sup> See page 64.



Or as Ronald Sullivan said before the United States Senate:

Mr. Zimmerman's acquittal was made possible because Florida's "stand your ground" laws and its concealed weapons laws conspired to create the perfect background conditions for his exoneration. These laws permitted Mr. Zimmerman to carry a loaded firearm, to disregard the clear directive of a 911 dispatcher, to follow and pursue Trayvon, and then stand his ground when young Trayvon reasonably sought to defend himself—and all because, I strongly suspect, that Mr. Zimmerman could not apprehend any lawful reason for a young black male to be walking through his middle-class neighborhood. To Mr. Zimmerman, Martin's blackness likely served as a crude proxy for criminality.<sup>121</sup>

Thus, while it may be difficult to impute overt racist intent in Stand Your Ground laws, or deliberate racism in its application and implementation, there is a voluminous amount of research documenting implicit bias and its impact on criminal justice. Stand Your Ground is not free of such bias; indeed, it is the proverbial Wednesday's child, full of woe, a sad example of how bias is embedded and enshrined in law to the detriment of our African American community.

## VI. DATA COLLECTION CHALLENGES

A. The SHR lacks adequate data to track critical SYG impact on protected classes

1. The SHR itself is not complete

As noted before, Florida does not even participate in the report. Nor do all states or their municipalities participate fully, or only intermittently.<sup>122</sup> Moreover, the data is reliant on self-verification – so researchers have to rely on the data, even if the locality providing it did not check, confirm, or verify whether it was correct.<sup>123</sup> Even more chilling, it is likely that many justifiable homicides are severely underreported.<sup>124</sup>

In addition, the methodology does not allow for separation of white and Hispanic in reporting.<sup>125</sup>

2. The lack of charging/non-charging data is important.

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<sup>121</sup> Ronald Sullivan, (2013) "Stand Your Ground Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force," October 29, 2013. Testimony before the Committee of the Judiciary, Subcommittee on the Constitution, Civil Rights, and Human Rights of the United States Senate, Serial No. J-113-35, p. 13.

<sup>122</sup> SYG Briefing, Testimony of William Krouse, Vol 2, p. 14.

<sup>123</sup> SYG Briefing, Testimony of John Roman, Vol. 2, p. 22.

<sup>124</sup> Testimony of William Krouse, *supra*, at p. 53.

<sup>125</sup> Testimony of John Roman, *supra*, at p. 23

Also noted before, the SHR data is based on information from the criminal justice system. If a person does not even enter the system – is not charged – that is not available. One of the challenges this investigation faced was the task of examining “charging sheets” where decisions are recorded as to the disposition of an arrested person. Perhaps now, with the advent of social media and the camera phone, it is more difficult today than at any other time in history for a shooting not to receive the type of scrutiny that would allow someone to escape any examination of their alleged actions in a SYG situation. But that doesn’t take the place of requiring data as part of submissions to the FBI, much less requiring submission to the FBI, which Florida resolutely does not do.

One of the most important aspects of Florida-style SYG laws is that there is discretion at the charging official, i.e., the police, to simply let someone go – even if they committed homicide – because they assert a prima facie case of Stand Your Ground. Both George Zimmerman and Michael Drejka were summarily released because the police determined that they had both asserted adequate SYG defenses to their actions. Only after considerable social and media attention were both men eventually arrested for their actions. Under any reporting regime, there is no obligation to report non-charging decisions, regardless of the underlying action. In the absence of any social media or press media attention, how many other decisions to release, rather than charge, go unnoticed, unreported, unknown. How many other young men not named Trayvon Martin, Jordan Davis, or Markeis McGlocktons never have the chance to have their killers go to trial?

## VII. PROPOSED RECOMMENDATIONS

It is thus, after this examination that we come to the end and ask: what next?

There are certain steps, recognizing the reality that gerrymandering, lobbying, and campaign contributions have on putting a thumb on the scales of justice, that Congress or state legislatures can do to ameliorate some of the obvious negative impacts that Stand Your Grounds laws have wrought upon our communities.

First, remove the immunity clauses from Stand Your Ground laws. Immunity clauses remove incentives to mitigate or reduce the use of deadly force by protecting the claimant regardless of the collateral consequences. It means that innocent bystanders, families, children, have no recourse to someone spraying an area with bullets. It also removes the confusion and concerns about liability from local law enforcement in investigating all the circumstances of any so-called self-defense claim rooted in Stand Your Ground, so we don’t have situations – like we have seen in Sanford and Pinellas – where law enforcement simply throws up its hands and says, in effect, “I can’t do it” out of concerns of the civil liability a municipality may incur.

Second, all states should modify their concealed-carry statutes to include proper education and training in how self-defense laws actually work, including conflict avoidance. Stand Your Ground,

at its most positive interpretation, is meant to protect your life and loved ones from imminent death or severe injury. It is not an excuse to pick a bar fight and know, in the end, you can shoot your opponent if you are coming out on the losing end.

Indeed, as a corollary issue to this, I find very puzzling that most self-defense statutes – including Florida's Stand Your Ground law – do NOT allow deadly force or the threat of deadly force when only faced with “unlawful force.”<sup>126</sup> What is unlawful force, and how does one distinguish that from a “forcible felony”? Proper gun education and some legislative and judicial guidance would be helpful in reducing the possibility of the unfortunate circumstances that have claimed so many lives.

Third, Congress should require that all states comply with the Supplementary Homicide Reporting Database, and include additional categories on race and ethnicity on the statistics on justified homicides. Further justified homicide reporting should also include demographic information on the disposition of cases that did not “enter” the criminal justice system, but where charges were never brought or dismissed early on. Ensuring that weapon factors, like use of a gun, will also help shed light and enable researchers to quantify and qualitatively measure the impact of justified homicides on protected classes such as the African American community.

Fourth, if any state is considering implementing a Stand Your Ground-type law (and the NRA continues to push for these, regardless of the negative attention and regardless of the terrible cases that continue to make headlines<sup>127</sup>), I am in favor of the suggestion of Katheryn Russell-Brown of requiring a racial impact statement<sup>128</sup> to be prepared. Focusing on the themes discussed in this Statement – impact on overall homicide rates, law enforcement decision-making, and most importantly of all, racial disparities in its application and the problems of implicit bias, would be essential.

Fifth, if any state is considering implementing a Stand Your Ground-type law, the legislation should be clear that an objective “reasonable person” rather than a subjective “reasonably believes”

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<sup>126</sup> FL. Statutes 776.012(1).

<sup>127</sup> The NRA continues to advance legislation today in Louisiana ([see https://www.bossiernow.com/la-house-votes-to-boost-gun-possession-and-stand-your-ground-laws/](https://www.bossiernow.com/la-house-votes-to-boost-gun-possession-and-stand-your-ground-laws/)) and Maine ([see https://www.nraila.org/articles/20190506/maine-gun-bills-head-to-criminal-justice-and-public-safety-committee](https://www.nraila.org/articles/20190506/maine-gun-bills-head-to-criminal-justice-and-public-safety-committee)), and will probably try again in Ohio after having legislation die in late 2018 ([see https://www.wcpo.com/news/state/state-ohio/ohio-senate-passes-new-gun-rights-law-minus-controversial-stand-your-ground-provision](https://www.wcpo.com/news/state/state-ohio/ohio-senate-passes-new-gun-rights-law-minus-controversial-stand-your-ground-provision)).

<sup>128</sup> Impact statements began being used by legislatures to evaluate potential fiscal and environmental consequences of proposed legislation prior to adoption and implementation. Racial impact statements have been adopted in several states to address racial disparities in sentencing and parole. *See* Mark Mauer (2009) *Racial Impact Statements Changing Policies to Address Disparities*, Criminal Justice, Volume 23, Number 4, Winter 2009.

standard should be used. Law enforcement has made it very clear that the subjective standard leads to bizarre and often bewildering results since they are forced to accommodate the particular viewpoint of the claimant of an SYG defense, rather than objectively reviewing the facts to see if the actions taken were reasonable. Such a standard may have made someone like George Zimmerman think twice before continuing his pursuit of Trayvon Martin after law enforcement asked him to withdraw.<sup>129</sup>

Sixth, and a corollary to the fifth point, is that any Stand Your Ground statute should remove the provision that prohibits law enforcement from arresting anyone asserting a Stand Your Ground defense unless they determine there is probable cause that the act was unlawful. Prosecutorial and law enforcement discretion already exists, and this clause is another source of confusion and, when combined with the civil liability clause, becomes another inhibitor on law enforcement investigating an incident.

Seventh, and last – of this section – it goes without saying, but it shall be said anyway, that all parties to the criminal justice system should undergo training to recognize and remove racial bias. It is simply unacceptable that it still remains a fact that the life – or death -- of young black person appears to be worth less than the life of a white person in the eyes of the law.

These are recommendations that are rooted in the reality of our time. But they are, at best, band-aids on a gaping wound that cuts to the core of who we are as a country.

If we are to be honest, to be true to the better angels of our nature, to truly strive to be the more perfect union, we would repeal all Stand Your Ground laws. We would state that the common law and its development has in American jurisprudence<sup>130</sup> has always recognized a right of necessity of self-defense in exigent and emergent circumstances. That the duty to safely retreat has and always been a prudent rule of self-preservation. That no one will question a person's right to protect their home or, outside the home, their family and loved ones from an imminent threat. That had been the law for over two hundred years, and it is the law now.

Instead, Stand Your Ground has made our lives less safe. It made lives worth less, especially if you are a young black person. It has contributed nothing but pain and misery, including to those who have invoked it to justify the death of another. By removing the duty to safely retreat, it has converted every confrontation to potential shootout—or execution. And for the African American

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<sup>129</sup> An ironic, and tragic, point often made about the circumstances of the struggle between Trayvon Martin and Zimmerman is that Trayvon had a lawful right to be in the neighborhood and a lawful right to defend himself from the obvious stalking engaged in by Zimmerman. In other words, Trayvon – not Zimmerman – was the real legal claimant of any Stand Your Ground defense. See, e.g., Miller Francis (2013) “What about Martin's right to ‘stand his ground’?” CNN, July 12, 2013, at <https://www.cnn.com/2013/07/11/opinion/francis-zimmerman-trial/index.html>.

<sup>130</sup> See, e.g., *Beard v. U.S.*, 158 U.S. 550, 564 (1895).

community, the disproportionate weight of tragedy and fear would be, however slightly, be lifted from their shoulders.

And if we are to truly honor Trayvon, and Jordan, and countless others of every color and creed and orientation, we would enact sweeping, comprehensive, and strong gun control. Stand Your Ground and concealed carry are the societal equivalent of matches and gasoline, but the lack of any semblance of reasonable gun control is like constructing that society from dried tinder. Congress makes brave noises about closing gun-show loopholes or bump stocks or noise suppressors. But universal background checks and licensing requirements, elimination of assault-style rifles, large capacity magazines – these and more are what is needed. Ask Gabby Giffords. Ask the parents of Newtown, the young men and women of Parkland, the survivors of Columbine and Aurora and Las Vegas and Orlando and too many cities and towns to mention. The solution to guns is not more guns. This is not Tombstone, or Dodge City, not any more.

Making guns less available turns February 26<sup>th</sup> into a brawl, makes November 23<sup>rd</sup> a loud and angry dispute. But everyone walks away.

Making guns less available and more rare, and its impact on crime and safety and, yes, on the civil rights of individuals in our country is a debate I would welcome.

## Statement of Commissioner Gail Heriot

This report should not have been published in this form. When the results of an empirical study don't come out the way Commission members hoped and expected that they would, the right thing to do is usually to publish those results anyway. Why hide useful information?<sup>1</sup>

Instead, the Commission sat on the report for years. Then it decided to discard the draft written by our staff and publish instead a transcript of the witness testimony received at our briefing that took place on October 17, 2014 in Orlando, Florida (along with Commissioner Statements like this one). In that way, the staff's empirical findings could be buried forever.

No one would claim that the results of the staff's empirical study conclusively resolve all the controversy over "Stand Your Ground" laws or even over Florida's "Stand Your Ground" law in particular. But they are useful for what they don't show. The most passionate opponents of "Stand Your Ground" laws appear to have believed that the empirical evidence would show clearly that African Americans are harmed by these laws. But it turns out things are not so clear; the evidence of discrimination against African Americans or even real disparate impact is absent. Yes, it is true that a disproportionate number of those killed in Florida in cases in which, correctly or incorrectly, the "Stand Your Ground" law has been invoked were African American. But it is also true that a similarly disproportionate number of those *for* whom that law has been invoked were African American.<sup>2</sup> African Americans are disproportionately on both sides of the issue.

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<sup>1</sup> This is not the first time in recent years that the U.S. Commission on Civil Rights has conducted an empirical study, only to downplay its results. In *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898* (2016), the Commission apparently hoped to prove that coal ash dumps were more likely to be located near neighborhoods with disproportionate numbers of African Americans. But the data came back showing the opposite. Although the Commission had originally intended this study to be a centerpiece of the report, instead it was barely mentioned. See Dissenting Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, *Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898* (2016), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2897775](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897775).

Another example is the Commission's 2015 civil rights enforcement report, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities* (2015). For that project, a delegation from the Commission toured two immigration detention centers. Yet barely any information about that visit made it into the staff-generated section of the report. As I described at some length in my Statement in that report (pp. 198-210), our visit suggested that these particular centers appeared to be generally well-maintained and that detainees appeared to be treated appropriately at the time. See Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities* (2015), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2897732](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897732).

<sup>2</sup> Statement of John Lott, Draft Report at 76 (stating that 34% of those for whom the law was invoked were African American).

The Commission embarked on this project in May 2013, at a time when public interest and public passions about “Stand Your Ground” laws were running high.<sup>3</sup> The immediate trigger of that interest was the Trayvon Martin case<sup>4</sup>—although, oddly enough, that case was not really a “Stand Your Ground Case.”<sup>5</sup>

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<sup>3</sup> See, e.g., Gary Yonge, *Open Season on Black Boys After a Verdict Like This: Calls for Calm After George Zimmerman Was Acquitted of Murdering Trayvon Martin are Empty Words for Black Families*, The Guardian (July 14, 2013), available at <https://www.theguardian.com/commentisfree/2013/jul/14/open-season-black-boys-verdict>. One way in which these laws have been impugned is to associate them with the National Rifle Association. See E.J. Dionne, Jr., *Why the NRA Pushes “Stand Your Ground,”* Washington Post (April 15, 2012)(claiming that such laws exist because state legislators were afraid to oppose the NRA) available at [https://www.washingtonpost.com/opinions/why-the-nra-pushes-stand-your-ground/2012/04/15/gIQAL458JT\\_story.html?utm\\_term=.c25da969e2df](https://www.washingtonpost.com/opinions/why-the-nra-pushes-stand-your-ground/2012/04/15/gIQAL458JT_story.html?utm_term=.c25da969e2df); Carl Hiaasen, *Welcome to Florida, Where the NRA Rules, and We Proudly Stand Our Ground*, Miami Herald BLOG (February 22, 2014, 7:00 pm)(arguing that Florida’s “Stand Your Ground” law will likely never be repealed, since the NRA “owns too many Republican lawmakers”), available at <https://www.miamiherald.com/opinion/opn-columns-blogs/carl-hiaasen/article1960643.html>; Andy Kroll, *The Money Trail Behind Florida’s Notorious Gun Law*, Mother Jones (March 29, 2012)(“the money trail leading to the watershed law in Florida—the first of 24 across the nation—traces primarily to one source: the National Rifle Association”), available at <https://www.motherjones.com/politics/2012/03/nra-stand-your-ground-trayvon-martin/>. For more examples, see Cynthia Ward, *“Stand Your Ground” and Self Defense*, 42 Am. J. Crim. L. 89, 96 n.19 (2015).

<sup>4</sup> Commissioner Michael Yaki, who proposed the project, said that he wanted to take up the issue in part because of the Trayvon Martin case. U.S. Commission on Civil Rights, Transcript of May 31, 2013 Business Meeting at 6. Commissioner Yaki also discusses the Trayvon Martin case several times in his Commissioner’s statement.

<sup>5</sup> See *infra* at 54-55. See also, e.g., Scott Lemieux, *The Zimmerman Acquittal Isn’t About Stand Your Ground*, The American Prospect, July 14, 2013, available at <http://prospect.org/article/zimmerman-acquittal-isnt-about-stand-your-ground> (wherein the progressive-leaning political science professor author notes that “Zimmerman’s defense involved just standard self-defense,” while nonetheless claiming that the case highlights serious racial issues); Jacob Sullum, *The New York Times Admits That Its Reporting on the Trayvon Martin Case Has Been Fundamentally Wrong*, reason.com June 20, 2013, available at <http://reason.com/blog/2013/06/20/the-new-york-times-admits-its-reporting>: “Zimmerman’s defense does not hinge on the right to stand your ground when you are attacked in a public place because he claims he shot Trayvon Martin during a violent struggle in which there was no opportunity to retreat.”

Commissioner Yaki also discusses at some length the Jordan Davis case as a supposed illustration of the problems with “Stand Your Ground” laws. But this also is a case that ultimately did not turn on the existence of such a law. Instead, it illustrates the point I have tried to make *infra* at 52-55 that “Stand Your Ground” laws do not authorize an individual to use force simply because “he feels threatened.”

The day after Thanksgiving, Davis and three of his friends pulled up to a convenience store. Michael Dunn and his girlfriend parked in the adjacent space, and Dunn began complaining about the music coming from Davis’s car. An argument erupted between Dunn and Davis and his friends. Dunn, who had a concealed weapons permit, reached for his gun from his glove compartment and began shooting into the other car, and continued shooting into the other car until it drove away. Davis was killed. Dunn drove away with his girlfriend and did not report the matter to the police.

At trial, Dunn claimed that he had acted in self-defense because he thought he saw Davis armed with a gun. But the police found no gun in Davis’s car or near the scene, and Dunn also never told his girlfriend at the time of the incident about the gun. See Kristal Brent Zook, *The Lessons of Jordan Davis’s Murder, Revisited*, The Nation November 13, 2015, available at <https://www.thenation.com/article/the-lessons-of-jordan-daviss-murder-revisited/>.

The jury convicted Dunn of first-degree murder. He won’t be out on the streets anytime soon. We cannot know for sure what the jury’s reasons were. But it seems overwhelmingly likely that they thought either (1) he was lying about believing that he saw a gun; or (2) if he believed he saw a gun, he was being unreasonable in doing so. In the unlikely event that it had come to the opposite conclusions on those issues, Florida’s Stand Your Ground law could have come into play in the sense that it would obviate the need for the jury to resolve whether Dunn could have safely withdrawn.

The concept paper proposing the project defined “Stand Your Ground” laws for the purposes of the project as “any state statutory enactment in the past decade that extends the common law right to use deadly force, without a duty to retreat, beyond an individual’s home.” See, e.g., Fla. Stat. § 776.041 (2014) (attached hereto as Exhibit A).

Much of the passion over “Stand Your Ground” laws was misplaced—a product of an imperfect understanding of their content and their impact. And that passion and its accompanying misunderstanding have not entirely subsided.<sup>6</sup> Florida gubernatorial candidate Andrew Gillum commented in 2018, with more dramatic flair than was warranted by the actual facts, that “you can’t have a conversation about Stand Your Ground without understanding what the racial elements are” and “[Florida’s “Stand Your Ground” law] is dangerous, which is why I ask the Governor to declare *a state of emergency*, because in the State of Florida, as long as that law exists, the state is not safe for all kids, it’s not safe for all people.”<sup>7</sup>

Alas, the Commission has not been immune to that misplaced passion. When the controversy first arose, it made a hasty decision to undertake a study of the racial effects of those laws.<sup>8</sup> At the time

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But it is unlikely that even in that event Florida’s “Stand Your Ground” law would have affected the outcome. If the jury had found that Davis was indeed threatening Dunn with a gun, they probably would have also found that Dunn could not have safely backed up his car and left the parking lot (thus leaving his girlfriend, who was in the convenience store when the fight erupted).

<sup>6</sup> Editorial: “*Stand Your Ground*” Doesn’t Stand Common Sense Test, York Dispatch (October 24, 2018), available at <https://www.yorkdispatch.com/story/opinion/editorials/2018/10/24/editorial-stand-your-ground-doesnt-stand-common-sense-test/1737906002/>.

<sup>7</sup> Ashley Velez, The Root Video: Andrew Gillum Says Florida Is Not Safe for All While “Stand Your Ground” Law Exists, (November 2, 2018)(emphasis added), available at <https://www.theroot.com/andrew-gillum-says-florida-is-not-safe-for-all-while-st-1830188947>.

<sup>8</sup> The project was proposed by Commissioner Michael Yaki. At the time, he said that he thought that already-existing data on the application of “Stand Your Ground” laws indicated a racially biased effect against African Americans. He stated:

By racial bias, I’m talking about the fact that just on some statistics out there alone there are questions about whether or not if you are a - if you are a black victim, in other words, the person who was shot by someone asserting the SYG, that there seems to be a disproportionate number of those victims are African-American or are a minority versus homicide victims generally for that.

I know there’s some people talking about crime rate, this, that when you’re just looking at the homicide rate alone. But when you cut it out for this type of homicide and this type of defense, the number of people who happen to be of minority background seems to be a little bit higher.



I warned the members of the Commission who favored such a study that “Stand Your Ground” laws effect only a fairly minor change to the law in the states that have adopted them and that enough data to draw firm conclusions will be lacking.<sup>9</sup> There are about 15,000 homicides each

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Commissioner Yaki later told MSNBC News that “All of the data shows it [Stand Your Ground] makes people kill people more often, and it makes black people die more often.” Zachary Roth, *Is Stand Your Ground Racially Biased?: George Zimmerman vs. Marissa Alexander*, MSNBC News (July 23, 2013), available at <http://www.msnbc.com/msnbc/stand-your-ground-racially-biased-george>. The project won Commissioner Yaki accolades in the national media. See, e.g., Emma Allen, *Customer Relations*, *The New Yorker*, November 11, 2013, available at <https://www.newyorker.com/magazine/2013/11/11/customer-relations> (generally favorable profile of Commissioner Yaki, mainly focused on his job as a consultant for the department store Barneys, that also mentions his work on Stand Your Ground at the Commission); Editorial, *When “Self-Defense” Violates Civil Rights*, *N.Y. Times* (June 19, 2012) (“Michael Yaki, a member of the civil rights commission, has properly asked that the cases involving Stand Your Ground laws be analyzed to see if there is racial bias in accepting a claim of justifiable homicide when the victim is a minority”), available at <https://www.nytimes.com/2012/06/20/opinion/when-self-defense-violates-civil-rights.html>. Like Commissioner Yaki, the media appear to have expected our study to come out a particular way. The *New York Times* wrote that “There can be no justifying the public mayhem legalized by Stand Your Ground. These laws should be repealed, and the [Commission’s] civil rights inquiry should help make that point.” *Id.*

When the Commission held a briefing on the topic, even though we hadn’t yet crunched any data, a number of witnesses confidently asserted to the Commission that Stand Your Ground laws had an unfair effect on racial and ethnic minorities. See, e.g., Statement of Ahmad Nabil Abuznaid, *Dream Defenders* at 1 (“These SYG laws have, in a sense, legalized the devaluing and dehumanizing of minority lives in a very real way... Since we understand that the system itself has had to be constantly revised to deal with its inadequacies related to minorities, it should come as no shock that a law allowing vigilantes to use fatal force on the streets would disproportionately affect minorities.”).

Nor is Commissioner Yaki’s Draft Commissioner Statement’s free of that misplaced passion. In it, he calls “Stand Your Ground” laws “the legal equivalent of carte blanche for the exerciser of a Stand Your Ground right” and quotes the Brady Center to Prevent Gun Violence calling Stand Your Ground a “Shoot First” law. He also writes that “And if we are to truly honor Trayvon, and Jordan, and countless others of ever[y] color and creed and orientation, we would enact sweeping, comprehensive, and strong gun control. Stand Your Ground and concealed carry are the societal equivalent of matches and gasoline, but the lack of any semblance or reasonable gun control is like constructing that society from dried tinder.”

Gun control laws are far beyond the scope of this report, so I will refrain from commenting to them except to say that when guns allow an innocent person to protect himself against an individual who is slamming his head against concrete, that would seem to me to be one of the best arguments in favor of guns. The odd thing here is that the Trayvon Martin case is one in which the only gun involved (Zimmerman’s) was used in what the jury clearly found was legitimate (and traditional as opposed to Stand Your Ground) self defense. Strict gun control laws would not have made things better in the case. There is every reason to believe that they would have led to Zimmerman’s death.

<sup>9</sup> My remarks at the meeting at which we officially accepted Commissioner Yaki’s concept paper included the following:

Okay. I believe that what's being proposed here is much, much too complicated for our commission to be able to undertake. This is a big issue, plus there's not much in the way of data.

We're talking about with regard to some of these states, you know, with South Carolina we've got almost 700 homicides, but only a very small number of those will have had any kind of a self-defense issue.

year in the United States. That may be a tragically high number by the standards of the developed world, but it is not a lot by the standards needed to draw statistical conclusions from the data. According to the FBI statistics, less than 3% (i.e. less than 450) are deemed to have been justifiable self-defense.<sup>10</sup> Of those, a similarly tiny, but undetermined proportion turn on whether a state has a “Stand Your Ground” law or not.<sup>11</sup> Add to that the problems that every murder has unique facts, accessing those unique facts from FBI statistics or even police reports is difficult, state “Stand Your Ground” laws differ from one another, and the states that have adopted “Stand Your Ground” laws differ culturally and demographically from those that have not. One must also add that it is impossible to estimate the number of occasions when “Stand Your Ground” laws have allowed an

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And the number that would have a self-defense issue that turns on the difference between Stand Your Ground and ordinary common law on self-defense, that's going to get down to like Bob and Suzy ... a couple of homicides in each state.

U.S. Commission on Civil Rights, Transcript of May 31, 2013 Business Meeting at 18-19.

<sup>10</sup> Even if that is a serious undercount, it is never going to be the case that a substantial proportion of the 15,000 or so homicides each year are cases of legally justifiable self-defense.

<sup>11</sup> Some of those justifiable homicides occur in the course of a burglary (and hence, ordinarily in the defendant's home and subject to the Castle doctrine). Even limiting myself to news stories running in 2018, it was not hard to uncover such cases. I think it is safe to state that the number of burglary/home invasion justifiable homicide cases is not insignificant. *Homeowners Tell 11 News They Shot Intruder in Self-Defense*, KKTV.com (October 10, 2018), available at <https://www.kktv.com/content/news/Shooting-Investigation-in-Colorado-Springs-495374221.html>; *Richmond Homeowner Shoots Intruder in Self-Defense: Police*, NBCBayarea.com (July 6, 2018), available at <https://www.nbcbayarea.com/news/local/Richmond-Homeowner-Shoots-Intruder-in-Self-Defense-Police-487512971.html>; Thomas, Leavy, *Memphis Homeowner Grabs His AK-47, Kills Two Burglars*, CBSnews.com (June 4, 2018), available at <https://www.cbsnews.com/news/memphis-homeowner-kills-two-burglars-with-ak-47/>; Thomas Plank, *Helena Man Who Fatally Shot Burglar Defends Gun Rights at Young Republicans Event*, Helenair.com (May 9, 2018), available at [https://helenair.com/news/local/helena-man-who-fatally-shot-burglar-defends-gun-rights-at/article\\_9b429d41-b70e-5843-a137-df0b93988b13.html](https://helenair.com/news/local/helena-man-who-fatally-shot-burglar-defends-gun-rights-at/article_9b429d41-b70e-5843-a137-df0b93988b13.html).

According to FBI statistics, in 2017, 90 persons were murdered in the course of a burglary (not including justifiable homicides). Presumably, then, all or nearly all of these were cases of the burglar murdering an innocent person. It is understandable why homeowners are thought to be reasonable for believing themselves to be in danger.

Many other cases occurred in the home, but not in the course of a burglary. *Police: Grandfather Fatally Shoots Grandson in Self Defense*, The Columbian (November 13, 2018) available at <https://www.columbian.com/news/2018/nov/13/police-grandfather-fatally-shoots-grandson-in-self-defense/>; Ken Curtis, *Dothan Police Believe Deadly Shooting Self-Defense*, WTVY.com (November 9, 2018), available at <https://www.wtv.com/content/news/Dothan-police-deadly-shooting-self-defense--500162481.html>; Lynn Moore, *Sister's Fatal Stabbing of Brother Rules Justified Self Defense*, Muskegon News (November 7, 2018), available at [https://www.mlive.com/news/muskegon/index.ssf/2018/11/sisters\\_fatal\\_stabbing\\_of\\_brot.html](https://www.mlive.com/news/muskegon/index.ssf/2018/11/sisters_fatal_stabbing_of_brot.html).

In addition, there are cases that occur outside the home, but for which it is obvious retreat would have been impossible. See Jon Wilcox, *Prosecutor: 13 Bullet Holes Showed Self-Defense for Man Cleared of Murder Charge*, The Victoria Advocate (October 22, 2018), available at [https://www.victoriaadvocate.com/counties/dewitt/prosecutor-bullet-holes-showed-self-defense-for-man-cleared-of/article\\_def55934-d637-11e8-9546-637075a1ed02.html](https://www.victoriaadvocate.com/counties/dewitt/prosecutor-bullet-holes-showed-self-defense-for-man-cleared-of/article_def55934-d637-11e8-9546-637075a1ed02.html).

individual to threaten self-defense in a way that prevented further violence. That is simply not a lot to work with, especially if one's task is to tease out the law's racial effects.<sup>12</sup>

As a result, it was always highly unlikely that we could obtain the necessary data to decide whether these laws had a *racial* effect or not, which is the issue we arguably have jurisdiction over.<sup>13</sup> It was not that I was against undertaking challenging empirical studies. Like Commissioner Yaki, I believe that the Commission should focus more of its energies on its own empirical studies and less on simply giving its opinion on policy issues. But I feared this particular exercise would not generate enough useful information to be worth the effort.

Our staff undertook the study and did the best that could be done with the data available. I have no reason to doubt either the competence or the integrity of the statistician in our Office of Civil Rights Evaluation ("OCRE") who undertook the analysis.<sup>14</sup> On the other hand, OCRE was not able to find data allowing it to make a comparison between jurisdictions with "Stand Your Ground" laws and those without them or between a jurisdiction before it adopted a "Stand Your Ground" law and after it did so. Thus even if a mammoth multi-factored analysis was desirable to determine whether "Stand Your Ground" laws disproportionately increase the number of homicides of African Americans, OCRE was in no position to conduct that analysis.

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<sup>12</sup> Of course, economists sometimes rush in where angels fear to tread. Two complex empirical studies have now been done on the effects of "Stand Your Ground" laws. Commissioner Yaki relies significantly on them to mount his critique, yet each has significant limitations that I discuss *infra* at p. 48, n. 50. For example, one of these studies—Chandler McClellan & Erdal Tekin, *Stand Your Ground Laws and Homicides*, 52 J. Human Resources 621 (2017)—suggests that states that have passed "Stand Your Ground" statutes that allow individuals to stand their ground if they are in a place they are legally entitled to be had an *increase* in total homicides per 100,000 in population in the 17 months following the laws' passage relative to other states *for whites, but not for African Americans*. (Indeed, for African Americans, the rate of total homicides was found to decrease slightly, but not significantly). Paradoxically, more limited "Stand Your Ground" statutes—such as those that extend the right to stand one's ground only to one's business or car—were associated with a decrease in the rate of total homicides (relative to states with no such changes in the law). Given these odd results, it is very hard to come away with the conclusion that the associations noted by the authors are causal in nature.

The other such study did not deal with racial effects at all. See Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence?: Evidence for Castle Doctrine*, 48 J. Human Resources 821 (2013). But given that it finds that laws of this kind increase homicide rates, it does itself rule out the possibility (as McClellan & Tekin purport to) that "Stand Your Ground" laws increase the number of African-American homicides. See *infra* at n. 50.

<sup>13</sup> Here is another way to give readers an idea of how small the pool of relevant cases is: In a study for PBS's Frontline, John Roman of the Urban Institute's Justice Policy Center looked at SYG racial disparities using FBI homicide data from 2005 to 2009. Out of 45,300 incidents of homicide from all 50 states in the database, there were only 25 white-on-black justifiable homicides during the period of Roman's study. See Sarah Childress, *Is There Racial Bias in "Stand Your Ground" Laws?* Frontline, July 31, 2012, available at <https://www.pbs.org/wgbh/frontline/article/is-there-racial-bias-in-stand-your-ground-laws/>.

<sup>14</sup> That individual head holds a Ph.D. in sociology from Howard University. Before coming to the Commission, he was a Senior Statistician at the Criminal Justice Coordinating Council for the District of Columbia.

Instead, the staff had a database, put together initially by the Tampa Bay Times, consisting of 192 Florida cases. The original list was supplemented by a list of cases compiled by the researcher Albert McCormick for his paper on Florida's "Stand Your Ground" law.<sup>15</sup> In the end, there were 305 cases in total. OCRE focused on whether success in invoking "Stand Your Ground" laws varies by the race of the parties.

Alas, these cases are not what they appear. They are not cases for which Florida's "Stand Your Ground" law made a difference in the outcome. Rather *some* are cases for which Florida's law *might* have made a difference depending upon whether it was ultimately determined that the shooter could have safely avoided the need for self-defense by retreating. (Of course, the point of "Stand Your Ground" laws is that they take that issue out of consideration.)<sup>16</sup>

Others cases in the database involved situations in which the defendant or the defendant's lawyer invoked "Stand Your Ground" law, but the facts did not fit "Stand Your Ground" (though in some cases, real issues of self-defense may have fit the facts). In some cases, the term "Stand Your Ground" was simply mentioned by somebody quoted in a news story account of the case. Sometimes that person had no idea what he or she was talking about.

Moreover, the cases were a hodgepodge. No two contained facts that were alike. For example:

- (1) Seventy-year-old Ralph Wald woke up at midnight to find a younger man having sexual intercourse with his 41-year-old wife in the living room. According to Wald, he believed his wife was being raped. He went to his bedroom, got his gun and shot the man in the head and stomach. It turned out to be one Walter Conley, with whom Wald's wife had once lived in a house next door to Wald's. Police believed instead that Wald shot Conley in a fit of rage. Whatever this case is, it does not turn on the application of Florida's "Stand Your Ground Law." While the defense cited that law, under the pre-existing Castle Doctrine, Wald had no duty to retreat in his own home anyway. Moreover, this was a case of defending a third party. He could not have successfully defended his wife (assuming she needed defending) by retreating. The case turns on a question of fact: Wald either reasonably believed that he was defending his wife from a rapist or he did not. Wald was charged

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<sup>15</sup> McCormick, Albert E. Jr., *The Enforcement of Florida's "Stand Your Ground" Law: Preliminary Findings*, 6 J. OF PUB. & PROF. SOCIO. 1 (2014), available at <https://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1072&context=jpps>.

<sup>16</sup> That is an aspect of "Stand Your Ground" laws that must always be kept in mind. Under a "Stand Your Ground" law, it is unnecessary to determine whether the individual claiming the right to self-defense could have retreated in safety. It doesn't matter if he has the right to stand his ground. By contrast, in a jurisdiction with a duty to retreat, it becomes necessary, when an individual fails to retreat and instead acts in self-defense, to determine whether he should have retreated instead. The upshot of this is that law enforcement investigators may classify a case as falling under a "Stand Your Ground" law when they mean only that the individual did not retreat.

with second-degree murder. Rightly or wrongly, the jury acquitted him. Florida's "Stand Your Ground Law" had nothing to do with it.

- (2) Andrew Smith and Keith Quakenbush got into an argument while in Smith's car. Smith requested that Quackenbush get out of his car, but Quackenbush refused. Smith was able to remove him from the car and *attempted to drive away*, but Quackenbush re-entered it. Smith removed him again. At that point, Quackenbush jumped onto the car and a physical fight began. When Quackenbush cut Smith with a box cutter, Smith took out a knife and stabbed Quackenbush, but did not kill him. The police arrested Smith. There does not appear to have been an opportunity for Smith to retreat once the physical fight began. Indeed, the Tampa Bay Times database specifically notes that retreat was not an option. Florida's "Stand Your Ground Law" is thus, again, superfluous.<sup>17</sup>
- (3) Gregory Gayle had been staying with his pregnant sister and her fiancé, Jakob Penrod, for three weeks when an argument turned violent. Penrod told Gayle to move out. Fearing Gayle, Penrod and Gayle's sister locked themselves in the bathroom (with Penrod's gun). When Gayle forced his way into the bathroom and struck Penrod, Penrod shot him. This was a routine self-defense case and not one that turned on Florida's "Stand Your Ground" law. Penrod was in his own home and had no opportunity to retreat anyway. According to the Tampa Bay Times website, "Witnesses, including some of Gayle's relatives, agreed with Penrod's description of the events and he was not arrested."<sup>18</sup> The only connection to "Stand Your Ground" law that I am aware of was the fact that Gayle's father told the local television station that the "Stand Your Ground Law" needs a second look.<sup>19</sup>

These cases were not difficult to find. There are certainly many more in the database that did not turn on the existence of the "Stand Your Ground" law. Indeed, while I did not look at them all, I did not run across a single case that really turned on the existence of a "Stand Your Ground" law, although I assume that some do.

Both the fact that every case has different facts and the fact that large numbers of cases in the database are not true "Stand Your Ground" cases make drawing conclusions very difficult. Add to that the database does not include cases where an individual who stood her ground was

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<sup>17</sup> Florida Stand Your Ground Cases (Tampa Bay Times) [http://stand-your-ground-law.s3-website-us-east-1.amazonaws.com/cases/case\\_262](http://stand-your-ground-law.s3-website-us-east-1.amazonaws.com/cases/case_262).

<sup>18</sup> Florida Stand Your Ground Cases (Tampa Bay Times) [http://stand-your-ground-law.s3-website-us-east-1.amazonaws.com/cases/case\\_269](http://stand-your-ground-law.s3-website-us-east-1.amazonaws.com/cases/case_269).

<sup>19</sup> Lisa McDonald, "Stand Your Ground" Put to Test in Leesburg Shooting, ClickOrlando.com (April 9, 2012) <https://www.clickorlando.com/news/florida/lake-county/stand-your-ground-put-to-test-in-leesburg-shooting>.

successful in scaring off her assailant just by brandishing a weapon (rather than running away) or cases where an individual retreated anyway, despite a legal right to stand his ground.<sup>20</sup>

The first draft of the report found that none of the attributes of those who claim the Stand Your Ground defense, including race/ethnicity, was significantly associated with the probability of a successful claim.<sup>21</sup> I would quote the draft and give the specific figures, but some of my fellow Commissioners have taken the position that for the Commission to publish this Statement quoting those figures might be interpreted to waive the Commission's deliberative process privilege. To address their concerns I have edited this statement. Suffice it to say that insofar as there was evidence, it suggested that African Americans and Hispanics were more likely to successfully assert the defense than whites, but the difference was not statistically significant.<sup>22</sup> The report also found that the probability of a successful Stand Your Ground claim was greater if the initial attacker was Hispanic than if he or she was black or white. But the differences were insignificant at the conventional 0.5 level.<sup>23</sup> The draft ultimately concluded that there was no significant difference in the probability that a Stand Your Ground claim would be successful based on the race or ethnicity of the claimant or the race of the initial attacker.

But Commissioner Michael Yaki, who spearheaded the project, was unhappy with the results and protested them. To the credit of our statistician in the Office of Civil Rights Evaluation, while he listened to and considered Commissioner Yaki's complaints, he *stood his ground* and declined to alter his results to follow a particular narrative.

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<sup>20</sup> In the absence of a "Stand Your Ground" law, brandishing a weapon in a case in which one has a duty to retreat would presumably be at least technically an assault. And yet, cases in which an otherwise innocent individual scares off an assailant by showing his weapon seems like a benefit of "Stand Your Ground" laws to me. Of course, the individual who shows his assailant his weapon in this way may put himself in a position where he must use it, since he has likely used up precious time that could have been used to retreat.

<sup>21</sup> Draft Report at v. Given the existence of ordinary self-defense and Castle Doctrine cases in the database, even if the data had shown bias, it would be unclear whether the bias came from the application of "Stand Your Ground" laws or the application of other self-defense doctrines. It is one thing to argue for the repeal of "Stand Your Ground" laws. Reasonable policymakers have taken both sides of that issue. It is quite another to argue for the repeal of the right of self-defense generally and hence for a "Duty to Die" rule for those who find themselves under attack. Alas, while it appears that racial bias may not be an issue in this particular context, racial bias has certainly been known to rear its ugly head in employment, real estate sales and credit. Yet no one argues that this is a sufficient reason to abolish employment, home ownership and credit. Nor would it be a good reason to eliminate the basic right to self-defense.

<sup>22</sup> Draft Report at 28.

<sup>23</sup> The difference between blacks and Hispanics were significant at all levels. The difference between whites and Hispanics was statistically significant at the .10 level.

For a while, there was talk within the Commission about trying to re-do the project.<sup>24</sup> Eventually, though, the staff who had originally been the most immersed in this project (our statistician from OCRE, as well as Commissioner Yaki's special assistant and counsel) left the Commission, and the discussions stopped. A majority of the Commission's members were apparently happy not to issue a report. But lately, they seem to be taking the position that the *quantity* of reports that the Commission issues is important. More than two years after we received the initial draft, the Commission voted to scrap that draft altogether and instead publish the report in the form you see today.

I believe that the findings that were contained in the draft are worth publishing, despite the fact that they do not resolve every issue we might like them to have. They are at least a bit of a counterweight to some of the more fevered commentary about the intent and effects of "Stand Your Ground" laws. Take, for example, the following comments, all of which were aimed at "Stand Your Ground" laws:

"There is a word for the unfounded, pre-emptive, due-process-free (but tacitly sanctioned) form of killing perpetrated against black people in this country in an effort to safeguard white property: lynching." –Sabrina Strings, Assistant Professor of Sociology, University of California at Irvine.<sup>25</sup>

"... SYG laws make it easier for straight, cisgender people to kill queer people, for white people to kill people of color, and for men to kill women, while preventing targeted minorities from defending themselves." Caroline E. Light, Director of

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<sup>24</sup> In February 2016, there was supposed to be a meeting of the eight special assistants and the then-head of OCRE to address some of the concerns about the first draft and discuss a plan for moving forward with the report. The meeting was cancelled after the OCRE head was assigned to a different role within the Commission. It was never rescheduled.

In his Commissioner's statement, Commissioner Yaki writes that "Through no fault of the Commission and its staff, the lack of resources—both fiscal and personnel—hampered the ability of the Commission to engage in the type of fact-finding this matter deserved. Because of the way that data is recorded in Stand Your Ground shootings—or, more accurately, was not recorded, as will be discussed later—the intensive investigative resources that would have been required to be dedicated proved to be beyond the reach of the Commission." As discussed above, I do not fault the Commission's career staff for the staff-generated section of this report's failure to come to fruition. But I do not think it is entirely accurate to suggest that the failure was mostly about a lack of resources. It was not. The Commission could have had three times its level of resources, and it still would have been without the data it needed to draw conclusions.

<sup>25</sup> See Sabrina Strings, *Protecting What's White: A New Look at Stand Your Ground Laws*, The Feminist Wire (2014), available at <https://thefeministwire.com/2014/01/protecting-whats-white-a-new-look-at-stand-your-ground-laws/>.

Undergraduate Studies in the Program in Women, Gender, and Sexuality Studies, Harvard University.<sup>26</sup>

“This [is] structural racism at its finest: a modern-day lynch law. . . . The arming and acquitting of racists is nothing new in our country, but [proposed Stand Your Ground laws] are open invitations for racist violence.”—Mari Christmas, Visiting Fellow in Creative Writing, Idaho State University.<sup>27</sup>

The Commission’s study certainly fails to substantiate these statements. Common sense is all that’s needed to understand that they are unhelpful and overblown.

Of course, misunderstanding about the racial aspects of “Stand Your Ground” laws is only one of several misunderstandings concerning these laws. There are others:

**THE APPARENTLY WIDESPREAD NOTION THAT “STAND YOUR GROUND” LAWS ARE A RECENT INNOVATION IS FALSE.**

Many people are under the incorrect impression that “Stand Your Ground” laws are a recent innovation and that they greatly expand the circumstances under which the right to self-defense can be invoked. The truth, however, is that “Duty to Retreat” rules and “Stand Your Ground” rules have existed side by side, at least as far back as 17<sup>th</sup> century England.<sup>28</sup> It hasn’t always been easy to tell which rule applies to which situations, but Anglo-American law has muddled through nonetheless. It is true that American law may be leaning somewhat more than English common law toward “Stand Your Ground” rules. But the differences are smaller than many seem to think.

Former Attorney General Eric Holder is among those who seems to be under this misimpression that “Stand Your Ground” laws are novel (beyond the fact that they are now statutory, whereas before they were common law). In addressing the NAACP in 2013, he stated: “These laws try to fix something that was never broken. . . . [I]t’s time to question laws that senselessly expand the concept of self-defense and sow dangerous conflict in our neighborhoods . . . . [W]e must examine laws . . . eliminate[e] the common-sense and age-old requirement that people who feel threatened have a duty to retreat, outside their home, if they can do so safely. By allowing and perhaps

<sup>26</sup> Caroline E. Light, *Stand Your Ground: A History of America’s Love Affair with Lethal Self-Defense* 184 (2017).

<sup>27</sup> Mari Christmas, *Stand Your Ground Is a Modern-Day, Racist Lynch Law*, Idaho State Journal (March 11, 2018), available at [https://www.idahostatejournal.com/opinion/columns/stand-your-ground-is-a-modern-day-racist-lynch-law/article\\_d530e232-c638-5c00-a8d2-2cbb8bcee138.html](https://www.idahostatejournal.com/opinion/columns/stand-your-ground-is-a-modern-day-racist-lynch-law/article_d530e232-c638-5c00-a8d2-2cbb8bcee138.html).

<sup>28</sup> Cynthia Ward, “*Stand Your Ground*” and *Self Defense*, 42 Am. J. Crim. L. 89 (2015).



encouraging violent situations to escalate in public, such laws undermine public safety.... [W]e must ... take a hard look at laws that contribute to more violence than they prevent.”<sup>29</sup>

Those who believe that recent “Stand Your Ground” statutes overrule a long history of precedent imposing a duty to retreat (outside the home) before a right of self-defense can be invoked sometimes rely upon William Blackstone’s *Commentaries on the Laws of England* as their authority. That treatise states, “[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 ...”<sup>30</sup> I’m guessing that most of those who cite to Blackstone for this purpose do not own their own copies of Blackstone. I do. Browsing his section on homicide, one finds that he is speaking of a particular kind of homicide—that arising in the course of a “sudden brawl or quarrel.”

This is an important qualifier. Going back to Lord Edward Coke’s *Institutes of the Lawes of England*, we learn that initial aggressors and mutual combatants had a duty to retreat before invoking the right to use lethal force in self defense, but that no duty to retreat existed where the an individual was simply defending his or her life or property.<sup>31</sup> (Yes, I own my own copies of

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<sup>29</sup> Attorney General Eric Holder’s Remarks on Trayvon Martin at NAACP Convention (full text), Washington Post (July 16, 2013), available at [https://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?utm\\_term=.e69c760b26c4](https://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?utm_term=.e69c760b26c4).

<sup>30</sup> IV William Blackstone, *Commentaries on the Laws of England* 184-85 (University of Chicago facsimile ed. 1979).

<sup>31</sup> Edward Coke, *The Third Part of the Institues of the Lawes of England* 55-56 (1669). In it, he makes the distinction between mutual combatants and victims of an attempted serious crime. Here we learn that retreat, if it can be accomplished in reasonable safety is required for mutual combatants:

Some [homicides] be voluntary, and yet being done upon an inevitable cause are no felony. As if A, be assaulted by B, and they fight together, and before any mortall blow given A, [retreats], until he cometh unto a hedge, wall, or other strait, beyond which he cannot passé, and then in his own defence, and for safeguard of his own life killeth the other: this is voluntary, and yet no felony, and the jury that finde, it was done *se defendendo*, ought to finde the speciall matter. ... If A assault B so fiercely and violently, and in such place, and in such manner, as if B should [retreat], he should be in danger of his life, he may in this case defend himself; and if in that defence he killeth A, it is *se defendendo* ....

On the other hand, the victim of an attempted serious crime has no duty to retreat:

Some without any [retreat] to a wall, &c. or other inevitable cause. As if a thiefe offer to rob or murder B, either abroad, or in his house, and thereupon assault him, and B defend himself without any [retreat], and in is defence killeth the theif, this is no felony; for a man shall never give way to a thief, &c., neither shall he forfeit anything.

See also 1 Edward Hyde East, *A Treatise on the Pleas of the Crown* 220-21 (1803)(stating that there is no duty to retreat from someone who comes with the intent to commit a forcible felony against one’s person or property); Michael Foster, *A Report of Some Proceedings* 273 (Oxford, Clarendon Press 1762)(“[An] injured party may repel force with force in defense of his person, habitation, or property, against one who manifestly intends and endeavors with violence or surprise to commit a known felony upon either. In these case he is not obligated to retreat ....”);

Coke's Institutes too. I am a law nerd.) This is consistent with a different section of Blackstone's Commentaries in which he discusses "such homicide, as is committed for the *prevention* of any forcible and atrocious *crime*" and makes no mention of a duty to retreat.<sup>32</sup> In the modern world, where dueling and just plain brawling is less common, this part of Blackstone's and Coke's commentaries is more significant. Never lose sight of the fact that we live in gentler times than most of our 17<sup>th</sup> and 18<sup>th</sup> century ancestors, no matter what part of the globe those ancestors came from.

Professor Cynthia Ward attempts to summarize the dominant theme among these distinguished legal commentators this way:

"Early English commentators distinguished between two fundamental scenarios: (1) cases in which the defendant's use of deadly force was *justified*—for example, where a blameless and law-abiding defendant used deadly force to repel an attack from a thief or a burglar who intended to kill or gravely injure him, and (2) cases in which the use of deadly force was merely *excused*—for example where the defendant either bore some responsibility for the deadly encounter, or had reasonably *but incorrectly* believed that he or she was faced with imminent threat of death or serious injury and responded with deadly force. In the former type of case, a defendant could claim self-defense although he or she had stood his or her ground and did not retreat; in the latter case, only defendants who could prove that they attempted to retreat before using deadly force could successfully claim self-defense. Even then, defendants of the second type did not merit a full acquittal but only an escape from execution, which was the usual penalty for intentional killings by private citizens. Thus under the English rule, as articulated by Edward Coke, a person was justified in using deadly force against another, even to the point of killing the other, if threatened with imminent death or grave injury for which the defendant bore no responsibility or blame. In other cases where the defendant and the deceased mutually came to blows and the embroglio reached the point where the defendant found it necessary to kill the other rather than die, the defendant could only claim self-defense in the defendant had first attempted to retreat."<sup>33</sup>

American law has developed beyond the English law over the course of 19<sup>th</sup> and 20<sup>th</sup> centuries. And, for the most part, it has done so toward somewhat more liberal use of the "Stand Your

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Matthew Hale, *The History of the Pleas of the Crown* 481 (1736)(stating that a "true man" has no duty to retreat and that if he kills his assailant, it is not a felony). See Cynthia Ward, "*Stand Your Ground*" and *Self Defense*, 42 *Am. J. Crim. L.* 89 (2015)(citing all three of the above).

<sup>32</sup> Blackstone at vol. III at 180.

<sup>33</sup> Ward at 98-99.

Ground” approach.<sup>34</sup> *Erwin v. State* (1876) was a significant early case.<sup>35</sup> It concerned an altercation between a farmer and his son-in-law, who is described as a “cropper” on the farmer’s land. The two argued over who had the rights to a certain shed. In the course of the argument, the son-in-law was said to have approached his father-in-law with an ax in a threatening manner, despite the latter’s warning to stop. When the son-in-law got within striking distance, the father-in-law shot him.

After discussing the evolution of the doctrine in this area, the Ohio Supreme Court asked: “Does the law hold a man who is violently and feloniously assaulted responsible for having brought [the necessity for self defense] upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so?” The Court’s answer was no. It held that while the right to use deadly force in self-defense is not available for minor trespasses or to a man who provoked the assault, “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.”

Some later authorities have assumed that the *Erwin* court was using the term “true man” as a way of invoking a particularly “virile man” or “macho man.”<sup>36</sup> In fact, the court was simply using the term used by Matthew Hale in the 17<sup>th</sup> century. Both the *Erwin* court and Hale appear to have

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<sup>34</sup> See Ward at 99-100 (“In the mid-to-late nineteenth century ... the American approach changed as homegrown commentators, influential state supreme courts, and United States Supreme Court opinions developed a more robust Stand Your Ground doctrine, which became a widely adopted basis for self-defense in this country”). See Richard Maxwell Brown, *No Duty to Retreat: Violence and Values in American History and Society* 5-7 (1994).

<sup>35</sup> 29 Ohio St. 186 (1876).

<sup>36</sup> See, e.g., *State v. Abbott*, 174 A.2d 881, 884 (N.J. 1961) (“advocates of no-retreat say the manly thing to do is to hold one’s ground, and hence society should not demand what smacks of cowardice”); Richard Maxwell Brown, *No Duty to Retreat: Violence and Values in American History and Society* 17 (1994) (The language of the [*Erwin* Court] with its emphasis on the action of a ‘true man’ ... illustrates ... concern for the values of masculine bravery in a frontier nation”). See also Caroline E. Light, *Stand Your Ground: A History of American’s Love Affair with Lethal Self-Defense* (2017). Light acknowledges that Hale used the term “true man,” but seems unaware that of how that term was used in the 18<sup>th</sup> century. Instead, she writes that “[l]ethal self-defense was a right of ‘true manhood.’” For reasons that make no sense to me, Light specifically associates “Stand Your Ground” laws with white men in particular:

Standing one’s ground against a perceived threat has long been a white, masculine prerogative in the United States. When European settlers arrived on American soil, they justified violence as necessary to their basic survival, seizing land that was already inhabited while imprisoning or exterminating its occupants. Settler colonialism and, later, the idea of Manifest Destiny—spreading Christianity across the continent—together demanded the subjugation of nonwhites. And the rights, privileges, and protections of citizenship were inaccessible to all but white, property-owning men. The legacies of this under-recognized history of repression and exclusion in the name of national survival still haunt us today.

Id. at 1.

meant “true” in the sense of trustworthy and honest. A “trueman” as used in the 18<sup>th</sup> century was a law-abiding man.<sup>37</sup>

Note that the defendant in *Erwin* had been arguing with the deceased. Just in case Blackstone and Coke viewed mutual combatants as including two individuals engaged in an spirited argument, the court made it clear that, under Ohio law, given that the father-in-law had not assaulted the son-in-law, he was not blameworthy and hence retained the right to stand his ground. It is not and should not be regarded as blameworthy to engage in an argument—not in America.

A year later, the Indiana Supreme Court decided *Runyan v. State* (1877).<sup>38</sup> *Runyan* was an Election Day altercation. Both the defendant and the deceased were in town to vote and to hear the election results for the 1876 Presidential contest between Rutherford B. Hayes (favored by the deceased) and Samuel Tilden (favored by the defendant). The deceased, who was described by the court as “a large and vigorous man,” had several encounters with the defendant during the day at which he used strong and threatening language. Out of fear of the deceased, the defendant, who had lost much of the use of his right arm fighting for the Union during the Civil War, borrowed a gun. Later that day, the deceased rushed him, striking him several times. The defendant drew his gun and shot him dead. The jury was instructed that he had a duty to retreat and hence convicted him.

The Indiana Supreme Court reversed. Stating that “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,” the Court stated: “[W]hen a person, being without fault and in a place where he as 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-defense, his assailant is killed, he is justifiable.”<sup>39</sup>

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<sup>37</sup> See The Compact Oxford English Dictionary (2d ed. 1991)(“trueman ... A faithful or trusty man; an honest man (as distinguished from a thief or other criminal”). The OED considers this definition to be obsolete. See Garrett Epps, The History of Florida’s “Stand Your Ground Law, American Prospect (March 12, 2012)(“a ‘true man’ in the legal sense—means not a manly man but, in the words of the Oxford English Dictionary, ‘an honest man (as distinguished from a thief or other criminal’)”, available at <http://prospect.org/article/history-floridas-stand-your-ground-law>.

<sup>38</sup> 57 Ind. 80 (1877).

<sup>39</sup> Id. at 84.

Many courts followed *Erwin* and *Runyan*<sup>40</sup>--but not all. In *Judge v. State* (1877),<sup>41</sup> the Supreme Court of Alabama, in retaining its duty to retreat, had this to say:

We are pleased to observe that in this case, the old, sound, and much disregarded doctrine, that no man stands excused for taking human life, if, with safety to his own person, he could have avoided or retired from the combat, has been given in charge, and must have been acted on by the jury. It is to be regretted that this salutary rule is not universally observed by juries, without reference to the social standing of the prisoner. Its observance would exert a wholesome restraint on unbridled passions and lawlessness, and would, in the end, preserve to the commonwealth many valuable lives.<sup>42</sup>

Note that the Alabama court wrote that *no* man who could have retreated stands excused for taking a life. This differs not just from *Erwin* and *Runyan*, but also from Coke and Blackstone (although the court does not appear to know this).

Federal courts have been accused of initially appearing to have gone in two directions. In *Beard v. United States* (1895), the U.S. Supreme Court appeared to some to be taking an approach similar to *Erwin* and *Runyan*.<sup>43</sup> Indeed, it quoted with approval broad language from *Erwin*. But just a year later, in *Allen v. United States* (1896), the Court made it clear that it intended to apply a “Stand Your Ground” rule only to cases that occur in the defendant’s home or on his or her property.<sup>44</sup>

Meanwhile, Harvard law professor Joseph H. Beale called the doctrine pronounced in *Erwin* and *Runyan* “brutal.”<sup>45</sup> In his view, “[n]o killing can be justified on any ground, which was not necessary to secure the desired and permitted result; and it is not necessary to kill in self-defense when the assailed can defend himself by the peaceful though often distasteful method of withdrawing to a place of safety.”<sup>46</sup>

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<sup>40</sup> See, e.g., *People v. Lewis*, 48 Pac. 1088, 1089-90 (Cal. 1897); *Boykin v. People*, 45 Pac. 419, 422 (Colo. 1896); *State v. Hatch*, 46 Pac. 708, 708 (Kan. 1896); *State v. Bartlett*, 71 S.W. 148 (Mo. 1902). Professor Joseph H. Beale has collected a number of other such cases in Joseph H. Beale, *Homicide in Self-Defense*, 3 Colum. L. Rev. 526, 539, §8 n. 5 (1903).

<sup>41</sup> 58 Ala. 406 (1877). Professor Joseph H. Beale has collected a number of other cases that appear to impose a duty to retreat in cases involving an otherwise non-blameworthy defendant acting outside his or her home in Joseph H. Beale, *Homicide in Self-Defense*, 3 Colum. L. Rev. 526, 540, §8 n. 1 (1903).

<sup>42</sup> *Id.* at 413-14.

<sup>43</sup> 158 U.S. 550 (1895).

<sup>44</sup> 164 U.S. 492(1896).

<sup>45</sup> Joseph H. Beale, *Retreat from a Murderous Assault*, 16 Harv. L. Rev. 579 (1902-1903).

<sup>46</sup> *Id.* at 580.

While Beale advocated a duty to retreat, he took pains to point out that the availability of firearms changes the calculus for many Americans:

It is of course true that to retreat from an assailant with a revolver in his hand is dangerous, and one whose revolver is in his hip pocket is not to be despised; the hip-pocket ethics of the Southwest are doubtless based on a deep-felt need. But because retreat is less often safe than in the days of knives and small-swords, it by no means follows that retreat when certainly safe should be less requisite.<sup>47</sup>

Ultimately, the U.S. Supreme Court moved in the direction of *Erwin* and *Runyan*. It just took a few years. In *Brown v. United States* (1921), Justice Holmes argued against any duty of retreat on the part of otherwise non-blameworthy defendants:

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 [referring to *Beard*]. Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in the 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 kill him.<sup>48</sup>

I can see at least two arguments for “Stand Your Ground” laws. The first argument is the one the Ohio Supreme Court employed in the *Erwin* case: A “*Stand Your Ground*” rule saves lives.

In *Erwin*, the Attorney General of Ohio, arguing in favor of a duty to retreat, had asserted that the Court should pick the rule that will save the most lives. In rejecting the Attorney General’s argument, the Court stated that, yes, in adopting a “Stand Your Ground” rule, it was doing exactly that:

The suggestion, by the attorney-general, that that rule should be declared the law which is best calculated to protect and preserve human life, is of great weight, and we can safely say, that the rule announced is, at least, the surest to prevent the occurrence of occasions for taking life; and this, by letting the would-be robber, murderer, ravisher, and such like, know that their lives are, in a measure, in the

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<sup>47</sup> Id.

<sup>48</sup> Id. at 343.

hands of their intended victims.<sup>49</sup>

What did the Ohio Supreme court mean by that? It meant that if thugs, including would-be rapists, murderers and armed robbers, are conscious—even vaguely conscious—of the fact that their intended victims are obliged to flee rather than fight, it will embolden them. Indeed, it will embolden them even if they simply have a vague expectation that they are more likely to flee. Put differently, there will be more such attacks as they perceive, however faintly, that efforts to commit a crime are low risk and efforts to forcibly drive someone from a place they have a right to be will be successful.

Thugs need not have a grasp of the law for the Ohio Supreme Court to be right. Laws both reflect culture and influence culture, and they do it in ways that both subtle and not-so-subtle. Sure, expectations about how a victim is likely to behave may be based on knowledge of what the law requires him to do. But, perhaps more likely, they will be based on vague notions of what the victim ought to do, which in turn are influenced by often-distant memories of what has happened in the past or of what others have said about what should happen based on their own memories of what has happened in the past.

Also the extent to which thugs are emboldened need not be great for the Ohio Supreme Court to be right. They need not believe their victims will certainly flee. All that is necessary is that a “Duty to Retreat” rule alter their expectations slightly relative to their expectations under a “Stand Your Ground” rule.

On the other hand, the view that “Stand Your Ground” rules save lives is contestable. Indeed, the Alabama Supreme Court did just that in *Judge v. State*, when it wrote that a “Duty to Retreat” rule “would exert a wholesome restraint on unbridled passions and lawlessness, and would, in the end, preserve to the commonwealth many valuable lives.”

Who is right? Does a “Stand Your Ground” rule or a “Duty to Retreat” rule save more lives? I am somewhat inclined to believe that in the long term it is a mistake to send a message to aggressors that their victims are required by law to respond passively. Eventually, they may learn to take advantage of that. I note that some researchers believe they have evidence to the contrary,<sup>50</sup>

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<sup>49</sup> 29 Ohio St. at 200.

<sup>50</sup> McClellan & Tekin (whose study is cited favorably by Commissioner Yaki in his Commissioner’s Statement) are among those who believe that they have uncovered evidence to the contrary. States that have passed “Stand Your Ground” laws or are considering passing or repealing such laws should certainly be willing to examine that evidence and any further evidence that may come to light on the issue. But comparing crime rates of two very different sets of states with different histories, cultures and demographics, attempting to control for those differences the best one can, but then attributing the remaining differences to “Stand Your Ground” laws is fraught with risk. States are complicated things. And the evidence that McClellan & Tekin have produced is rather odd. It purports to show that in the seven months following each “Stand Your Ground” state’s adoption of its law, homicides dropped sharply relative to other states, but that beginning in the eighth month through the fourteenth month, the homicide rates in

those states began to climb, while they remained more stable in the other states. The net effect of these changes was to raise the homicide rate in “Stand Your Ground” state relative to the other states. Such a roller coaster relationship is hard to attribute to changes in the law (which, at least with a change as minor as this one, one would expect to take a decade or more to affect the culture anyway). Why would a “Stand Your Ground” law cause a decrease in homicides during the first seven months followed by a six-month increase?

The most obvious explanation is that something else is driving this (especially since the study finds states that enacted more limited “Stand Your Ground” statutes during the same period were found to have experienced a *decrease* in homicides rather than an increase like that found for the states that enacted the stronger versions of that law). Knock me over with a feather if large numbers of the citizens of these states could tell you the difference between their state’s statute and the statutes of other “Stand Your Ground” states.

There are several possibilities I can think of that are worth exploring. I’m sure others can think of more. First, the states that adopted the strong versions of “Stand Your Ground” are disproportionately located in the South, where incarceration rates have historically been higher than average. During the period of the enactment of these statutes, those incarceration rates had become controversial and difficult to maintain. The trend toward greater incarceration de-accelerated and ultimately reversed itself in the years around 2006-2009. Is it possible that Southern states were disproportionately affected and hence witnessed an uptick in homicides not matched in other parts of the country? I believe this is worth looking into.

An alternative explanation was suggested by the authors themselves--that gun ownership was climbing faster in “Stand Your Ground” states than in others (although the authors suggest that “Stand Your Ground” statutes may have *caused* that increase). The notion that “Stand Your Ground” laws led to a greater rate of gun ownership rates strikes me as attributing too much to these laws. The more likely explanation for any difference in rates of increase in gun ownership is that Southern states, for cultural reasons, were especially fertile ground for sparking increased interest in firearms at a time that the Supreme Court was deciding Second Amendment rights. Issues of firearm control were very much on the minds of many Americans. See *District of Columbia v. Heller*, 554 U.S. 570 (2008). Prior to the Trayvon Martin case “Stand Your Ground” laws received far less attention.

A third possibility is that that increases in population over the course of the decade were insufficiently taken into account by the authors. Since the “Stand Your Ground” states tend to be high-growth states, this would make it appear that homicides were increasing in “Stand Your Ground” states, while the increase was largely a function of population growth. Texas, Arizona, and Florida, for example, grew 20.6%, 24.6% and 16.6% respectively and were “Stand Your Ground” states, while Illinois, New York, and Ohio grew 3.3%, 2.1% and 1.6% respectively and did not enact “Stand Your Ground” statutes. I cannot tell the extent to which the authors adjusted their figures to account for this constant change in population size.

Note the fact that population growth can itself result in increased feelings of rootlessness and hence in higher crime. Even taking into consideration actual population for each time period looked at will not account for this.

I am not in a position to draw conclusions here, except to state that the peculiarities in the findings of McClellan & Tekin leave me unconvinced that they have discovered a causal connection between “Stand Your Ground” statutes and an increase in homicide rates. See also *supra* at n. 12.

The same is true of the findings in Cheng & Hoekstra. Their study is similar to that of McClellan & Tekin in that it attempts something that is nearly impossible: It tries to isolate the effects of “Stand Your Ground” laws from the many other differences between states like Texas, Florida, and Arizona (which have adopted “Stand Your Ground” statutes) and states like New York, Illinois and Ohio (which have not).

Cheng & Hoekstra (whose study is also cited favorably by Commissioner Yaki) used a difference within difference approach. They make two findings: (1) If “Stand Your Ground” statutes have any deterrence effect on robbery, aggravated assault and burglary, it is a very small one; and (2) On the other hand, states that passed “Stand Your Ground” statutes (which the authors repeatedly call “Castle Doctrine” laws) experienced a very substantial uptick in homicide following the adoption of those statutes.



just as some believe they have evidence in support.<sup>51</sup> But I am skeptical that overly ambitious and complex regressions can be the basis of any conclusions.<sup>52</sup> And I submit that anybody who is

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If I were, for example, a Texas state legislator, I'm not sure I'd be as discouraged as Cheng & Hoekstra at the evidence of the deterrence effect of "Stand Your Ground" laws. They admit that it may well be the case that "Stand Your Ground" laws caused a 2.5% decrease in aggravated assault, a 1.9% decrease in robbery, and a 2.1% decrease in burglary. The authors evidently think that is small potatoes. In fact, however, that would represent 1,822 fewer aggravated assaults, 633 fewer robberies, and 3, 123 burglaries in Texas each year.

That may not be as impressive as the effect one might get from hiring 500 more police officers or cutting the unemployment rate by a percentage point, but it takes far less from the public purse than the former and it is more within the control of the state legislature than the latter. If I were a Texas legislator I would be more than delighted to learn that such a small tweak to state law had such a beneficial effect.

But Texas legislators shouldn't get excited. Cheng & Hoekstra did not find such an effect; they simply could not eliminate the possibility. Moreover, their finding that "Stand Your Ground" states have experienced an 8% uptick in homicide relative to other states (after controlling for many differences between the groups of states) demonstrates that their analysis did not take into consideration all the differences between the groups of states. It is simply implausible that "Stand Your Ground" statutes would have such a profound effect on homicide rates. It would be easier to believe that "Stand Your Ground" laws cause cancer. Consequently, their findings on deterrence must be viewed with great skepticism as well.

Why is the 8% implausible? "Stand Your Ground" laws affect only a very small number of homicide cases. Very few homicides involve claims of self defense. See text and note at n.10. Of those that do, most involve situations in which it is obvious that the individual invoking self defense had no opportunity to flee. The danger was imminent. Of those where flight would have been possible, many occur in the home, where the right to stand one's ground is longstanding and universal across American jurisdictions.

<sup>51</sup> A Texas study in this regard is interesting. In September of 2007, Texas passed a "Stand Your Ground" law. In November of the same year, in suburban Houston, resident Joe Horn shot and killed two burglars who had been burglarizing his neighbor's home. He said they were coming at him in the neighbor's front yard. The incident was recorded on a 911 tape with the 911 operator urging Horn to wait for the police to arrive rather than to insert himself into the situation. See [https://en.wikipedia.org/wiki/Joe\\_Horn\\_shooting\\_controversy](https://en.wikipedia.org/wiki/Joe_Horn_shooting_controversy). Rightly or wrongly under Texas law, the grand jury declined to indict.

Researchers found that through the period leading up to August 31, 2008, burglaries decreased in Houston, but not in Dallas. Ling Ren, Yan Zhang & Jihong Solomon Zhao, *The Deterrent Effect of the Castle Doctrine Law on Burglary in Texas: A Tale of Outcomes in Houston and Dallas*, 61 *Crim & Delinquency* 1127 (2012). Did Texas' "Stand Your Ground" law have any causal role to play here? It is certainly plausible that the intense publicity surrounding the Horn case deterred burglaries. But did Horn's action have any causal connection to the "Stand Your Ground" law? If he would have acted the same way under previous law, then the answer would be "no." But it is difficult to say. Maybe he would not have.

<sup>52</sup> A good example is a study of Arizona's 2006 "Stand Your Ground" law. Looking at data from 2002 to 2011, its author found that the number of robberies was not decreased by the passage of that legislation and (more importantly) the number of homicides was not increased. This suggests the change was not very important. Curiously, it nevertheless found that the number of suicides had increased. Since it is not obvious why "Stand Your Ground" legislation would lead to more suicides (but not more homicides), it seems odd to attribute the suicide increase to the "Stand Your Ground" law. But the author seems inclined to do so anyway. Mitchell B. Chamlin, *An Assessment of the Intended and Unintended Consequence of Arizona's Self-Defense, Home Protection Act*, 37 *J. Crime & Justice* 327 (2014). Perhaps the Great Recession, which commenced in 2008 and lasted many years, is a more likely contributor to rising suicide rates over this period. Mayowa Oyesanya, Javier Lopez-Morinigo, and Rina Dutta, *Systematic Review of Suicide in Economic Recession*, 5 *World J. Psych.* 243 (2015). See also David K. Humphreys, Antonion Gasparrini & Douglas J. Wiebe, *Evaluation the Impact of Florida's "Stand Your*

certain about the answer to this question for all time is making a mistake. It depends on a host of unknowables. And the answer may be different for one culture than it is for another. It is thus a question that needs to be left to the political judgment of legislatures or, in the absence of a judgment by a legislature, by the courts.

The best I can offer may be this: I very much doubt the effect is large, no matter which direction it goes. Stand Your Ground laws apply to only a few cases, and most citizens are unaware of their existence. Some advocates of the “Duty to Retreat” have tried to suggest that the states that have adopted “Stand Your Ground” rules tend to be those that value a gun-slinging image. One would think, however, the longer a state has employed a “Stand Your Ground” rule, the more dangerous they would be to live in (and the longer a state had been known for its “Duty to Retreat” rule, the more tranquil it would be). If so, that would mean Ohio and Indiana should be among the most dangerous, and Alabama among the most tranquil. Yet I doubt many Americans view those states that way.

The second argument in favor of a “Stand Your Ground” rule is a prudential one that arises out of the difficulty of knowing for sure whether a defendant could have safely retreated. One could say that “Stand Your Ground” rules create an irrebuttable presumption that if an otherwise innocent person decides to stand his ground rather than flee, that is was because he could not have safely retreated. Such a presumption will be wrong sometimes, but it may be right more often than a rule that juries must decide in each case whether the defendant could have safely retreated.<sup>53</sup>

Beale, of course, disputed the wisdom of such a rule. He argued that just because it is often difficult to judge whether retreat would have been safe it “by no means follows that retreat when certainly safe should be less requisite. “

One can conceptualize taking the issue away from the jury by irrebuttably presuming an otherwise innocent defendant could not have safely retreated as adhering to the logic of Justice Holmes: Expecting detached calculation from someone who is in danger of imminent death is to expect far too much. Give them a break.

I don’t need to resolve these issues. Legislatures are in a better position to judge these matters than a law professor. But here’s the bottom line: Whether one supports or opposes “Stand Your

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*Ground” Self-Defense Law on Homicide and Suicide by Firearm*, JAMA Intern. Med. 44 (January 2017)(making extraordinary claims out of proportion to the number of self-defense cases).

<sup>53</sup> The argument for this approach may be stronger in more recent centuries than it was in 16<sup>th</sup> century England, when altercations were more likely to involve swords, knives or fists than guns. In 19<sup>th</sup>, 20<sup>th</sup> or 21<sup>st</sup>-century United States, the likelihood that guns will be involved increased very substantially. The proportion of cases in which retreat will be ill-advised thus increased substantially. At some point, it arguably makes sense to presume irrebuttably that retreat would have been unsafe.

Ground” laws, Attorney General Holder’s view that they are somehow novel is incorrect. This is a debate that has been going on a long time.

**THE APPARENTLY WIDESPREAD NOTION THAT “STAND YOUR GROUND” LAWS ALLOW AN INDIVIDUAL TO USE DEADLY FORCE IF HE SIMPLY “FEELS THREATENED” IS FALSE.**

The argument that “Stand Your Ground” laws allow anyone who feels threatened is frequently repeated.<sup>54</sup> Even former President Obama appears to have bought into this misimpression. Shortly after George Zimmerman was acquitted in the Trayvon Martin case, Obama asked what would have happened had the roles been reversed: “[D]o we actually think that [Trayvon Martin] would have been justified in shooting Mr. Zimmerman, who had followed him in car, because he *felt threatened?*”<sup>55</sup>

But it is an ill-informed question. Florida’s “Stand Your Ground” law as to the use of deadly force is as follows:

**776.012 Use or threatened use of force in defense of person.— ...**

- (2) 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*. 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.

Note that what I am discussing here is not really about “Stand Your Ground” itself. This goes to the contours of basic self-defense law.<sup>56</sup> Florida requires a reasonable belief that one is being

<sup>54</sup> Commissioner Yaki appears to be among those who buy into this misconception. See Yaki Statement at 16-17.

See also Robert Leider, *Understanding Stand Your Ground*, Wall Street Journal (April 18, 2012)(“Many have asserted that in Florida anyone who believes he is in danger can use deadly force. ... These perceptions of the law are wrong. ... [Florida’s Stand Your Ground law requires that an individual] “reasonably believe that the aggressor threatened him with death, great bodily injury, or intended to commit a forcible felony ....”).

<sup>55</sup> *Transcript: Obama Addresses Race, Profiling and Florida Law*, CNN (July 19, 2013)(italics added), available at <https://www.cnn.com/2013/07/19/politics/obama-zimmerman-verdict/index.html>. See also *Editorial: “Stand Your Ground” Doesn’t Stand Common Sense Test*, York Dispatch (October 24, 2018)(“[T]here should be little argument that so-called “stand your ground” laws, which allow armed citizens to shoot and kill assailants if they feel threatened, are unnecessary invitations to vigilante homicide and need to be rescinded”), available at <https://www.yorkdispatch.com/story/opinion/editorials/2018/10/24/editorial-stand-your-ground-doesnt-stand-common-sense-test/1737906002/>.

<sup>56</sup> In tort law, only someone who *reasonably* believes that his assailant is about to inflict an *intentional contact or other bodily harm* and that he is thereby put in *peril of death, serious bodily harm or ravishment*, which can be *safety prevented only by the immediate use of force* likely to cause death or serious bodily harm. See Restatement (Second) of Torts § 65 (1965). The Model Penal Code, on the other hand, is a little different and is considered

threatened. And not just any threat of intentional contact or bodily harm will do. The threat has to put the individual in peril of death, great bodily harm or the imminent commission of a forcible felony (e.g. rape). Moreover, the threat must be imminent. If there is time to call the police, then the police must be called. Any suggestion that deadly force can be employed if someone merely feels threatened is thus false.<sup>57</sup>

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unusual: It doesn't mention reasonableness (though it does require "the actor [to] believe[] that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." Model Penal Code § 3.04(1). The Model Penal Code, however, does impose a duty to retreat (in places other than the home). I can see the argument for the Model Penal Code's failure to require the use of deadly force in self-defense to be reasonable for criminal law purposes (although for tort law purposes there needs to remain, at the very least, a requirement of reasonableness). One could argue that incarcerating or otherwise punishing a person who happens to be unreasonably timid and anxious serves no purpose. But if one is going to take that position it is important that one stick with a duty to retreat. "Stand Your Ground" jurisdictions should (and do) require reasonableness.

<sup>57</sup> A variation of this argument involving the concept of "implicit bias" appears in Commissioner Yaki's Statement. Commissioner Yaki does not define the term "implicit bias," but I understand him to be referring to the "attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner." <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>. In the racial context, this is often interpreted to mean that many white persons who profess not to be racially biased nonetheless actually are unconsciously biased against racial and ethnic minorities and that this unconscious bias means that whites frequently discriminate against racial and ethnic minorities without being aware of it.

Talk of "implicit bias" is fashionable these days, especially among those involved in the diversity training business – perhaps in large part because a free, readily available online test purports to be able to measure an individual's "implicit bias" against African Americans. See Project Implicit, available at <https://implicit.harvard.edu/implicit/takeatest.html>. There is, however, significant reason for skepticism that the test accurately measures an individual's actual bias.

A full discussion of the merits of the IAT lies beyond the scope of this Statement, but for overviews of the major criticisms of the IAT, *see generally* Jesse Singal *Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job*, *New York Magazine*, January 11, 2017, available at <https://www.thecut.com/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html>; Olivia Goldhill, *The world is relying on a flawed psychological test to fight racism*, *Quartz*, December 3, 2017, available at <https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight-racism/>; Althea Nagai, *The Implicit Association Test: Flawed Science Tricks Americans into Believing They Are Unconscious Racists*, *The Heritage Foundation*, December 12, 2017, available at <https://www.heritage.org/science-policy/report/the-implicit-association-test-flawed-science-tricks-americans-believing-they>; Heather Mac Donald, *Are We All Unconscious Racists?* *City Journal*, Autumn 2017, available at <https://www.city-journal.org/html/are-we-all-unconscious-racists-15487.html>.

The important part is this: Even if one is less skeptical of implicit bias than I am, it still makes little sense to use implicit bias as an argument against the "reasonable belief" component of "Stand Your Ground" laws. As discussed above, the plain text of the Florida law requires that the person must believe that the use of 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." The perception that an individual is threatening merely because of his or her race would not qualify under this standard. Moreover, the "reasonable belief" standard in not just a component of "Stand Your Ground" laws, it is part of traditional self defense. I trust that Commissioner Yaki would not abrogate traditional self defense—i.e. impose upon Americans who are being threatened with imminent death or great bodily harm have a duty to die simply because the implementation of that defense will never be perfect.

**THE APPARENTLY WIDESPREAD NOTION THAT INITIAL AGGRESSORS CAN BENEFIT FROM “STAND YOUR GROUND” LAWS IS ALSO FALSE.**

Another common misunderstanding is that an initial aggressor can invoke the right to stand his ground. This, too, is mistaken. From the time of Coke and Blackstone, it has been repeatedly articulated that if two individuals are engaging in mutual combat with each other, such that they are both in some way at fault, there is a duty to retreat if it can be done safely before deadly force may be employed. This aspect of the rule is important to the law. Consider, for example, the case of duelists—perhaps the quintessential mutual combatants. Without a duty to retreat on the part of mutual combatants, whoever prevails in the duel would be able to claim that since the other party intended to kill him they are in the clear for acting in self-defense. Imposing a duty to retreat on both of them preserves to the state the ability to come down hard on duelists.

The case for denying the initial aggressor in an attack on an innocent victim is a fortiori an exception to traditional “Stand Your Ground” rules. Blackstone discusses the *innocent* victim’s right of self-defense without any qualifier. Coke is explicit that the *innocent* victim has no duty to give way.

This was evident in American cases as well. For example, in *Erwin v. State*, the Indiana Supreme Court placed an important qualifier on its “Stand Your Ground” rule. It stated that a man “who is without fault” “is not obliged to fly from his assailant.” It never suggested that an initial aggressor (i.e. a man who is with fault) is entitled to that same option.

Most important, the Florida “Stand Your Ground” law is not to the contrary. It explicitly states that the justification of self-defense is *not* available to an individual who:

- (1) Is attempting to commit, committing or escaping after the commission of, a forcible felony; or
- (2) Initially provokes the use or threatened use of force against himself or herself, unless:
  - (a) Such force or threat of force is so great that 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 the use or threatened use of force which is likely to cause death or great bodily harm to the assailant; or
  - (b) In 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.

Fla. Stat. § 776.041 (2014).

Determining what constitutes the “initial aggression” (or in the words of the Florida statute, what “initial[] provo[cation]”) may sometimes require a little thought. The most obvious cases involve physical attacks. Indeed, physical attacks are by far the most typical initial aggression. If Alice walks up to Bob and punches him in the nose, and Bob, fearful that Alice is about to cause him seriously bodily harm, draws his gun, Alice has a duty to retreat, if she can do so safely, rather than to draw her gun and kill Bob. Why? Because Alice initially provoked Bob (§ 776.041(2)). This is so even though the punch in the nose may itself be only a misdemeanor and not a felony under § 776.041(1).

At the other end of the spectrum, certain things are *not* considered initial aggression or provocation. An individual has the right to discuss a sensitive subject, to engage in an inconsiderate act, to demand an explanation of the other individual’s actions, and even to hurl insulting epithets at the other individual without forfeiting any aspect of his right to defend himself.<sup>58</sup>

One can easily see how a nation that is careful to protect free expression in so many ways would be careful not to define the exercise of free expression as “aggression” or “provocations.”

Are there things that don’t constitute violence that are classed as initial aggression or provocation? Professor Cynthia Ward in “Stand Your Ground and Self-Defense” cites “being caught sleeping with the deceased wife” as a possible example.<sup>59</sup> But, if so, that goes far beyond inconsiderate acts, insults, or annoying interrogations.

The Trayvon Martin case was thus not a case of initial aggression by Zimmerman. Some have suggested that George Zimmerman somehow “provoked” Martin by following him and asking him why he was there. But this does not rise to the level of aggression or provocation as those terms have been understood.

Even if it did constitute aggression or provocation within the meaning the Florida statute, Zimmerman would likely qualify under § 776.041 (2)(b) as having “withdraw[n] from physical contact with [Martin] and indicate[d] clearly to [Martin] that he ... desire[d] to withdraw and terminate the use or threatened use of force, but [Martin] continue[d] ... the use or threatened use of force.

The uncontradicted evidence was not just that he had turned away and was surprised by Martin, who had turned the tables and was now following Zimmerman. The jury found that Martin had knocked Zimmerman to the ground and was beating Zimmerman’s head into the concrete sidewalk when Zimmerman pulled out his gun and shot Martin. At that point, retreat was impossible.

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<sup>58</sup> 2 Wharton’s Criminal Law § 128 (5<sup>th</sup> ed. 1993), quoted in Ward at 114.

<sup>59</sup> Ward at 114 (citing *id.*).

Might the jury have been wrong about the facts? Anything is possible (though the scrapes on the back of Zimmerman's head must have gotten there somehow). But the point remains that the problem in that case was not the Florida "Stand Your Ground" law.

**CONCLUSION:**

The Commission is publishing this transcript more than seven years after Trayvon Martin passed away—without any reference to its independent research on the subject. The controversy over his death and over "Stand Your Ground" laws has largely faded out of the headlines. Some members of this Commission might be inclined to bemoan this report not being as relevant as it might have been had it been ready closer to 2012. I disagree. Cooler heads should have prevailed early on during the debate over Stand Your Ground laws. But they did not. Now that years have passed, the Commission could have made a modest contribution to that debate by publishing the results of its research. It chose to bury those results instead only because they did not go in the direction the Commission's majority was hoping for.

## Statement of Commissioner Peter N. Kirsanow

The Commission held a hearing on Stand Your Ground laws in the wake of the death of Trayvon Martin. In my view, this is not a subject the Commission is well-equipped to address. Reviewing the witness statements and hearing transcripts four years after the hearing, it seems that most of the disagreements center around four primary issues:

- 1) Whether there is a duty to retreat when exercising self-defense;
- 2) Self-defense;
- 3) Possession of firearms; and
- 4) Race.

The first three items are closely linked. However, all of them were jumbled together during our briefing under the heading “Stand Your Ground,” and also in regard to the tragic Martin-Zimmerman altercation. This did not bring clarity to the discussion.

### The Duty to Retreat

The term “Stand Your Ground” is confusing. It sounds novel, when it is merely one long-standing interpretation of the law of self-defense.<sup>1</sup> Nor is this interpretation limited to states regarded as politically conservative.<sup>2</sup> Therefore, in this section, I will discuss the disagreement over whether there is a duty to retreat when exercising self-defense, as that better describes the issue.

One of the problems with having the Commission investigate an issue such as Stand Your Ground is that there are different and irreconcilable values in play. It is tempting to view Stand Your Ground as a matter of determining whether individuals of a particular race are more likely to invoke Stand Your Ground or not, but the conflict is more fundamental. The issue is really a matter of determining who should bear a heightened risk of injury – the aggressor or his victim. States that have adopted stand your ground laws or have common-law doctrines of self-defense that are similar to stand your ground have decided that the aggressor should bear the heightened risk of

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<sup>1</sup> See Eugene Volokh, “The Duty to Retreat in the Founding Era,” The Volokh Conspiracy, December 21, 2017, <http://reason.com/volokh/2017/12/21/the-duty-to-retreat-in-the-founding-era>.

<sup>2</sup> See Cal. Jury Instr. – Crim. 550. Self-Defense – Assailed Person Need Not Retreat.

A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of [his][her] right of self-defense a person may stand [his][her] ground and defend [himself][herself] by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue [his] [her] assailant until [he][she] has secured [himself][herself] from danger if that course likewise appears reasonably necessary. ***This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.*** [emphasis added]



injury. States that adhere to a “duty to retreat” say that the victim should bear the heightened risk of injury.

I was struck by this while reading exchanges between various commissioners and South Carolina Representative Todd Rutherford. This exchange is representative:

Vice-Chair Timmons-Goodson: Okay. Second and last question. You say that stand your ground law to you means that you don't have to live in force –

Representative Rutherford: Fear

Vice-Chair Timmons-Goodson: - that it doesn't make sense to you that one would not be permitted to elevate force. I guess I'm left wondering why is it not common sense that if someone comes up and pushes you, that you push them back, or someone comes up and hits you with a fist that you hit them with a fist, why should – I mean, why does it make such sense that you could elevate the force that you use to a gun or a knife in response to being pushed or hit with a fist?

Representative Rutherford: Commissioner, respectfully, I submit that you should have a right to not have people hit you with a fist. That you have a right not to be pushed. That you have a right not to wait and see what the next step will be once someone hits you in the face.

You should not wait to see whether you're going to be knocked out. You should have a right to pull that gun if you have one and say, “Leave me alone. I don't want to be bothered.” And that's what the general assembly found. We have a right to live in peace.

And peace means that I'm not going to wait on you to hit me. I'm not going to wait on you to push me. I'm standing with my two children – I have two little boys. And if you're going to walk up to me and try and assault me or one of them I'm not going to wait to see what your next step is going to be before I decide what I'm going to do.

That's what the general assembly found. And I think that's common sense.<sup>3</sup>

It might seem hyperbolic to say that a duty to retreat shifts extra risk on to the victim of aggression, and undoubtedly that is not what my colleagues have in mind. Nonetheless, that is the practical effect. As Representative Rutherford said, the duty to retreat means that you have to “wait and see what the next step will be once someone hits you in the face.” Professor Katheryn Russell-Brown also discussed these disparate values in her written testimony:

The second approach [to the issue of use of deadly force in self-defense] is “no retreat.” In the face of threatened violence, a person should be allowed to stay put – to stand his ground and fight back against his attacker. In the 1800s, the “no

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<sup>3</sup> Transcript at 73-74.

retreat” approach was particularly attractive to frontier states, which viewed retreat as a sign of cowardice. *Erwin v. State*, an 1876 case decided by the Ohio Supreme Court, represents this perspective. The court declined to use the retreat rule and overturned the defendant’s conviction. It stated, “[A] true man, who is without fault, is not obliged to fly from an assailant who, by violence of surprise, maliciously seeks to take his life or do him enormous bodily harm.” In *Brown v. United States* (1921), the U.S. Supreme Court addressed the retreat rule. The murder case involved a victim who had a knife and a defendant who had a gun. The Court ruled that retreat is not always required. Instead, it is a factor for the court to consider evaluating a self-defense claim. Many people viewed the rule of retreat as an outdated legal carryover from the common law. Today the majority of states do not require retreat before the use of deadly force.<sup>4</sup>

This difference of opinion, largely rooted in cultural differences, persists today.<sup>5</sup> As Ilya Shapiro stated in his written testimony, “[T]he core of the debate over SYG – the real one, not the phony way we’ve been having lately – is really one about the duty to retreat.”<sup>6</sup>

## Self-Defense

The views expressed at the hearing would in many cases cast the idea of self-defense into jeopardy entirely. For example, David Labahn stated:

Even hearing that California is a stand your ground state surprises me immensely. I was a 10 year prosecutor there in that state, I prosecuted plenty of homicides and lots of violence, especially in Southern California.

I then spent 10 years at the State Association. I was running the California District Attorneys Association when the proponents of this legislation – it was 2006, they brought it to Sacramento and they tried to put the bill in. We laughed at it. We laughed that you’re going to have criminal immunity and civil immunity for taking somebody else’s life. We thought it was almost funny that – you’ve got to be kidding me.<sup>7</sup>

One problem with Mr. Labahn’s statement is that if you kill someone in self-defense (and Stand Your Ground is merely one way the law approaches the natural right to self-defense) then yes, you are not criminally prosecuted for taking someone’s life. Nor should you be civilly liable for taking someone’s life if you were attacked by that person and had to defend your own life. If you clearly acted in self-defense, you shouldn’t have to go through a trial to prove that. As with so many other aspects of government, the process is itself a punishment. The fact that Mr. Labahn thought this

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<sup>4</sup> Written Statement of Katheryn Russell-Brown, University of Florida, Levin College of Law, at 3-4.

<sup>5</sup> Written Statement of Ilya Shapiro, Cato Institute, at 3.

<sup>6</sup> Written Statement of Ilya Shapiro, Cato Institute, at 3.

<sup>7</sup> Transcript Panel 3 at 61-62.

idea laughable illustrates how opposition to Stand Your Ground is often rooted in skepticism of self-defense.

John Lott made an interesting observation regarding homicide rates in states that introduce Stand Your Ground laws. If the homicide rate in a state does increase, and if that increase is attributable to this law, it could be because more people are availing themselves of the right of self-defense. (There are relatively few homicides, so even a small increase in the number will show up in the statistics.) A person who would have been robbed, assaulted, or raped defends herself, and in doing so takes the aggressor's life.<sup>8</sup> Some of my colleagues raised the question of why a person wouldn't use something short of deadly force to defend herself. I agree that is preferable. But many times, a criminal (or an angry ex-boyfriend) will prey on someone who is physically weaker. If a would-be mugger is looking for a victim and an Ohio State football player walks down one side of the street, and an elderly man in a wheelchair rolls down the other side of the street, the mugger will probably think it will be less trouble to attack the elderly man. A wheelchair-bound person is unlikely to be able to defend himself – unless he has a gun.<sup>9</sup> The Ohio State football player might – *might* be able to punch the mugger and go on his way (and maybe not if the mugger has a knife or gun), but the man in the wheelchair certainly can't. But if he shoots the mugger, the mugger is more likely to die than if the football player punches him.

## Possession of Firearms

Many of the panelists cite George Zimmerman's history of arrests and question why he was not barred from owning a gun.<sup>10</sup> The fact is, though, that Zimmerman was never convicted of a felony. Usually progressives support programs that divert low-level offenders from jail, like the program that sent Zimmerman to alcohol-education classes rather than convicting him of two felonies. Let us imagine this had played out differently. Let us imagine that George Zimmerman had been convicted of those two felonies and had served his time. Then in October 2014, he is sitting in

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<sup>8</sup> John Lott, "Misleading Journal of the American Medical Association research about Florida's Stand Your Ground law," November 28, 2016, <https://crimeresearch.org/2016/11/misleading-journal-american-medical-association-research-floridas-stand-ground-law/>.

<sup>9</sup> John Barnes, "Justified to kill: Why there are more self-defense killings in Michigan than anyone knows," MLive, June 12, 2012, [https://www.mlive.com/news/index.ssf/2012/06/justified\\_to\\_kill\\_why\\_there\\_ar.html](https://www.mlive.com/news/index.ssf/2012/06/justified_to_kill_why_there_ar.html).

Sometimes, cases are reported [to the FBI] that are wildly inaccurate.

The FBI lists an incident in Flint in 2001 where a 17-year-old boy shot a 68-year-old man.

It was the other way around.

The 68-year-old, Clinton Burns, was confronted in his home by Howard Byas, who climbed through the window and threatened to kill Burns unless he surrendered his wallet and other valuables.

Burns pointed a remote control at the teen and ordered him to leave. When the teen snatched the remote, Burns shot him with a .38 caliber pistol hidden under a seat cushion.

The cushion was on his wheelchair. Burns, who passed away in 2008, was a paraplegic.

<sup>10</sup> Written Statement of Arkadi Gerny, Center for American Progress, at 1.

front of the Commission testifying about how he committed a youthful indiscretion and had tried to go straight, and yet had been unable to obtain employment that matched his skills because of his criminal record. The Commission would have solemnly nodded and agreed that there is a need for diversion programs so that the lives of foolish young people are not permanently blighted, and issued a report on the need to prohibit the use of criminal background checks in hiring.<sup>11</sup>

I support the use of criminal background checks in hiring, and I believe the current regime of criminal background checks in gun purchases is defensible. But I think employers should treat arrests and convictions differently when evaluating an individual's suitability for employment. We should be at least as careful when it comes to curtailing an individual's constitutional rights. After all, no one has a constitutional right to a particular job – or to any job at all – but the right to carry a gun is protected by the Second Amendment.

Our Constitution was not drafted with “safety” as its overriding concern. It protects certain rights, even at the expense of other interests. It protects freedom of speech, even though that freedom has often been used to hurt people while providing (in the minds of many) no discernable benefit.<sup>12</sup> Defendants have the right to confront their accuser, even though that has pained many victims of

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<sup>11</sup> Those few readers who follow this Commission closely may be aware that the Commission has in fact done exactly that, except that the man sitting in front of us explaining the difficulty ex-felons have obtaining employment had committed, among other offenses, armed robbery. See U.S. Commission on Civil Rights, *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy*, December 2013, at 49 (testimony of Glenn E. Martin), [http://www.eusccr.com/EEOC\\_final\\_2013.pdf](http://www.eusccr.com/EEOC_final_2013.pdf); Glenn E. Martin, JustLeadership USA, <https://www.heartsonfire.org/glenn-e-martin-justleadershipusa/>.

<sup>12</sup> *Snyder v. Phelps*, 562 U.S. 443, 454 (2011)(Roberts, C.J.).

The “content” of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of “purely private concern.” The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don't Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You're Going to Hell,” and “God Hates You.” While these messages may fall short of refined social or political commentary, the issues they highlight – the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy – are matters of public import.

*But see Snyder v. Phelps*, 562 U.S. 443, 463 (2011)(Alito, J., dissenting).

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree.

crime. And individuals have the right to bear arms, both as a shield against government tyranny and for self-protection, even though people sometimes unlawfully kill others.<sup>13</sup>

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (*per curiam*). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.<sup>14</sup>

## Race and Self-Defense

This hearing was prompted by the tragic death of Trayvon Martin. No one really knows what happened that night. Even George Zimmerman may not recall events with complete clarity, given the darkness and the stress of the situation. And tragically, Trayvon Martin is dead. What we can say is that a Florida jury of six women found George Zimmerman not guilty<sup>15</sup>, and that the Obama Justice Department found that there was insufficient evidence to charge Zimmerman with violating Martin's civil rights.<sup>16</sup> It is worth noting that even states that have a duty to retreat only require a person to retreat if he can safely do so. If Martin was on top of Zimmerman and attacking him, as Zimmerman claimed (and which is supported by forensic evidence), Zimmerman physically could not have retreated. Depending on how the confrontation between Martin and Zimmerman played

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<sup>13</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010).

<sup>14</sup> *Heller* at 634-35.

<sup>15</sup> Trayvon Martin shooting fast facts, CNN, updated May 7, 2018, <https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html>.

<sup>16</sup> Department of Justice, Federal Officials Close Investigation Into Death of Trayvon Martin, February 24, 2015, <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-trayvon-martin>.

out before they wound up on the ground, Zimmerman may not have been able to *safely* retreat even before he was on the ground.<sup>17</sup>

None of this is to say that I think Zimmerman followed the best course of action leading up to the altercation with Martin. But the most heated claims made about this sad series of events were not supported by the evidence.

The hearing was prompted by the claim that “Perhaps the most divisive and inflammatory of those questions [about the Martin-Zimmerman altercation] is whether racial bias skews our justice system through “Stand Your Ground” (SYG) laws that shield those who claim self defense.”<sup>18</sup> This question is very difficult to answer at any level of generality. There are few justifiable homicides<sup>19</sup>, an even smaller number would be classified as “SYG,” and whether or not a homicide is justified is very fact-specific.

Still, there is some statistical evidence that SYG laws do not have a significant racial disparate impact, which I discuss below. When this report was proposed, the idea was that Commission staff, principally Dr. Sean Goliday<sup>20</sup>, would analyze Stand Your Ground cases to determine if there was a racially disparate impact or racial bias in the application of Stand Your Ground Laws.<sup>21</sup> The

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<sup>17</sup> Transcript 1 at 37-38.

Senator Smith:

[O]ne of my pet peeves when discussing stand your ground is when anyone mentioned “retreat” today, remember Florida law and I’m unsure of other laws, always had a word that everyone neglects, it said, “safely retreat.” . . . The Florida law has always been, you had a duty to safely retreat.

<sup>18</sup> Commissioner Michael Yaki, “USCCR Special Investigation: Stand Your Ground Laws & Racial Bias,” Concept Paper, June 7, 2012.

<sup>19</sup> Transcript 2 at 17-18.

William Krouse:

[I]n any given year white-on-black justifiable homicide incidents they range from about 25 to 30 with a slight increase in the latter five year period. . . . [But] if you go to Gary Kleck in Point Blank, he estimates that we under-report justifiable homicides by private citizens by about two, three, maybe four-fold. So you’re looking at, over this 10 year period, about 250 cases or 25 cases a year of white-on-black justifiable homicides. . . . But if you were to look at comprehensive data you might be looking at anywhere between 50, 75, to 100 cases per year. So if you did it for a 10 year period that’d be a thousand cases.

<sup>20</sup> Unfortunately, Dr. Goliday left the Commission for another position within the federal government. I thank him for his hard work on this report, even though none of his work saw the light of day.

<sup>21</sup> There’s a lot of – there’s data out there that suggests, and it only suggests, and again that’s why I think that it’s appropriate that we get involved in this, that there may be racial bias in the enforcement and application of these statutes.

By racial bias, I’m talking about the fact that just on some statistics out there alone there are questions about whether or not if you are a – if you are a black victim, in other words, the person who was shot by someone asserting the SYG, that there seems to be a disproportionate number of those victims are African-American or are a minority versus homicide victims generally for that.

Commissioner Michael Yaki, U.S. Commission on Civil Rights, Transcript of May 31, 2013 Business Meeting at 6-7.

projected budget for this study was \$100,000.<sup>22</sup> It is now more than six years since the Commission voted to proceed with this project, and now we are releasing only a transcript – not any of the statistical analysis that staff conducted. I leave it to the reader to draw his own conclusions as to why this is so.

### **Statistical Research of William Krouse, John Roman, and John Lott**

William Krouse, John Roman, and John Lott presented statistical research at the Commission's hearing. When considering their research, it is important to remember that they were using different datasets. Krouse and Roman used justifiable homicide data from the FBI's Uniform Crime Statistics Supplementary Homicide Reports.<sup>23</sup> In addition, Krouse was only presenting data on justifiable homicides generally, not on homicides where SYG was invoked.<sup>24</sup> Lott used the Tampa Bay Times'<sup>25</sup> database of SYG claims made in Florida since the law was enacted through October 1, 2014.<sup>26</sup> This means that Krouse and Roman were drawing from a larger but incomplete universe of cases (for example, Florida is not included in the Supplemental Homicide Reports).<sup>27</sup> Lott was using a data set that included cases from only one state, but was arguably more complete in regard to that state and had more details about individual cases<sup>28</sup>

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<sup>22</sup> Id. at 5.

<sup>23</sup> See Written Statement of William Krouse; see also Transcript 2 at 19 (Roman: "I'm going to talk about the same data that Bill [Krouse] talked about, we used it in our analysis").

<sup>24</sup> Transcript 2 at 11.

<sup>25</sup> Throughout the hearing transcript, witnesses refer to this newspaper as the "Tampa Bay Tribune," but the name is the Tampa Bay Times.

<sup>26</sup> Written Statement of John Lott at 3, 5.

Up through October 1<sup>st</sup> this year, the newspaper had collected 119 cases where people charged with murder relied on Florida's Stand Your Ground law, starting with cases filed in 2006. . . . Besides information on the victim's and defendant's race and gender, the Tampa Bay Tribune collected a lot of other useful information on the cases: whether the victim initiated the confrontation, whether the defendant was on his own property when the shooting occurred, whether there was physical evidence, whether the defendant pursued the victim, and the type of case (a drug deal gone bad, home invasion, etc.). This detailed information about cases is valuable and has not been available in other studies.

<sup>27</sup> Transcript 2 at 13.

The Supplementary Homicide Reports suffer from certain very serious limitations. One, Florida does not report in a manner that is accepted by the FBI. I think it has to do with a technicality on the offender/victim relationship, familial relationship. . . . Other states and localities more importantly do not participate, do not participate fully, and/or only participate intermittently in this Supplementary Homicides Reports Program.

Making things more difficult these reports do not always reflect the final disposition of these cases. Like the UCR, federal and tribal law enforcement do not report to the Supplementary Homicide Report Program.

<sup>28</sup> Unfortunately, it appears that the Tampa Bay Times stopped updating its SYG database in 2013. To get a sense of the type of information Lott is referring to, the archived version of the site is available here: <http://stand-your-ground-law.s3-website-us-east-1.amazonaws.com/data>.

Krouse provided data to the Commission that showed the number of firearms-related intra- and inter-racial homicides involving black and white individuals (single victim/single offender incidents) from 2001-2010.<sup>29</sup> The number of black-on-black homicides was the largest, hovering around 2,000 homicides annually. The number of white-on-white homicides hovered around 300-500 fewer homicides annually – around 1500-1700. The number of inter-racial homicides was quite small. The number of black-on-white homicides held steady at around 250-350 annually, and the number of white-on-black homicides was steady at around 150 annually. The number of black-on-white homicides was *always* greater than the number of white-on-black homicides.

The number of firearms-related, intra- and inter-racial *justifiable* homicides involving black and white individuals from 2001-2010 was quite small, starting around 150 in 2001 and rising to just over 200 in 2010.<sup>30</sup> The annual numbers of black-on-black and white-on-white justifiable homicides both hovered around 60 and slowly rose over 10 years. There was only one year (2004) when the number of white-on-white justifiable homicides was larger than the number of black-on-black justifiable homicides. The number of black-on-white justifiable homicides was miniscule – perhaps around 5 annually – and the number of white-on-black justifiable homicides, although small, was much larger, around 25-30 per year.

Viewing these two charts in conjunction brings to mind a possibility that was not mentioned by Krouse, or indeed by anyone at the hearing: if the number of black-on-white homicides (let us say 250 in a particular year) is much larger than the number of white-on-black homicides (150), perhaps it is not surprising that there are more white-on-black justifiable homicides. If whites are more likely to be on the receiving end of inter-racial violence, they are more likely to use violence to defend themselves. If there are 250 murders of whites by blacks per year, it is perhaps unsurprising that 25 whites per year kill a black attacker in self-defense.

John Roman, also testified at the briefing. His work in this area has received quite a bit of attention. In a report for the Urban Institute, Roman argued that whites were more likely to successfully utilize a SYG defense than were blacks.<sup>31</sup> In particular, Roman argued, white-on-black homicides were more likely to be ruled justified than were black-on-white homicides, and this disparity became more pronounced after a state became a SYG state.<sup>32</sup> In Roman's report for the Urban

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<sup>29</sup> Appendix A, "Firearms-Related, Intra-and Inter-Racial Homicides Involving Black and White Individuals (Single Victim/Single Offender Incidents, 2001-2010)," from Written Statement of William Krouse, at 12.

<sup>30</sup> Appendix A, "Firearms-Related, Intra- and Inter-Racial Justifiable Homicides Involving Black and White Individuals (Single Defender/Single Assailant Incidents, 2001-2010)," from Written Statement of William Krouse, at 13.

<sup>31</sup> John K. Roman, Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Data, July 2013, <https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF>.

<sup>32</sup> Transcript 2 at 25-26.



Institute, he found that of all justified homicides from 2005-2010 (that were included in the FBI's Uniform Crime Statistics Supplementary Homicide Reports):

Overall, 2.57 percent of homicides in the six-year period were ruled justified (1,365 out of 53,019). White-on-black homicides were most likely to be ruled justified (11.4 percent), and black-on-white homicides were least likely to be ruled justified (1.2 percent). Whether a state was an SYG state also affects the likelihood of a homicide being ruled justified.<sup>33</sup>

If you examine shootings that share the salient characteristics of the Martin-Zimmerman shooting, the statistics look different. Roman wrote in his report for the Urban Institute that in shootings where there is a single victim and a single shooter, they are strangers, both are male, and the defendant is older than the assailant, 41.14 percent of white on black homicides are ruled justified in non-SYG states, and 44.71 percent of white on black homicides are ruled justified in SYG states. When you have the same incident characteristics, except that the assailant is white and the defendant is black, 7.69 percent of homicides were determined to be justified in non-SYG states, and 9.94 percent in SYG states.<sup>34</sup>

It is worth noting that according to Roman's research, the only time a self-defense claim was less likely to succeed in a SYG state than a non-SYG state was when there was a black assailant and a black victim.<sup>35</sup> In fact, a greater percentage of black-on-white homicides were deemed justified in SYG states (11.10 percent) than were black-on-black homicides (9.94 percent). This would seem to cut against the claim that law enforcement is hopelessly explicitly or implicitly biased against blacks and in favor of whites in SYG states.

Furthermore, John Lott pointed out at the Commission briefing that Roman's analysis actually indicates the opposite of what he claimed – SYG states actually have a smaller disparity between whether a white-on-black homicide will be found justified rather than a black-on-white homicide. Lott testified:

If you look at Table III of his reports, what he has is, he has a column for the rate of justifiable homicides for black-on-white, white-on-black, for non-Stand Your Ground States, and for Stand Your Ground states. If you look at the coefficients for the non-Stand Your Ground states essentially, when a white kills a black he has a coefficient of like 41, and the coefficient of 7 for blacks killing whites. So it's a

<sup>33</sup> John K. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Data*, July 2013, at 6, <https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF>.

<sup>34</sup> John K. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Data*, July 2013, at Table 3, <https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF>.

<sup>35</sup> *Id.*

ratio of about 5.4 to 1. So it's saying whites who kill blacks are 5.4 times more likely to be found justified in terms of the homicides than blacks.

But then if you look at the Stand Your Ground states the ratio of the coefficients actually falls to 4. So rather than exacerbating it, he simply doesn't – didn't read his coefficients correctly.

And so – also when he talks about 10 to 1, his regressions actually show 4 to 1 difference for Stand Your Ground rather than the 10 to 1 that he was saying. And the problem that you have there is that when you bring up the type of things that Commissioner – a commissioner earlier asking him about the 3 to 1 differences just in terms of whether the person was armed. You pretty much can explain away the differences even just for one of the factors that are there. . . .

*So his results actually showed the opposite of what he was claiming. Rather than the Stand Your Ground laws exacerbating it, it actually reduces the difference in the coefficient between black and white that are there.*<sup>36</sup>[emphasis added]

Lott presented his own research at the briefing using cases from the Tampa Bay Times' database of Florida Stand Your Ground cases. He responded to the Tampa Bay Times' [remember that Lott and others consistently referred to the paper as the "Tampa Bay Tribune," but the correct name is the "Tampa Bay Times"] finding that "67 percent of those who killed a black person faced no penalty compared to 57 percent of those who killed a white."<sup>37</sup> Lott wrote:

Just because two people are charged with murder doesn't mean the two cases are identical. In particular, black and white victims are usually killed by their own race. **The Tribune data shows that seventy-six percent of blacks who were killed in cases where Stand Your Ground was invoked as a defense were killed by other blacks.** Similarly, the vast majority of those who killed whites were white, though that isn't true for Hispanics.

Again, since most blacks are killed by other blacks, that also means that blacks who claim self-defense under the Stand Your Ground law are convicted at a lower rate than are whites. **About 69 percent of blacks who raised the Stand Your Ground defense were not convicted compared to 62 percent for whites.** Interestingly, Hispanics who raise the Stand Your Ground defense are successful the most often – 78 percent of the time.

If blacks are supposedly being discriminated against because their killers so often are not facing any penalty, wouldn't it also follow that blacks are being discriminated in favor of when blacks who claim self-defense under the Stand Your

<sup>36</sup> Transcript 3 at 57-58.

<sup>37</sup> John R. Lott, Jr., Written Statement, at 4. In analyzing the Tampa Times data, Lott found that in Stand Your Ground cases where a black person was killed, 76.3% of the killers were black, 18.4% were white, and 5.3% were Hispanic. In Stand Your Ground cases where a white person was killed, 11.9% of the killers were black, 80.6% were white, and 7.5% were Hispanic. In Stand Your Ground cases where a Hispanic person was killed, 22.2% of the killers were black, 55.6% were white, and 22.2% were Hispanic.

Ground law are convicted at a lower rate than are whites? If this is indeed a measure of discrimination, rather than merely reflecting something different about these particular cases, why are conviction rates so low for Hispanics who raise the Stand Your Ground defense? The figures used to support claims of racism are cherry-picked from the data.

There were also other important differences across the cases not reflected by the simply averages. **Using the Tribune data, blacks killed in these Stand Your Ground confrontations were 26 percentage points more likely to be armed with a gun than whites who were killed.** This strongly suggests that their killers reasonably believed they had little choice to kill their attackers. **By a 42 to 17 percent margin, the blacks killed were also more often in the process of committing a robbery, home invasion, or burglary.** Further, it is much more likely that there is both a witness and physical evidence around when a white person was killed (by a 51 to 38 percent margin). [emphasis added]<sup>38</sup>

## Stand Your Ground and Criminal Records

Panelist David Labahn stated that individuals with arrest records<sup>39</sup> successfully invoke Stand Your Ground legislation. As I discussed above, an arrest is not the same as a conviction and should not prohibit you from losing important rights. Furthermore, simply because you have engaged in criminal activity in the past does not mean you are engaging in criminal activity now. A person who has a criminal record may be more likely to live in a poorer area that has higher crime rates, and thus be more likely to need to engage in self-defense.

Even if you have a criminal conviction, you do not lose the right to defend your life, even if you are generally prohibited from possessing a firearm.<sup>40</sup> For example, a felon in possession of a firearm (at least in Florida, this seems to be a common offense that bars individuals from invoking

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<sup>38</sup> John R. Lott, Jr., Written Statement, at 4-5.

<sup>39</sup> Transcript 3 at 25 (“A recent study concluded that the majority of defendants shielded by stand your ground laws had arrest records prior to the homicide at issue.”).

<sup>40</sup> See *People v. King*, 22 Cal.3d 12, 24 (Cal. 1978).

We conclude, therefore, that the prohibition of section 12021 [forbidding felons from possessing concealable firearms] was not intended to affect a felon’s right to use a concealable firearm in self-defense, but was intended only to prohibit members of the affected classes from arming themselves with concealable firearms or having such weapons in their custody or control in circumstances other than those in which the right to use deadly force in self-defense exists or reasonably appears to exist.

*People v. Rhodes*, 29 Cal.Rptr.3d 226, 232, 233 (Cal.Ct. App.4<sup>th</sup> 2005).

[A]lthough Rhodes was a convicted felon, he had the right to defend himself, stand his ground, and use the amount of force reasonable under the circumstances. . . . The cumulative effect of these misdeeds [misstatements of law by prosecutor and erroneous jury instructions] was to impose upon Rhodes the duty to retreat when there was no such duty.

Stand Your Ground<sup>41</sup>), should not be punished for defending his life solely because of the other offense.<sup>42</sup> The authorities can separately prosecute him for the firearms offenses, if need be.

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<sup>41</sup> See, e.g., *Little v. State*, 111 So.3d 214, 216 (Dist.Ct.App.Fla., 2d Dist. 2014); *Andujar-Ruiz v. State*, 205 So.3d 803 (Dist.Ct.App.Fla., 2d Dist. 2016); *Garrett v. State*, 148 So.3d 466 (Dist.Ct.App.Fla, 1st Dist. 2014).

<sup>42</sup> *Little v. State*, 111 So.3d 214, 216 (Dist.Ct.App.Fla., 2d Dist. 2014).

Aaron A. Little seeks certiorari review of the circuit court's order denying his motion to dismiss the criminal charge of second-degree murder with a firearm. Little argued that he shot the victim in self-defense and was entitled to immunity from criminal prosecution under section 776.032(1), Florida Statutes (2009), which is part of what is commonly known as the "Stand Your Ground" law. . . . We agree with Little that his use of deadly force was justified under the circumstances. We also reject the State's alternative argument that Little was not entitled to immunity under the Stand Your Ground law because he was engaged in an unlawful activity at the time he used the deadly force. We therefore grant Little's petition for writ of prohibition.

#### *I. Facts*

The incident in question occurred when Little was walking to his girlfriend's house with his friend, Rashad Matthews. The two men happened upon Matthews' friend, Terry Lester, who was standing in the driveway of his mother's home. Lester was leaning into the driver's door of a vehicle parked in the driveway when Matthews approached and engaged Lester in conversation. Little, who was a stranger to Lester, initially waited for Matthews by the street.

After a few minutes, Little started walking toward the two men. When Little reached the driver's side of the car, Demond Brooks jumped out of the back seat. Little knew Brooks, but the two were not friends. Without warning, Brooks pulled two handguns from his waistband, pointed them at Little, and yelled that he was "going to make it rain." Little believed Brooks was threatening to shoot him, so he ran behind Lester and asked Lester to intervene, or to "get" Brooks. Lester tried to calm Brooks down to no avail.

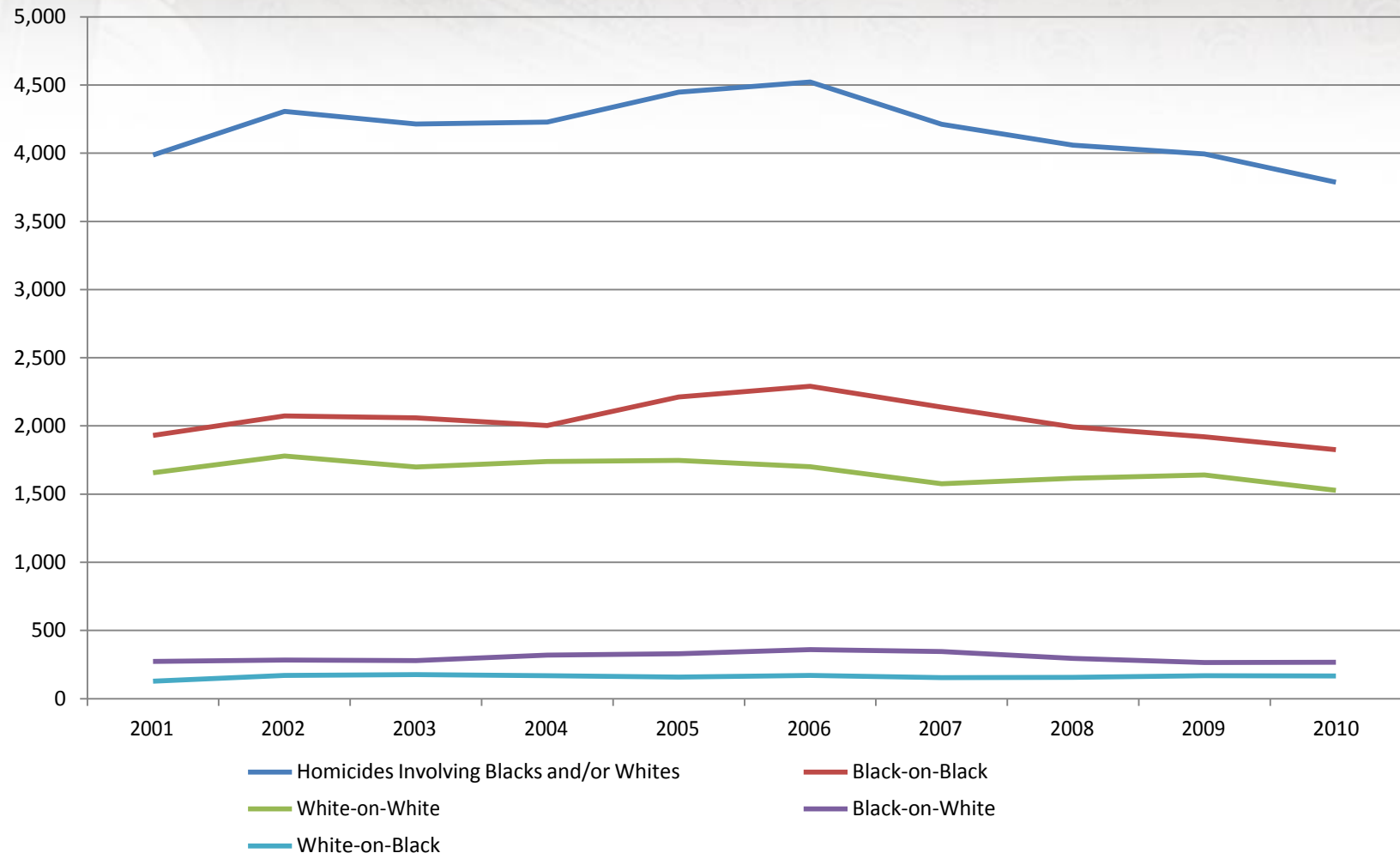
Lester's mother, Janet Speed, heard the commotion from inside the house and came to the open front door for a moment. Little used the distraction as an opportunity to obtain shelter and ran into the house. Brooks followed Little but stopped on the second of the three front porch steps. From there, Brooks held his guns down by his sides and yelled through the open door for Little to come outside. Little pressed his back up against the wall, pulled a handgun out of his pants pocket, and held it down by his side. He called to Ms. Speed to "get" Brooks.

Ms. Speed had not seen Little arm himself. Ms. Speed was alerted to the gun by her daughter-in-law, Kimberly, who was also in the room. Little, who was visibly afraid, tried to explain that he was holding the gun because Brooks was threatening to shoot him from outside. Ms. Speed did not want a gun in her house and responded by telling Little to leave. But Brooks was still on the porch step yelling for Little to come outside. Little told Ms. Speed, "I ain't going out there," and said something about both men having their "fire." Ms. Speed called for her son Lester.

Lester then came into the house and ordered Little out. Little begged for Lester to stop Brooks, but Lester offered no help. In fact, Lester appeared to think the situation was funny because he had been laughing with Brooks as he passed him on his way inside the house.

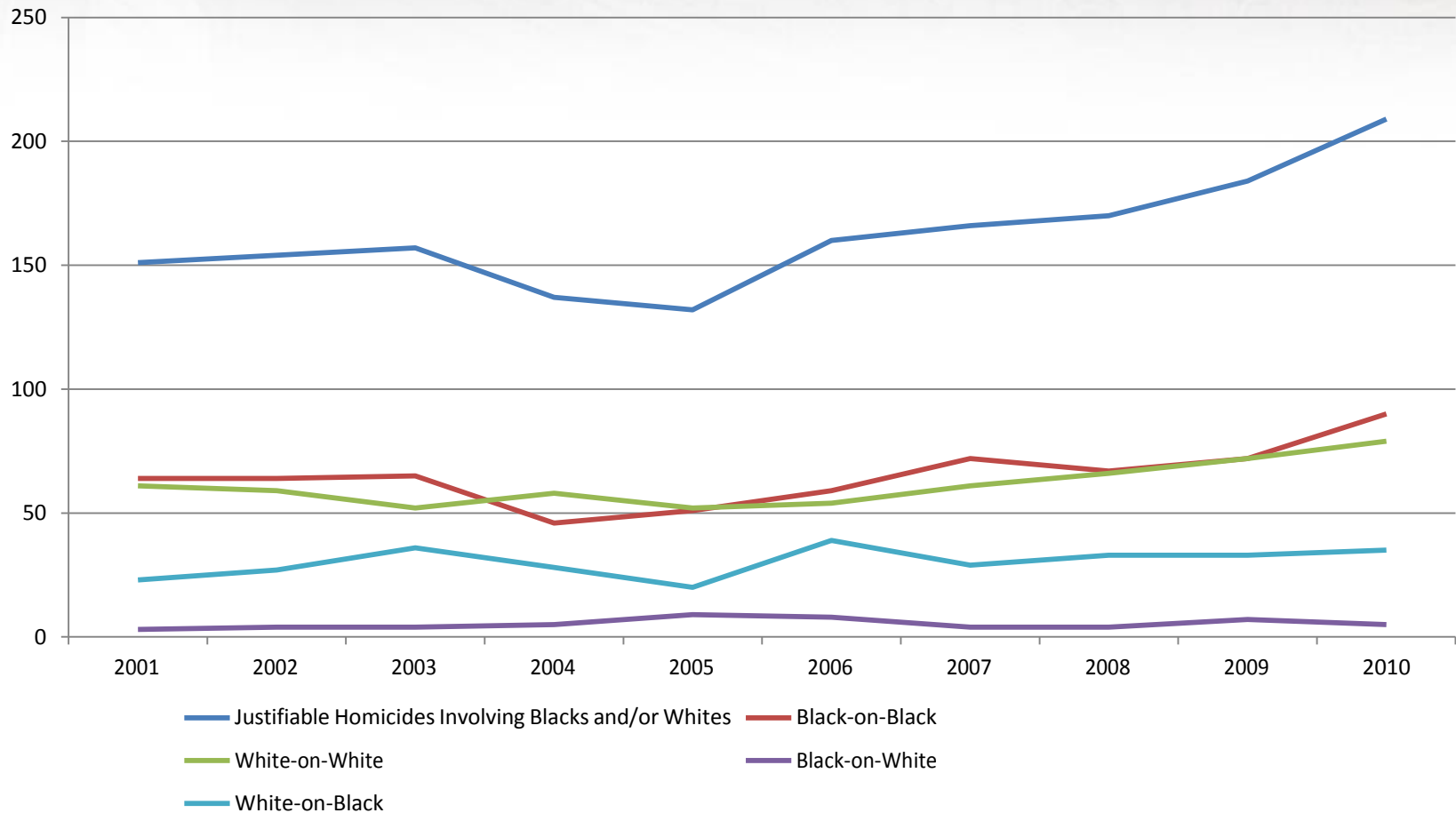
Seeing no backdoor exit, Little reluctantly exited the house through the front door. Brooks backed up to let Little pass, but Brooks still had his guns down by his sides. Little proceeded cautiously, turning sideways to stay facing Brooks and keeping his gun hidden behind his back. When Little reached the yard, Brooks walked toward him and said something like, "[D]o you know what he did to me?" Little told Brooks to calm down and backed away. Brooks did not take action until Little backed into the car parked in the driveway. Then Brooks raised his guns and pointed them at Little. Little brought his gun around, closed his eyes, and pulled the trigger several times. Brooks dropped to the ground and eventually succumbed to his gunshot wounds. Little fled to his girlfriend's house.

# Firearms-Related, Intra- and Inter-Racial Homicides Involving Black and White Individuals (Single Victim/Single Offender Incidents, 2001-2010)



Source: FBI Supplementary Homicide Reports

## Firearms-Related, Intra- and Inter-Racial Justifiable Homicides Involving Black and White Individuals (Single Defender/Single Assailant Incidents, 2001-2010)



Source: FBI Supplementary Homicide Reports

**STAND YOUR GROUND PUBLIC BRIEFING TRANSCRIPT (OCT. 17,  
2014)**

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THE UNITED STATES COMMISSION ON CIVIL RIGHTS  
BRIEFING ON STAND YOUR GROUND.

Place: The Rosen Hotel  
9700 International Drive  
Orlando, Florida 32819  
9:00 a.m. - 3:30 p.m.

Date: October 17, 2014

Reported by:  
Kathy Wescott, CSR

(Volume I, pages 1 through 108, a.m. session,  
Panel Number 1)



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Present:

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Commissioner Michael Yaki

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Commissioner Roberta Achtenberg

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Marlene Sallo

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Commissioner Marty Castro (Chairman)

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Commissioner Karen K. Narasaki

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Commissioner Patricia Timmons-Goodson

10

Commissioner Gail L. Heriot

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12

Appearing by phone:

13

Commissioner David Kladney

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Commissioner Peter Kirsanow

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Panel Number 1:

17

Senator Chris Smith

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Representative Todd Rutherford

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Mr. Ahmad Nabil Abuznaid

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CHAIRMAN CASTRO: I'm calling the meeting to order. I'm Marty Castro, Chair of the U.S. Commission on Civil Rights. And I want to welcome everyone this morning to our briefing on racial disparities and the stand your ground laws.

It is currently 9:06 a.m. on October 17, 2014. I am joined today by Commissioners Achtenberg, Commissioner Narasaki, Commissioner Timmons-Goodson, Commissioner Yaki, and Commission Heriot. Commissioner Kladney and Commissioner Kirsanow will join us by phone.

The purpose of this briefing is to determine whether there is a possible racial bias in the assertion, investigation, or enforcement of justifiable homicide laws in states with stand your ground provisions.

Experts at this briefing will present testimony on the personal impact of the laws, findings from their research, especially those research pieces regarding the racial dimensions of justifiable homicides and elaborate upon actions that are being taken by advocacy groups to alleviate concerns related to stand your ground laws.

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Now stand your ground laws, some of us are part of a larger issue. We see what happened here in Florida. Other states obviously have similar situations. We see what's happened in Ferguson. Names like Trayvon Martin, Jordan Davis, these are now part of the national fabric of conversation about race and the impact about race.

Whether laws are biased, implicitly biased, explicitly biased. Those sorts of questions must be answered not by anecdote, or example, but by concrete research.

And it is our hope that the work that the U.S. Commission on Civil Rights is doing on this topic will present concrete statistical information, much of which is lacking in this area right now. To allow us to critically look at the true impact of these laws.

Today we're going to hear from folks from different perspectives and different points of view. Our job here at the U.S. Commission on Civil Rights is to shine our historic light on these issues and separate the wheat from the chaff of what is being said and what is being produced

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2 on these topics, and present to the President and  
3 Congress and the people of the United States our  
4 opinion based on over 50 years of advocacy and  
5 being a watchdog on civil rights as to what we  
6 believe to be the impact of these laws on minority  
7 individuals and minority communities.

8 I want to thank Commissioner Yaki for  
9 his opportunity to bring this forward to us. I  
10 will ask him to make a very brief statement and  
11 then I will introduce the members of the panel and  
12 we'll begin our briefing.

13 Commissioner Yaki.

14 COMMISSIONER YAKI: Thank you very much,  
15 Mr. Chair, and thank everyone who is here today.

16 I called for this investigation. And  
17 today while it's just a briefing it's part of a  
18 broader -- broader discussion and broader analysis  
19 by the commission.

20 This investigation is by -- today will  
21 help the investigation. It is by no means an end,  
22 but just a beginning of the analysis that will be  
23 conducted by our staff. I did so because a year  
24 and a half -- about two years ago I actually  
25 started calling for this investigation, and it

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wasn't until last year that the commission had the resources and the personnel in order to start this -- down this path.

I did so because I'm troubled by stand your ground laws. I'm troubled by the fact that we have to have discussions about the deaths of African American men like Trayvon Martin and Jordan Davis. I'm troubled by conclusions and statistics showing racial disparity in the research of people like John Roman.

I'm troubled by the expansion of a common law doctrine that now allows people not only to defend themselves in their home, but converts it into a "shoot first" anywhere policy. And I'm troubled by the fact that despite its claims homicides seem to increase rather than decrease in states with stand your ground laws.

And I'm especially, as a member of the U.S. Commission on Civil Rights, deeply troubled by the fact that here we are in the 21st century and we are here to try to understand and study the implications, extent, and effect of bias, unconscious, implicit bias and its impact on laws like stand your ground. I hope today and in the

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2 days ahead that we will get evidence and hear data  
3 and collect information that can help policy  
4 makers, lawyers, judges, and others understand  
5 better these laws and their impact on our society.

6 And I want to thank again everyone here  
7 today. And I want to extend a special thanks to  
8 our staff director, Marlene Sallo, for working so  
9 diligently and hard on this matter with me. And,  
10 again, I appreciate everything that she's done.

11 Thank you very much, Mr. Chair.

12 COMMISSIONER CASTRO: Thank you,  
13 Commissioner Yaki.

14 So now on to some housekeeping matters.  
15 So today's briefing is going to consist of a  
16 number of panels. Our first is going to be made  
17 up of -- all total of 16 distinguished speakers.  
18 The first panel is going to consist of legislators  
19 and advocates.

20 Panel two will consist of statistics  
21 behind the stand your ground laws. And a guest  
22 advocate speaker that will give us a real life  
23 perspective on the consequences of the  
24 implementation of stand your ground laws.

25 And ultimately panel three, with

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2 scholars giving us their perspective on this  
3 important topic.

4 Now during the briefing each panelist  
5 will have eight minutes to speak. After all of  
6 the panelists have made their presentations  
7 commissioners will then have an opportunity to ask  
8 questions of them. There will be an allotted time  
9 period for that to occur.

10 As I have in the past I will fairly  
11 recognize commissioners who wish to speak. Those  
12 commissions who were unable to get here that are  
13 on the phone, you'll have to designate -- shout  
14 out your name and let me know that you want to  
15 speak. Otherwise, the commissioners present just  
16 raise your hand and I will keep a list of who will  
17 be next.

18 So we also want everyone to adhere  
19 strictly to their time allotments so that we all  
20 have an opportunity to engage in the conversation  
21 on this important topic.

22 You panelists will notice there's a  
23 series of warning lights that have been set up.  
24 When the light turns from green to yellow that  
25 means you've got two minutes remaining. When the

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2 light turns red I ask you to wrap up your  
3 statements. And just be mindful of other  
4 panelists' times so we don't take away from  
5 anyone. I certainly don't want to cutoff anyone  
6 mid-sentence.

7 Again, I ask my fellow commissioners to  
8 be considerate of the panelists and one another  
9 and try to keep our questions and comments  
10 concise. I know there will be followups and I  
11 will allow that to a point, but we want to have  
12 everyone have the opportunity to ask questions.

13 Once we do all this I think that we will  
14 have the data that we need. So what I'd like to  
15 do is first proceed with the panel that is before  
16 us now, our first panel. I will introduce you to  
17 the panelists and I will swear you in.

18 Our first panelist this morning is  
19 Chris Smith, Florida State Senator representing  
20 the 31st State Senate District.

21 Our second panelist is Todd Rutherford,  
22 Minority Leader for the South Carolina State  
23 House. Representing South Carolina's 71st House  
24 District.

25 And let's see. Our third panelist is



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Ahmad Nabil Abuznaid a Legal and Policy Director  
for Dream Defenders.

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And for the first panel we were to have

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Lucia McBath, the mother of Jordan Davis.

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Unfortunately, she won't be able to join us today.

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She sends her sincere apologies and asks that her

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previously submitted statement be accepted for the

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record in lieu of her testimony, which we will do.

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So I will now ask the panelists to swear

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and affirm that the information that you're about

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to provide us as true -- is true and accurate to

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the best of your knowledge and belief. Is that

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correct?

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SENATOR CHRIS SMITH: Yes.

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REPRESENTATIVE RUTHERFORD: Yes.

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MR. AHMAD NABIL ABUZNAID: Yes.

18

COMMISSIONER CASTRO: Thank you.

19

Senator Smith, please proceed.

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SENATOR CHRIS SMITH: Thank you. And I

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want to first welcome you to the sunshine state of

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Florida. I appreciate you coming down here and

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having this very important grownup discussion

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about stand your ground. And I especially as a

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legislator who deals with the budget really

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appreciate you coming to Florida.

My district is the 31st Senate District which is Broward County, which is Fort Lauderdale, about three hours south of here. Which is home of a lot of good shopping so after this feel free to trek down I-95.

I'll begin my remarks. In 2005 Florida passed the first stand your ground law becoming in the process the national pioneer for all subsequent tragedies and unintended consequences that have followed. We have seen the law used by aggressors as a license to kill by allowing anyone to escalate minor disputes into a deadly incident. Anyone to provoke a confrontation and then seek immunity under stand your ground, an escape hatch of fear of imminent bodily harm or death. While these provocations can occur anywhere at any time, aside from the most notorious cases, namely, the Trayvon Martin case and the Jordan Davis case.

Other less well known cases and incidents have occurred outside of family restaurants, bars, house parties, public parks, and as a result of road rage confrontations.

Within weeks of the national uproar over

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2 the killing of Trayvon Martin in 2012 I convened a  
3 task force of prosecutors, defense attorneys, law  
4 enforcement personnel, and scholars to review the  
5 law and make recommendations for legislative  
6 changes.

7 My task force issued a report and  
8 recommendations in May of 2012. Among the things  
9 my task force recommended were education of the  
10 public and law enforcement officers on the stand  
11 your ground law.

12 Two, creation of a system to track  
13 self-defense claims in Florida so we could  
14 identify any desperate (phonetic) treatment.

15 Three, allowing police to fully  
16 investigate all killings by detaining suspects,  
17 even when they claim stand your ground immunity.

18 Four, defining the term "unlawful  
19 activity" and clarification of the role of  
20 provocation, thus allowing the law exactly when  
21 people are aggressors such as -- that they should  
22 not -- when people are aggressors they should not  
23 be able to hide behind stand your ground after  
24 taking a life.

25 The Governor of Florida convened a task

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force and they also recommended that the legislature examine the term "unlawful activity" as to give guidance to court's on the proper application of the law with the intent to protect innocent persons.

The Governor's task force also agreed with my recommendations to educate law enforcement agencies, prosecutors, and judiciary on self-defense laws and to review the standards regulating neighborhood watch associations.

Despite the recommendations by my task force and the governor the legislature only looked at two of the recommendations, removal of immunity from injuries and deaths of an innocent third party. And review of 10/20 life, minimum mandatory in a narrow scope of cases involving stand your ground.

At this time the state still refuses to compile a comprehensive database of cases. Luckily, the Tampa Bay Times, the Urban Institute, and the American Bar Association and others have, and data shows disturbing disparity involving the impact of this law which remains bewildering to law enforcement, confusing to prosecutors, and

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misapplied by courts.

I noticed on your agenda that you have persons discussing the statistics and so I will not go through those statistics.

Just to recap that the overwhelming statistics show that it's the race of the victim which is most dispositive of the outcome of the cases. When the victim is black there are huge statistics showing that you're more likely to proceed with a stand your ground defense.

This year I filed a bill, a bipartisan bill, which did four of the things in which I discussed. It clarified the definition of aggressor, and made clear that people who start fights and chase victims down cannot later claim immunity or self-defense under stand your ground.

It provided guidance to judges and jury's about the legislative intent of the law. And it placed guidelines on neighborhood watch programs and allowed innocent bystanders to file lawsuits to recover injuries.

Even though the bill passed two committees it was later blocked from the Senate floor.

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Still I provided the legislature with yet another opportunity to right the wrongs of this law. I proposed a simple, common sense amendment to a bill being considered on the floor of the Senate. My amendment would have specified the how, when, and by whom of using the statutes' defense.

It would have defined aggressor. Stopped those who start and bring themselves to a deadly fight from hiding behind the law's protections. It would have simply added a bipartisan statement of legislative intent which would finally give notice to the public and guidance to judges and juries about what the legislature meant to achieve with stand your ground statute.

My amendment would have clarified that justification and immunity protections in the statute were not meant to show aggressors, vigilantes, and others -- and condoned other acts of revenge. Yet, the Senate rejected these concepts. My amendment was rejected along party line votes with the majority party prevailing.

Over and over some legislators have

2 disingenuously said that this -- that that tragic  
3 outcome was not the intent when we passed stand  
4 your ground. But that is cold comfort to anyone  
5 who has lost a family member to a senseless  
6 violence inspired in part by perpetrators belief  
7 that this law gives them absolute right to take a  
8 life and provide them immunity after doing it.

9 Adding insult to injury, when given the  
10 opportunity to clarify, clearly outline and  
11 statute, what exactly they meant when they passed  
12 the statute, some of my colleagues turned their  
13 backs on the opportunity, and in doing so turned  
14 their backs on many youth who tend to be victims  
15 of this egregious abuse of the immunities and  
16 defenses contained in the current law.

17 Even the -- notably, the one thing that  
18 the legislature did do this session was to expand  
19 stand your ground. Cynically invoking the case of  
20 Marissa Alexander to justify broadening the flawed  
21 law. Purportedly the purpose of the new expanded  
22 language was to help protect a person who fires a  
23 warning shot in circumstances where they would be  
24 free to use stand your ground to injure or kill  
25 someone. It provides that such a person cannot be

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prosecuted.

However, the new language goes further and does much more. It allows stand your ground claimants to have their records expunged if their charges are later dropped or they prevail in court. This will make it virtually impossible for the public to effectively track these incidents and thereby use the data to demonstrate desperate (phonetic) impact of the law.

COMMISSIONER CASTRO: Thank you, Senator, appreciate your presentation.

Representative Rutherford, you can have the floor.

REPRESENTATIVE RUTHERFORD: Thank you and good morning. And thank you for inviting me. And I apologize that I seem to have lost my tie in transit, didn't realize it until this morning when I was coming over.

And I do want to state first and foremost that while I am one of the legislator's that voted for the stand your ground law in South Carolina and continue to be one of its proponents I am interested in the conversation and the dialog this morning as to whether any changes can be made



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to make it any better.

In South Carolina I do believe that it will remain the law of the land, that it is not going anywhere any time soon. And as a lawyer I have used stand your ground successfully in one case and have another hearing coming up in November. And recently used it this week in another case. And have not seen the data to suggest that there's a disparate impact on African Americans, although I am very interested in Senator Smith's data and how we can look at that and make sure that that is not going on.

I will not remain a proponent of a law that clearly has a disparate impact on African Americans, although it has not been shown to me that that is the case currently in South Carolina.

The last case that I tried was the State of South Carolina versus Shannon Scott. It deals with one of the instances that Senator Smith brought about. My client was charged with -- when he was at home he received a phone call from his daughter who was being chased home from a nightclub by some female thugs. They chased her all the way to her house. He had his daughter

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2 pull in the backyard. When he did the female  
3 thugs out front fired a warning shot. They turned  
4 around at the end of the street, cut off their  
5 headlights and as they were approaching his house,  
6 again he requested that they please stop. He  
7 fired a shot. And that shot hit a second car that  
8 was following the female thugs and killed a 15  
9 year old individual in that car.

10 My client was charged with murder for  
11 the death of the 15 year old child. It was a  
12 senseless tragedy that never should have happened.  
13 But one that could have been prevented, (A) by the  
14 female thugs never following his daughter home.  
15 And (B) by the police arresting the female thugs  
16 and charging them with felony murder as would be  
17 allowed in South Carolina. No clue why that did  
18 not happen and on the stand the police, when  
19 confronted with why they did not arrest them said,  
20 "I don't know."

21 And so an innocent person shot, clearly  
22 the wrong person shot. But my client Shannon  
23 Scott simply defending his home, his castle, and  
24 his family who were cowering on the floor in the  
25 kitchen trying not to get shot.

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2                   The one this week was an individual who  
3 was at home and some people tried to do a home  
4 invasion on his house. Beating on his door with a  
5 sledgehammer. They beat on it three different  
6 times as confirmed by witnesses across the street.  
7 He opened the door, did not realize that someone  
8 had tried to get in until he saw the marks on the  
9 door. He then went to leave his apartment. In  
10 doing so he was confronted by an individual with a  
11 gun. The other gentleman with the sledgehammer,  
12 who he thought had a gun, the individual pointed a  
13 gun at him, my client exited his vehicle, fired  
14 several shots, one of whom hit the gentleman with  
15 the sledgehammer. He was not prosecuted. Is  
16 going to do a statement to the police and will  
17 receive immunity under the stand your ground law  
18 for that case.

19                   The next one in November is an 18 year  
20 old -- ah, he's a 17 year old child at the time,  
21 was at a restaurant, fast food place, after a  
22 basketball game. He -- it was a -- because it was  
23 a basketball game with rival teams there was --  
24 there were several words being thrown back and  
25 forth in the restaurant. My client leaves the

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2 restaurant, goes and gets in his vehicle and as he  
3 is leaving the restaurant is approached by another  
4 kid -- because these are 17 year olds -- who comes  
5 up to his window, and the allegation is that the  
6 victim in this case, or the person who was  
7 stabbed, reached in the window and tried to grab  
8 my client. And certainly put him in fear for his  
9 life. My client reached out the window with his  
10 knife -- the knife that his grandfather had given  
11 him -- and he stabbed him one time, cut off the  
12 bottom of his heart, and the victim died within  
13 the next five minutes.

14 Tragic cases in every single instance.  
15 But, cases that in South Carolina would have left  
16 an African American male charged with a murder  
17 charge that they would probably not be able to  
18 defend financially. That would have left them in  
19 jail in South Carolina typically for a year, two  
20 years before they would have ever gone to trial.  
21 And having the ability to use the self-defense  
22 case law, South Carolina does not have a  
23 self-defense statute prior to stand your ground so  
24 you would have had to have relied on case law,  
25 which suggests that you must retreat. That you

2 cannot elevate the use of force. Which in most  
3 instances is troubling in and of itself, but  
4 certainly in these cases, it would have led to the  
5 most recent client, the child -- the basketball  
6 game, because he used a knife on someone who was  
7 unarmed, not able to avail himself of the  
8 self-defense law.

9 It has been my opinion since I saw the  
10 -- the proposal for stand your ground that the old  
11 law, the old case law as it related to  
12 self-defense was outdated. That people should not  
13 have to live in fear. That you should not have to  
14 measure your use of force by that which is being  
15 used against you. That it was archaic and that it  
16 continues to be.

17 I am troubled by the fact that someone  
18 could act as a vigilante. But I do believe that  
19 the courts, at least in South Carolina thus far  
20 have rooted those cases out. Am troubled by the  
21 fact that someone could be a wrongdoer and claim  
22 that he was lawfully someplace where he should not  
23 have been.

24 That case came up in South Carolina. A  
25 gentleman that was in the middle of a home

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2 invasion tried to claim that he was forced to do  
3 the home invasion. And when he shot the homeowner  
4 that he deserved immunity under stand your ground.  
5 The judge laughed at it. Sent it up to the  
6 Supreme Court and the Supreme Court tossed it out.

7 I am told by a number of lawyers who  
8 have not given me permission to use their clients  
9 names or their fact scenarios, but that there are  
10 several other cases pending in South Carolina with  
11 African American defendants who shot white  
12 individuals who were the wrongdoers who are  
13 seeking to claim stand your ground as an immunity  
14 defense, but have not been able to do so because  
15 they simply cannot get a hearing. It is -- the  
16 evidence that I have seen in South Carolina, the  
17 anecdotal evidence has been that it is more used  
18 by African American defendants than it is by white  
19 defendants.

20 I can tell you that I watch the news as  
21 everyone else and I am concerned about the Trayvon  
22 Martin case, about all of the cases in Florida  
23 that seem to be going in the wrong direction. But  
24 I don't know that I've seen one where the stand  
25 your ground law was used successfully and used in

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an immunity hearing in such a way as to create a  
disparate impact.

I welcome that data. And as you all,  
once I get that data if there is a change that can  
be made in the law I'd seek to do it.

Thank you.

COMMISSIONER CASTRO: Thank you,  
Representative Rutherford.

Next we'd like Mr. Abuznaid to present.

MR. AHMAD NABIL ABUZNAID: Thank you.  
Thank you to the commission for convening this  
initiative. We are extremely excited for the  
future results.

I'm here representing the Dream  
Defenders, a youth based human rights organization  
in Miami, Florida. Our organization was created  
in response to the tragic killing of Trayvon  
Martin. A national and international dialogue has  
been brewing around the harmfulness of stand your  
ground laws, also known by many as "shoot first"  
laws, and their implications for the right to  
life, non-discrimination and equality before the  
law. These stand your ground laws have, in a  
sense, legalized the devaluing and dehumanizing of

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minority lives in a very real way.

We have recently heard from the members of the United Nations Human Rights Committee that stand your ground laws are incompatible with the right to life. We have also heard great concern from the Inter-American Commission on human rights regarding many of these tragedies. It is imperative that the federal government ensures that state and local governments do not promulgate laws that violate rights as fundamental as the right to life and equality before the law.

Stand your ground laws amount to state complicity in the perpetuation of violence by its citizens. Furthermore, our society has a long history of racial discrimination and a system that to put it mildly has never been kind to its black and brown minorities. Since we understand that the system itself has had to be constantly revised to deal with its inadequacies related to minorities it should come as no shock that a law allowing vigilantes to use fatal force on the streets would disproportionately affect minorities. Obvious history and notions aside, research has shown that stand your ground laws are



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dangerous in terms of increasing levels of homicide and are discriminatory in their application as to race and gender.

Statistics based on a database compiled by the Tampa Bay Times of SYG cases in Florida since the passage of the law show that a defendant who killed a white person was more likely to be convicted of a crime than a defendant who killed a black person. White-on-black homicides are 250 percent more likely to be found justified than white-on-white homicides in stand your ground states. This disparity increases to 354 percent in stand your ground states. Moreover, the Urban Institutes Justice Policy Center conducted a study using the FBI's Supplementary Homicide Report for 2005 until 2009 and determined that less than 2 percent of homicides are eventually ruled to have been committed in self-defense, that number contains a significant split between stand your ground and non-stand your ground states.

Women have also been disproportionately impacted by stand your ground, especially those dealing with domestic violence. Florida has been home to the tragic handling of Marissa Alexander's

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2 case. In a recent analysis of FBI homicide data  
3 prepared by the Urban Institute comparing stand  
4 your ground and non-stand your ground states and  
5 examining the use of stand your ground laws in  
6 cases involving women defendants, 13.5 percent of  
7 cases where a white woman killed a black man were  
8 found justified, whereas in contrast only 2.9  
9 percent of cases where a black woman killed a  
10 white man were found justified. Again, this  
11 highlights the disproportionate -- thank you --  
12 disproportionate role that race plays in  
13 justifiable homicides and how that is overlaid in  
14 cases involving women defendants.

15 The data also revealed that such laws  
16 introduce bias against black victims and in favor  
17 of white defendants. In cases where the defendant  
18 was black and the victim was white, there was  
19 little difference between the stand your ground  
20 states and other states. However, when the  
21 defendant was white and the victim was black 16.85  
22 percent of the homicides were ruled justified in  
23 stand your ground states and only 9.15 percent in  
24 non-stand your ground states.

25 Even worse, blanket immunity and broad

2 discretion to law enforcement offered by  
3 Florida-type stand your ground laws infringe on  
4 victims access to courts and their right to a  
5 remedy. The more recent case involving the murder  
6 of Jordan Davis and the jury's deadlock on his  
7 murder -- his murder count exposed just how much  
8 confusion stand your law -- stand your ground have  
9 introduced into the criminal process.

10 It took a second trial and jury to  
11 convict a man of a murder that everyone knew he  
12 committed. Why did the jury find trouble with the  
13 decision? Stand your ground laws of course,  
14 because they allow for subjective biases, implicit  
15 biases to guide decision making that could later  
16 be fortified by law. Sadly, most victims and or  
17 their families will never receive justice and  
18 worst off they will have to live without their  
19 loved ones for the rest of their lives all because  
20 someone thought they looked suspicious while  
21 walking through their father's neighborhood, or  
22 they disturbed someone's movie experience while  
23 texting the babysitter. As you may know, some of  
24 the most high profile tragedies we have witnessed  
25 in stand your ground have occurred here in

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Florida. We have been the first state to enact such a law and Florida should be the first state to repeal such a law. The federal government must support such a repeal. The federal government must step in to condition funding to states based on its ability to guarantee equal protection of all of its citizens and elimination of laws that hinder their ability to fulfill that duty.

On the ground here in Florida groups like the Dream Defenders, Community Justice Project, Power You, and others have been rallying around communities concerned about that very protection of our lives, which stand your ground stands in the way of.

Unfortunately, the people's call for a repeal has been ignored by the Florida legislature. Not only that, but more legislation being sent down the pipelines to gun us down, including a so-called "warning shot" bill whose advocates propelled it forward under the guise of support for Marissa Alexander. But these lawmakers have shown that they don't care about Marissa. They don't care about Trayvon, Jordan or our communities. Florida and other states are

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2 currently looking at laws that would arm  
3 schoolteachers with guns, and I would postulate  
4 that it would not be long before one of our  
5 teachers stands their ground against one of our  
6 kids. We are not safe in our streets, our  
7 neighborhoods, gas stations, movie theaters, and  
8 soon to be schools.

9 Thank you.

10 COMMISSIONER CASTRO: Thank you. At  
11 this point in time I would like to encourage  
12 commissioners to begin to ask questions. I'll  
13 cede the floor to Commissioner Yaki to begin. And  
14 just identify for me then we'll keep a list.

15 COMMISSIONER YAKI: Thank you very much,  
16 Mr. Chair. And this goes to all three panelists.  
17 I was struck by the notion of due process, and I  
18 think for, especially Mr. Rutherford who's a  
19 lawyer as well. The issue of due process I think  
20 is very important in stand your ground from a  
21 number of different factors. But especially from  
22 the standpoint of the person who may be the victim  
23 of a stand your ground defense. That person may  
24 be injured, that person may be dead, and not being  
25 able to present his or her side of the story

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you've essentially ceded the authority to be judge, jury, and for lack of a better word, executioner to the person asserting that. And I guess, the question that I'm asking is, if you were confronted with a statistic, a scientific fact, that the research shows that people are more likely to act in a certain way based on unconscious racial stereotypes they may have within them. I mean, I'm not talking about somebody who says, "I'm a racist I hate, you know, blankity, blank, blank, or blank, blank." I'm talking about the studies that show that if you give a test to people there's a disparity in how people judge people based on what they look like. It doesn't matter -- it doesn't matter if they claim themselves to be racist or not. But the most current example's the fact that if you show -- if you talk about voter I.D. law to a white voter, but if you accompany that image with that of the image of a black person at the voting poll support for a voter I.D. law shoots up well beyond the statistical range. By the same token when you have these tests that test for implicit -- implicit bias a black person is much more likely

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2 to be shot by someone much more than a white  
3 person in these tests based on the fact that it's  
4 unconscious bias in the system.

5 So I'm just asking when you have a law  
6 like stand your ground which has in it essentially  
7 a, for lack of a better word, a trigger component  
8 in it to say I have to make a decision right here  
9 and right now, what am I going to do. And if  
10 there's a built in bias against finding for not  
11 shooting against a white person and for shooting  
12 against a black person how do you reconcile that  
13 as a legislator and a policy maker?

14 REPRESENTATIVE RUTHERFORD:  
15 Commissioner, thank you for that question. And I  
16 can tell you that as a black man growing up -- who  
17 grew up in South Carolina I am well aware of  
18 implicit bias. And as the lawyer for the  
19 gentleman that, most recently in South Carolina,  
20 Levar Jones, who was shot by the trooper while  
21 simply reaching for his wallet. A trooper who  
22 I've known for 10 years. I can tell you that I  
23 understand also how implicit bias comes into play.

24 In that particular case Mr. Jones was  
25 requested by the trooper to get his I.D., he

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2 patted his back pocket, not finding it there he  
3 turned to go into the car and Trooper Groubert of  
4 the South Carolina Highway Patrol shot at him four  
5 times hitting him once in the hip.

6 The most troubling part was Trooper  
7 Groubert's statement afterwards where he defined  
8 or tried to define Mr. Jones as being an  
9 aggressor. That he aggressively went into his  
10 car. That he aggressively went into his case.  
11 That he aggressively approached him. That he  
12 aggressively -- none of which was indicated on the  
13 video, but all of which, absent the video would  
14 have been enough to clear Trooper Groubert.

15 Troubling because I still see members of  
16 the South Carolina Highway Patrol when I go to  
17 court who talk about race and that Trooper  
18 Groubert is not a racist. And they missed the  
19 point that he would not have done that if it were  
20 not a black male, who looked unlike Trooper  
21 Groubert. Who did something that Trooper  
22 Groubert, in his mind, may have believed to be  
23 aggressive. Because he was simply following his  
24 commands.

25 I, like, Attorney General Holder was



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2 walking in Georgetown when I was in college and a  
3 cop walked up to me and placed his baton in my  
4 chest and told me to cross the street. I said,  
5 "Why?" And he hit me again with the baton and  
6 told me to cross the street. And I crossed the  
7 street. This was in 1989, this is not the '60s.

8 I am well aware of the bias that goes  
9 on, but I also see the bias in the judicial  
10 system. I've listened to the statistics that are  
11 given and well aware that a white defendant in a  
12 stand your ground case may have a better ability  
13 to hire a lawyer to assert his stand your ground  
14 rights than an African American defendant, that as  
15 my client this week with the stand your ground  
16 hearing he was able financially to bring me to the  
17 scene to talk to law enforcement at the scene to  
18 detail for them how this happened. And to mention  
19 stand your ground to law enforcement before an  
20 arrest was ever made. And I know that implicit  
21 bias and racism run rampant throughout the  
22 judicial system, especially in South Carolina.

23 It cannot be taken out of the system in  
24 one fell swoop. And to suggest that by myself or  
25 any other proponent of stand your ground is simply

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2           ridiculous. I would be curious to know in --  
3           within the statistics how much racism as a whole  
4           played into the impact in the end. And that means  
5           that the law enforcement officer didn't care that  
6           stand your ground laws existed. There was a black  
7           person with a gun and a dead white person and he  
8           was simply going to arrest them anyway and ignore  
9           stand your ground. Which I have had happen as  
10          well. Stand your ground, the way that I intended  
11          when I voted for it, the way that I stand behind  
12          it as a proponent is meant so that people do not  
13          have to live in fear. That you don't have to walk  
14          down the street with your children and someone  
15          intends you harm and you would have to retreat  
16          back to the furthest place. You could not elevate  
17          force. You could not do any of those things,  
18          which to me negate common sense.

19                    Now in saying that about common sense I  
20                    again use common sense and apply the fact that  
21                    racism is rampant in our system and I don't know  
22                    how to take it out. Implicit bias is rampant in  
23                    our system and I don't know how to take it out.

24                    But in a situation where an individual  
25                    is using the law and the law as it is currently

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2 written in my case is, African Americans in some  
3 cases, wrongfully used by white Americans, but  
4 simply using the law as it is written judges are  
5 supposed to determine without the implicit bias,  
6 without the built in racisms that are in the  
7 system, are supposed to determine that someone is  
8 immune from prosecution. They are supposed to be  
9 the ones that determine reasonableness. If  
10 they're not doing their jobs in South Carolina we  
11 would look to remove them. But I don't know how  
12 to take that out of the system without taking out  
13 the ability of other persons to defend themselves.

14 COMMISSIONER CASTRO: Senator Smith.

15 SENATOR SMITH: If I can -- two points.  
16 When you talked about due process, looking at the  
17 Florida law, I haven't looked at the South  
18 Carolina law, due process also involves the  
19 officer on the scene. The Florida law is so  
20 ambiguous that it's not a judge making the  
21 determination it's an officer on the scene,  
22 because the way the law's written it says,  
23 "person cannot be arrested." And in the arrest  
24 definition it says, "detained." So the Florida  
25 law is so ambiguous that an officer coming up on a

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2 scene in a park with a dead person and a person  
3 holding a gun that says, "I'm invoking stand your  
4 ground," realistically that officer cannot detain  
5 that person, thus do a full investigation. We saw  
6 it play out in the Trayvon Martin case where the  
7 officers were confused as to whether we can even  
8 detain Mr. Zimmerman.

9 And so when you talk about due process  
10 that is a major problem in Florida. We're not  
11 even getting to judges, we're not getting to  
12 jury's. Officers on the scene are told within the  
13 law, that we've tried to change, they cannot  
14 arrest. An arrest is defined as "detaining" also.

15 And secondly I noticed in all of the  
16 paperwork and I just heard, one of my pet peeves  
17 when discussing stand your ground is when anyone  
18 mentioned "retreat" today, remember Florida law  
19 and I'm unsure of other laws, always had a word  
20 that everyone neglects, it said, "safely retreat."

21 Prior to 2005 we had self-defense in  
22 Florida that's often ignored. The Florida law has  
23 always been, you had a duty to safely retreat.  
24 There wasn't a "turn and run" portion of the  
25 Florida law. It always had "safely retreat,"

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2 which is ignored. So please, as people discuss  
3 the Florida law today keep that in mind, prior to  
4 2005 it had the words "safely retreat." It was  
5 never a concern of you having to run away from  
6 someone attacking you in public.

7 MR. AHMAD NABIL ABUZNAID: If I may add,  
8 I think that Senator Smith definitely contributed  
9 a couple of very important points, but I also  
10 wanted to add that while it's important that  
11 people shouldn't have to live in fear, due to  
12 stand your ground others have to live in fear now.

13 And also, looking at fear and breaking  
14 down fear and finding that a lot of times the fear  
15 is unfounded with -- Michael Dunn it was  
16 because hip hop music was blaring from the car.  
17 And Jordan Davis and his friends seemed to be like  
18 thugs to Michael Dunn. And, you know, to George  
19 Zimmerman, Trayvon Martin seemed suspicious  
20 because he had an implicit fear of black men in  
21 hoodies.

22 And so I think that people should not  
23 have to live in fear, however we should navigate  
24 that fear a little bit deeper and figure out where  
25 it comes from. You know, the fact is that if

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2 we're going allow for, you know, vigilantes to not  
3 be afraid then those of us minorities who are  
4 often viewed as threats by society might start  
5 being very afraid of walking around our  
6 neighborhoods.

7 COMMISSIONER CASTRO: Before I give the  
8 floor to Commissioner Narasaki I actually have a  
9 question. Well, we really have been talking about  
10 this issue and it is talked about in a black/white  
11 binary for the most part. Is there anything each  
12 of you might be able to shed light on in terms of  
13 the impact on Latino's when the stand your ground  
14 laws are used?

15 SENATOR SMITH: If I can, Mr. Chair.  
16 It's -- in part of my introduction I talked about  
17 the lack of statistics. We can only go by what's  
18 been reported in say the St. Pete Times and those  
19 others. That's part of the problem, we don't keep  
20 the actual statistics about black, white, and  
21 Latino. A lot of times when you're looking at it  
22 you can only go by if it was said that "this was a  
23 black male," or it doesn't say, "this was a  
24 Hispanic male." And so it's hard to really give  
25 you a definitive answer and that was part of the

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2 concern that we have in Florida is actually  
3 keeping statistics because part of what we  
4 proposed is that if an officer comes up on the  
5 scene in Hialeah and it's involving a Latino and  
6 someone else and that officer determines that it's  
7 a -- this is a stand your ground case, they could  
8 go home. We wanted to make that officer keep  
9 actual records that stand your ground, victim,  
10 aggressor and perpetrator or however, so that we  
11 can -- so that you can come back in 2 or 3 years  
12 and discuss that.

13 So as you look at these laws please look  
14 at -- it's hard to really answer your question  
15 without anecdotally looking at facts because in a  
16 lot of these states we don't require officers or  
17 judges or prosecutors to keep actual statistics  
18 that you can look at empirically in a year or two  
19 to determine that.

20 MR. AHMAD NABIL ABUZNAID: I would also  
21 like to add that often times, you know, who's  
22 categorized as white, Latino, Hispanic, Arab,  
23 Muslim, has a great weight in factors.

24 If you look at the Department of  
25 Corrections, you'll look down at the list of

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2 inmates, you'll see all types of Muhammad, Ahmad  
3 all that and it says "white." So I think  
4 sometimes, you know, the way people are labeled  
5 has a great deal with our ability to keep these  
6 statistics.

7 REPRESENTATIVE RUTHERFORD: I've not  
8 seen that data in South Carolina and certainly  
9 would be interested in looking at making judges  
10 and law enforcement officers keep that data to see  
11 whether there is a disparate impact on Hispanic  
12 males as a class.

13 COMMISSIONER CASTRO: Thank you.  
14 Commissioner Narasaki.

15 COMMISSIONER NARASAKI: Thank you,  
16 Mr. Chair. I want to thank Minority Leader  
17 Rutherford for sharing the stories of his clients.  
18 It shows how tragic all of these situations are.

19 I have two questions though. One is,  
20 does South Carolina law also include like Florida  
21 immunity from civil liability? And if so, what  
22 should the rights of the family who's lost a loved  
23 one who was an innocent bystander in that  
24 situation if there is immunity from civil  
25 liability because there's more than one victim in



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that case?

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And the second is, it sounds like you do support data collection. Would you support the federal government tying funding for federal criminal justice funding to requiring states to set up sufficient reporting systems?

REPRESENTATIVE RUTHERFORD: I'll answer the second question first and say, absolutely. The collection of data is essential to the understanding of any law and its impact. And in these cases especially so because, like I said, in South Carolina I have not seen what I've seen in Florida. I could not stand here as a lawyer, and a proponent of justice, and look at what goes on in Florida and act like it's okay.

The first question is and -- now I'm losing the first question --

COMMISSIONER NARASAKI: Civil liability.

REPRESENTATIVE RUTHERFORD: Right, yes. South Carolina -- the stand your ground laws came out of the conservative group that sent the law to South Carolina. We looked at it, we passed it. It mirrors Florida's law. In fact, our case law in South Carolina initially came from Florida as

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2 the Supreme Court looked at how to deal with stand  
3 your ground cases. It not only offered civil  
4 liability -- I'm sorry, civil immunity, it also  
5 allows for the return of attorney fees if someone  
6 is sued after they are found immune from  
7 prosecution under a stand your ground case.

8 As to the victims and what the victims  
9 can do, the problem gets to if you have a  
10 situation where someone has truly availed  
11 themselves of the stand your ground law, which is  
12 difficult to determine. And I say that because if  
13 a law enforcement officer comes out to the scene  
14 and believes that an individual used self-defense,  
15 that law enforcement officer's typically an  
16 investigator at that level making that  
17 determination, not just a line officer, but  
18 somebody that has, hopefully, years of experience.

19 That person is determining that the  
20 individual, the perpetrator in this case because  
21 there's a shooting or a stabbing or whatever the  
22 -- the -- it's the person that took the life. So  
23 I don't want to call them the victim, but the law  
24 enforcement officer may consider them to be the  
25 victim.

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That he is determining that they didn't do anything wrong or that they simply acted in self-defense. Your stand your ground is somewhat of an articulation of self-defense.

In doing so stand your ground says they are not to be detained, they are not to be arrested. Which some people take -- well, they're not investigated. I disagree. I think that an investigator should, at least, in South Carolina an investigator would investigate a murder case not just a line officer.

That investigator determines that this person used self-defense, that they can articulate that they had a lawful right to be where they were, that they had a reasonable fear for their life, and that they acted on that fear and that belief. The investigator determines that they are clear and he's not going to detain or arrest them. Which, under self-defense he should not have done anyway. But, South Carolina, as I stated before had no self-defense law it was based on case law. So in order for an individual to be cleared in South Carolina they would have to have been charged with murder or charged with whatever the

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2 offense was --

3 COMMISSIONER NARASAKI: Yeah, I'm  
4 actually, though, I'm not focused on the criminal  
5 process I think it's -- I'm focused on the civil  
6 liability, which as you well know is a different  
7 standard. And the question here is, I'm not  
8 focusing on whether the person who felt fear, what  
9 he did versus the person who was causing the fear.  
10 I'm talking about the innocent bystanders who had  
11 nothing to do with either side of the equation,  
12 who nonetheless lost their lives. So what is the  
13 recompense for them?

14 REPRESENTATIVE RUTHERFORD: The  
15 recompense --

16 COMMISSIONER NARASAKI: And are you  
17 concerned that this stand your ground law could in  
18 fact create a huge public safety issue because now  
19 you're not talking about someone who's close to  
20 their home, but you're talking about someone who  
21 could be in a crowd wildly shooting. Is that  
22 something that you feel comfortable with, and if  
23 there's no civil liability do you feel like there  
24 might be a tendency for more of that to happen?

25 REPRESENTATIVE RUTHERFORD: No, ma'am.



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2 have a right to possess a firearm and the federal  
3 government gave him 23 years in prison.

4 And so that's how they dealt with that  
5 case. But would he have -- if he had shot, as he  
6 did, and paralyzed someone would they be able to  
7 sue him, he wouldn't have any assets for them to  
8 be able to sue him anyway --

9 COMMISSIONER NARASAKI: Yes, but what  
10 we're talking about in your case, your client had  
11 a house.

12 REPRESENTATIVE RUTHERFORD: Right. So  
13 -- well, he rented the house and so there was no  
14 insurance.

15 COMMISSIONER NARASAKI: Well, I think,  
16 you know, the issue about whether they would have  
17 actually had money or not is not the question that  
18 I'm asking. The question is, should there be some  
19 kind of recognition in the law that something  
20 happen to someone who is an innocent bystander?

21 REPRESENTATIVE RUTHERFORD: Thank you.  
22 And, yes, to answer that question succinctly, an  
23 innocent bystander who is shot can always sue,  
24 whether they could ever collect is a different  
25 story. Even under this they could sue someone

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2 that was cleared because -- well, when you say  
3 "innocent" it -- it gets dicey. And the short  
4 answer is, "I don't know."

5 COMMISSIONER CASTRO: Ah, Representative  
6 -- Senator --

7 SENATOR SMITH: If I can, I think you  
8 would -- the Florida law clearly says immunity  
9 even from civil liability. So I guess in your  
10 scenario -- or even in your scenario if the person  
11 negligently is defending themselves and then just  
12 sprays the room or something that in Florida even  
13 though they were negligent and just, you know,  
14 spraying a room they're immune from civil  
15 liability even though they were highly negligent  
16 as long as they claim stand your ground. And I  
17 think that is a concern. I don't know if your  
18 statute is that specific.

19 REPRESENTATIVE RUTHERFORD: The statute  
20 is that specific but I think -- I don't think you  
21 can negligently spray a room. I think if you're  
22 spraying a room you're not going to be cleared --  
23 you should not be cleared under the statute by  
24 stand your ground. That's not defending yourself.  
25 That's negligently spraying a room.

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And there's a difference -- so if -- if someone can show me the case where someone is clearly defending themselves and found immune from prosecution by -- under stand your ground, and should be sued, I'd love to look at it. But you can't negligently spray a room and claim stand your ground, that's not the same thing --

SENATOR SMITH: There is a Miami case in which it happened, a drive-by shooting and a 3 year old sitting on her porch, the young man was defending himself under stand your ground, and when he shot at the guys shooting at him he hit a 3 year old sitting on her porch. He's immune from civil liability, we're not talking about the criminal case, we're talking about civil liabilities. So her family could not sue that perpetrator even though he's maybe judgment-proof because he's broke there still is a civil immunity from going after that person who shot.

REPRESENTATIVE RUTHERFORD: But as tragic as it is that 3 year olds parents should not be suing him they should be suing the people in the car that were shooting at him. That's what stand your ground says. And to take that to its



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logical conclusion --

SENATOR SMITH: That's what we're talking about --

REPRESENTATIVE RUTHERFORD: -- the suggestion is that the individual that was being shot at should, what, get shot? Should not be able to defend themselves? The civil liability for that 3 year old, for those parents of that 3 year old, goes against the initial people that started the shooting, not against the person that, unfortunately, and tragically, took the life of their 3 year old. So liability would extend not to the person that did the shooting, but to the person that caused the shooting to take place.

So, yes, the person that did the actual shooting would be immune, but the person that caused the shooting absent a collection, absent being able to do so, should be the one that is sued.

So they are not blocked from civil liability, the civil liability is taken from the person that is found immune and extended to the person that actually caused this to transpire in the first place.

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In the case that I just mentioned in the entertainment district it would be that they would sue the person that pulled the gun. In the case that I talked about initially where the people were in their home, they would sue the girls in the car, if all of these people are rich, and understand that you have to have the ability to pay.

But in the 17 year olds case there would be no -- they would have nobody to sue because their child was simply involved in -- and it's a one-on-one situation. But anytime you've got an innocent person who was hit, someone not involved in whatever is going on, that person's civil action is against the wrongdoer not the person that is found immune.

COMMISSIONER CASTRO: Senator, did you want to add something it looked like you were --

SENATOR SMITH: Well, I guess we're -- I'm a little confused. The wrongdoer even if -- when I gave the scenario of the person doing the shooting from the car -- and I understand under the Representative's scenario the person who initially -- who initiated it and caused the

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2 incident to happen should be the person liable.  
3 But if the person that's actually doing the  
4 shooting even though they're defending themselves,  
5 if they defend themselves in a negligent manner  
6 under the case law they're immune from -- from --  
7 even in the case of negligence they're immune from  
8 civil liability.

9 REPRESENTATIVE RUTHERFORD: Yes, sir.  
10 And this is where this came up and this is prior  
11 to stand your ground. And it came up several  
12 times in the case that I tried with the 15 year  
13 old deceased victim.

14 If someone robs a store and the store  
15 owner has a gun and he pulls the gun to defend  
16 himself and he accidentally hits someone else in the  
17 store, do we say that store owners should not have  
18 guns to protect themselves?

19 Do we mandate that the police always  
20 shoot straight? Do we take guns from police  
21 officers who mistakenly hit innocent victims? The  
22 answer is, that the wrongdoer, the person that is  
23 causing the problem in the first place, is the one  
24 that's subjected to civil liability and criminal  
25 liability. That's the way that it should go.

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I understand that under stand your

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ground we have an issue of whether this actually

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-- whether this person is actually the wrongdoer.

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And that's the bigger issue. But as it relates to

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civil liability, the civil liability goes to the

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person that created the wrong in the first place.

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You can't say that someone negligently

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shot if the only reason why they shot is because

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they were being shot at. You can't mandate that

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-- in the case that I just mentioned with the

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South Carolina Trooper, at pointblank range he

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fired at my client 4 times, he hit him once in the

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hip and just barely on the side. He almost missed

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him that time too, 4 times, pointblank range.

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You don't mandate that people shoot

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straight. You would hope that they would not have

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to shoot at all. And stand your ground, in my

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opinion, suggests that I have a right to defend

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myself and I should not fear defending myself that

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later on someone's going to say, "Well, you should

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have shot better." And that was actually the

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testimony from the police officer as to why he

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arrested my client, he said, "He should have been

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a better shot."

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That's not the law. That ain't the law for police officers. It's not the law for individuals. The law says I have the right to be clear, to free myself from thugs, from people that intend to do me harm. And that if I defend myself I should not be sued, nor should I be arrested, detained, or prosecuted because of it.

I'm expensive and if someone is arrested or detained and they have to hire me to defend them they have spent a lot of money doing so. And in doing so and they are initially found -- and they are eventually found immune from prosecution what the system has said is that you were wronged, you were wronged by police officers who may have seen you as a black man who killed a white person who they didn't want to find you immune at the scene so they arrested you. They made you go through this trial. That's wrong. And that happens. We can't take racism out of the system, but we can't also sit here and act like situations don't occur. And they will. And they will continue to where someone defends themselves and then finds themselves placed in a position where they have to avail themselves of the stand your

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ground law.

And once they do so civil liability is there. It is clear. And it goes against the wrongdoer, the perpetrator, not the person that defended themselves.

SENATOR SMITH: Every accident is not negligence, and I concede that. And Representative Rutherford you keep talking about "accident" and I concede that you don't have to be a perfect shot, but there are times when people are negligent. If it's an accident where your store owner, if he accidentally shoots someone, you must agree that all accidents are not negligence. We're talking about in cases where there is true negligence.

REPRESENTATIVE RUTHERFORD: I think by definition accidents are negligent, because if it's not negligent, then it's intentional. So you're only getting situations where someone either negligently did something or they intentionally did something.

You can do reckless. Reckless is they did it negligently but they should have known better. Someone that gets in an accident for

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speeding on a highway, they're going 10 miles over the speed limit, that's negligence. They're going 100 miles over the speed limit, that's reckless and there's a difference.

SENATOR SMITH: Well, I stand corrected, even in reckless in Florida you are still immune.

REPRESENTATIVE RUTHERFORD: But, again if the recklessness -- if the reckless act was brought on, simply by the person doing a wrong act, meaning that, my recklessness I'm firing because this person shot a gun at me we're not going to go back in South Carolina, and I doubt Florida will either, and say that when you are fired upon you can only fire one shot and that shot must be at the upper torso, at the head.

That's not the law. The wrongdoing is the person that caused this person to fire a shot. In the Trayvon Martin case, and I've said this repeatedly, what would have been interesting in Florida is if Trayvon Martin would have shot George Zimmerman and tried to avail himself of stand your ground, and was denied that by law enforcement and then by a judge. That's what would have been interesting whether a black man in

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a hoodie could avail themselves of stand your ground.

That's a test of the law. That's a test of the law. What George Zimmerman did, did not use your stand your ground. He simply said, "I'm white, he's black. Self-defense." People found that.

But if Trayvon Martin would have shot George Zimmerman, that's a test of the law.

The five -- it's five points, the entertainment district shooting where the young lady was paralyzed, that gentleman's family called me and I knew that there was a stand your ground case. I did not know that he was a convicted felon. That was going to be a test case in South Carolina as to whether they truly have the backbone to support when an individual that we know society -- whether he's Latino or African American has shot someone, an innocent white woman who's now paralyzed, whether he's going to be able to use the stand your ground defense.

They were able to skirt that by letting the federal government take it over, but that's a test of the law. That's a test of the law.



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COMMISSIONER CASTRO: Before we go on to Commissioner Achtenberg, actually Commissioner Yaki has an article here that is germane to the colloquy that was going on here.

Commissioner Yaki and then we'll go to Commissioner Achtenberg and then -- no, I know I've got a list here. It's Achtenberg, Patricia Timmons-Goodson, and then Gail.

COMMISSIONER YAKI: I just wanted to point out that cutting through -- cutting through all of this is that a South Carolina Judge has interpreted the statute to be identical to Florida and to grant civil immunity to an individual who -- who in exercising his or her stand your ground rights shot and killed an innocent bystander. I just wanted to put that on the record.

REPRESENTATIVE RUTHERFORD: Right, that's my case.

COMMISSIONER CASTRO: Commissioner Achtenberg, then Commissioner Timmons-Goodson, and then Commissioner Heriot.

And do any of the Commissioners on the phone want to indicate an opportunity to ask a question?

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COMMISSIONER KIRSANOW: Mr. Chair, this is Kirsanow, I may have one question.

COMMISSIONER CASTRO: Okay. I'll have you after Commissioner Heriot.

Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: Thank you, Mr. Chairman. Senator Smith, my -- I have many grave concerns about the Florida version of the stand your ground law. The most significant of which is the interjecting of complete subjectivity into the self-defense law of Florida.

And by that I mean what used to be an objective standard, whether or not it was a reasonable person would have perceived the threat sufficiently to warrant his or her response with deadly force not whether or not a person with a, you know, a thin -- a thin skinned plaintiff or what have you, but whether or not this person perceived that they were in -- in danger of being -- having deadly force used against them they responded preemptively and in kind.

Can you explain the rationales being offered at the time that this revolutionary statute was adopted by the Florida legislature?

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2           What was the -- was there a precipitating event  
3           that encouraged the legislature to throw out a  
4           hundred years of common law and to change the  
5           paradigm such that implicit bias is then baked  
6           into the system?

7                         We talked before about the limitations  
8           to due process and the assertion was made, with  
9           which I agree that given that there's implicit  
10          bias abounding it affects everything that we do,  
11          including what judges do, and what prosecutors do,  
12          and what police do, and what persons on the street  
13          do. But why bake in that bias into the  
14          assumptions of this new law, what was the  
15          rationale offered at the time, Senator?

16                        SENATOR SMITH: It's funny that you  
17          mention it, there was a case in North Florida that  
18          was that cited as the impetus of this. It was a  
19          -- it was after a hurricane, an elderly gentleman  
20          and his wife -- and what was told to the  
21          legislature by the proponents of it, there was an  
22          elderly gentleman and his wife living in their  
23          trailer after a hurricane and a man from South  
24          Carolina who was working in Florida to help with  
25          the clean up came to the gentleman's house, and an

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2           altercation ensued and the older gentleman shot  
3           the young guy. And it was told that the older  
4           gentleman was arrested and had to go through all  
5           of these months of worrying about whether he was  
6           going to be convicted, had to get lawyers and  
7           everything. But it turned out to be a fallacy  
8           once the purporters started looking into it later.  
9           But just -- the climate in the Florida legislature  
10          is the easiest law to pass is something, you know,  
11          giving people more gun rights or tough on crime or  
12          something like that.

13                         And to go more to your concern it wasn't  
14          thought that it would be such a subjective  
15          standard. When it was passed and I voted against  
16          it, but even colleagues of mine that voted for it  
17          did not know and it wasn't fully explained that it  
18          would be a subjective standard. And that's why  
19          we've tried to go in subsequently and at least  
20          move it to more of an objective standard. Because  
21          as you've stated that's where the racial bias  
22          comes in. That's where some of the concerns come  
23          in because it's such a subjective standard that  
24          people can avail themselves of this even -- not in  
25          a reasonable circumstance. I don't reasonably

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2 think that I should shoot someone in a movie  
3 theater because they threw popcorn at me. But if  
4 it's subjective, if I go to a subjective and did  
5 this person actually fear when the person stood up  
6 and threw popcorn, they can avail themselves.

7 And so that's been some of the concerns  
8 that we've had and some of the changes that we've  
9 proposed to make it more of an objective standard  
10 instead of subjective.

11 COMMISSIONER ACHTENBERG: And did the  
12 legislature recognize that all of these judgments  
13 would be made at the scene and essentially by the  
14 officer? Did they understand that what had  
15 traditionally been the prerogative of judges and  
16 lawyers in courtrooms with due process,  
17 evidentiary protections, et cetera, et cetera,  
18 would now be pushed down to the investigating  
19 officer to make some kind of, at least,  
20 preliminary judgment about whether or not the  
21 person had reasonable -- not reasonable fear,  
22 whether the person had fear at all and I therefore  
23 used deadly force against an aggressing, you know,  
24 an aggressor?

25 SENATOR SMITH: At the time in 2005 I

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2 was the Minority Leader of the Florida House and I  
3 can honestly say this wasn't a big issue. When  
4 stand your ground passed, myself and two other  
5 lawyers that were in the Democratic Party, we  
6 wrote a letter -- we voted against it. And only  
7 about 12 of us did. The entire Senate,  
8 bipartisan, every member of the Florida Senate  
9 voted for it. It wasn't seen as a groundbreaking  
10 piece of legislation, and it sat actually dormant  
11 and not used until you started hearing about the  
12 Trayvon Martin case. So remember this passed in  
13 2005, and when did you really hear about this law?  
14 After the Trayvon Martin case.

15 And now we've seen a plethora of cases  
16 come after it because people are starting to avail  
17 themselves and become embolden because they think,  
18 you know, "I got this great get out of jail ticket  
19 to do my aggression."

20 But, honestly, in 2005 members did not  
21 understand the full ramifications, non-lawyer  
22 members because we're, you know, legislature of a  
23 lot of people, did not understand the  
24 ramifications. And even the lawyers in the  
25 legislature didn't fully understand because it was

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such a new and groundbreaking piece of legislation. It was just sold on a political basis as "you shouldn't have to cut and run, you shouldn't have to retreat, you shouldn't have to turn and run. And this is the way of making -- giving your citizens a chance not to have to turn and run and get shot in the back."

COMMISSIONER ACHTENBERG: Thank you, Senator, I appreciate that.

COMMISSIONER CASTRO: Next we have Commissioner Timmons-Goodson, who will be followed by Commissioners' Heriot, Kirsanow, Kladney, and then Commissioner Yaki.

COMMISSIONER TIMMONS-GOODSON: Thank you so very much, Mr. Chair.

COMMISSIONER CASTRO: You're welcome.

COMMISSIONER TIMMONS-GOODSON: My question is for Representative Rutherford. One of the major criticisms offered of the stand your ground laws by opponents is that it so easily allows the escalation of fairly small incidents into deadly affairs.

And with that in mind I'd like to just explore with you for just a few moments your

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thoughts based on statements that you've made.

You've said early on that at the time that the stand your ground law was enacted in South Carolina that there was no self-defense law. That laws related to self-defense were outdated and archaic. That one could not elevate, I believe you said, the use of force.

In fact the common law was what was in effect. Is that not right? In other words, the judges used the common law, applied that to the facts that came before them. Is that right?

REPRESENTATIVE RUTHERFORD: They applied prior case law, exactly.

COMMISSIONER TIMMONS-GOODSON: Okay. And that prior case law was based on common law?

REPRESENTATIVE RUTHERFORD: That's right.

COMMISSIONER TIMMONS-GOODSON: Now you've also said that stand your ground or the stand your ground that you support means that people don't have to live in fear. That elevating -- not elevating force doesn't make sense to you.

First, I guess I want to know -- ask you to explain your thought that the laws that were in



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effect or applied relating to self-defense prior to stand your ground laws, why they were archaic, you know, what makes you say they were outdated?

REPRESENTATIVE RUTHERFORD: Well, remember South Carolina had no statute on self-defense. So it was simply based on your ability to articulate your self-defense or why you did something in a trial while you were on trial for a judge, determine that are absolutely right. You defended yourself. You have a right to do so. And in doing so you should be immune from prosecution.

The non-elevation --

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COMMISSIONER TIMMONS-GOODSON: Well, let me just ask you. How does that differ from any other defendant defending themselves in response to a criminal charge filed or a civil case where a plaintiff asserts something and, you know, one is called upon to gather your resources and to defend, I mean, how is that --

REPRESENTATIVE RUTHERFORD: Your liberty is not in jeopardy in a civil case. In a criminal case your liberty is in jeopardy. And so, for most criminal cases if a trial is going forward on a forgery or a fraud charge, what you're saying is that "I did not do this."

When it's related to self-defense then stand your ground requires that you say, "I did this. And I did this for this reason." And you're asking that a judge in an immunity hearing say, "What you did is reasonable." Or "What you did is unreasonable."

In the case where the gentleman was involved in the home invasion and he tried to say, "I should be cleared under stand your ground." The judge sent it up. The Court of Appeals said, "No, give him a hearing." The judge gave him a

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hearing and denied him immunity. Period.

It is based on reasonableness. And I'll read you 1611.420 --

COMMISSIONER TIMMONS-GOODSON: That's -- that is -- well, we could go in different directions, but I hear -- and I didn't mean to cut you off. But I hear what you're saying. But you do have bond in cases that would have involved self-defense as you would have had bond offered in other cases in South Carolina, do you not?

REPRESENTATIVE RUTHERFORD: Yes, ma'am. And bond is based on -- what should be based on, simply someone's -- whether they're going to show back up in court. Whether they're a danger.

If they're charged with murder even under the stand your ground cases they would still have to go forward and get a bond. But at least at the bond hearing you'd have the right, as I did in the most recent case to say, "We believe that this -- that stand your ground is going to apply in this." And have a judge listen and agree or disagree and set bond accordingly.

Bonds are not meant to punish, but most often in murder cases they do exactly that.

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COMMISSIONER TIMMONS-GOODSON: Okay. So as I understand that the reason that your existing or the existing South Carolina laws relating to self-defense were viewed as archaic is that it required an individual to -- it required an individual to go forward and to defend themselves?

REPRESENTATIVE RUTHERFORD: To stand trial. And at trial only then could you defend yourself, not prior to that point.

COMMISSIONER TIMMONS-GOODSON: Okay. Second and last question. You say that stand your ground law to you means that you don't have to live in force --

REPRESENTATIVE RUTHERFORD: Fear.

COMMISSIONER TIMMONS-GOODSON: -- that it doesn't make sense to you that one would not be permitted to elevate force. I guess I'm left wondering why is it not common sense that if someone comes up and pushes you, that you push them back, or someone comes up and hits you with a fist that you hit them with a fist, why should -- I mean, why does it make such sense that you could elevate the force that you use to a gun or a knife in response to being pushed or hit with a fist?

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REPRESENTATIVE RUTHERFORD:

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Commissioner, respectfully, I submit that you

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should have a right to not have people hit you

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with a fist. That you have a right not to be

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pushed. That you have a right not to wait and see

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what the next step will be once someone hits you

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in the face.

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You should not wait to see whether

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you're going to be knocked out. You should have a

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right to pull that gun if you have one and say,

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"Leave me alone. I don't want to be bothered."

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And that's what the general assembly found. We

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have a right to live in peace.

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And peace means that I'm not going to

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wait on you to hit me. I'm not going to wait on

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you to push me. I'm standing with my two children

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-- I have two little boys. And if you're going to

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walk up to me and try an assault me or one of them

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I'm not going to wait to see what your next step

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is going to be before I decide what I'm going to

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do.

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That's what the general assembly found.

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And I think that's common sense.

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COMMISSIONER TIMMONS-GOODSON: Thank

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you, sir.

COMMISSIONER CASTRO: Commissioner  
Heriot, you have the floor.

COMMISSIONER HERIOT: Thank you,  
Mr. Chairman.

Here's my problem with the discussion so far. It seems like a lot of what is being said here is not special to stand your ground at all, but rather could be an argument against the doctrine of self-defense in the first place. And I assume that nobody here is in favor of repealing self-defense as a basic doctrine here.

Representative Rutherford, I was impressed by your discussion a little while ago about implicit bias. Let me see if I can restate it and see whether you still agree with me.

The way that I see it, as you put it implicit bias is background. It's involved not just in stand your ground laws it's involved in every kind of law there can be including the exercise of basic self-defense.

So if we're talking about a non-stand your ground state one of the things that has to be guarded against, generally, is implicit bias

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2           against black males, a trigger-happy person who  
3           believes he's under attack, but isn't. You know,  
4           he thinks the black male is about to attack him,  
5           but it's not true, he pulls the gun. And, you  
6           know, that problem's always there.

7                         And that problem's there when we talk  
8           about home invasions and the general Castle  
9           Doctrine. And what stand your ground adds to that  
10          is simply now there's this small number of cases  
11          -- I think it's important to recognize stand your  
12          ground applies only on very, very few cases. I  
13          mean, you know, the result will turn on stand your  
14          ground in just a shockingly small number of cases.  
15          These will be the cases that don't occur in a  
16          home. Do occur in some place where the person who  
17          is exercising self-defense or supposedly  
18          exercising self-defense believes reasonably that  
19          he could retreat but chooses not to.

20                        In most of these cases in public places  
21          that's not going to be possible to retreat and  
22          therefore stand your ground doesn't make any  
23          difference you still have a right to self-defense.  
24          And we're talking about this tiny number of case  
25          -- cases where the defendant or the person who is

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2 exercising or is said to be exercising  
3 self-defense knows that he can retreat but chooses  
4 not to, that's a very small number of cases.  
5 Stand your ground adds an implicit bias problem  
6 against the black male who is perceived to be  
7 attacking.

8 But on the other hand it helps the black  
9 male in the opposite position, the one who's  
10 actually purportedly exercising self-defense, he  
11 has to worry about implicit bias at the time of  
12 trial whence the jury is second guessing him on  
13 whether or not he could have retreated. They  
14 weren't there. And they may be more likely to  
15 find "Hey, you know, the guy says that he was  
16 under attack, we don't believe him." Or "Hey, he  
17 says that he could have retreated, we don't  
18 believe him."

19 So implicit bias is everywhere in that  
20 respect. And stand your ground doesn't add to the  
21 problem for the black male it simply helps a  
22 different category of black male.

23 REPRESENTATIVE RUTHERFORD: Absolutely.  
24 You succinctly stated exactly what my position has  
25 been. And I agree with you. I think that a lot



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2 of these cases that have been mentioned aren't  
3 necessarily turning on stand your ground, but an  
4 officer and an investigator's perception of what  
5 is self-defense any way. And then he's saying,  
6 "Well, because of stand your ground I'm not going  
7 to arrest you -- I'm not going to detain you."  
8 But it's his assertion of self-defense in using  
9 that as a --

10 COMMISSIONER HERIOT: So the second  
11 manifestation that I saw with this problem where  
12 we seem to be moving between self-defense and  
13 stand your ground and not recognizing that the  
14 arguments were being -- made that apply to  
15 self-defense too.

16 REPRESENTATIVE RUTHERFORD: Right.

17 COMMISSIONER HERIOT: Was -- in the area  
18 -- Senator Smith, you mentioned the detain issue  
19 in the Florida statute. But isn't that just what  
20 the basic law would be with regard to self-defense  
21 if police officers investigate a crime and it's  
22 not a stand your ground case, it's just basic  
23 self-defense, everybody agrees there was no  
24 ability to retreat so stand your ground doesn't  
25 make any difference. You don't arrest someone if

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2 the police officer concludes, "Oh, I believe based  
3 on what I know this was self-defense."

4 You wouldn't arrest somebody like that,  
5 would you? You wouldn't advocate that would you?

6 SENATOR SMITH: The concern with stand  
7 your ground, and it puts the officer in a very  
8 defensive posture. Before stand your ground I  
9 agree you need probable cause and you would do  
10 that. But stand your ground, now the officer now  
11 has a statute that says I cannot detain and  
12 also --

13 COMMISSIONER HERIOT: But he couldn't  
14 before could he?

15 SENATOR SMITH: -- ma'am, if I could --

16 COMMISSIONER HERIOT: On a self-defense  
17 case you couldn't -- he can't detain somebody if  
18 the police --

19 SENATOR SMITH: Within that statute it  
20 explicitly gives a civil liability to that police  
21 department if it's found that they were detained  
22 in a stand your ground case. So it couldn't  
23 before but that was case law and officers use  
24 prudent judgment. But now an officer has a  
25 statute -- a statute that says "I cannot detain,"

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2 and "by the way if I detain I might get sued."  
3 And so it affects the way that officer truly  
4 investigates. As before he would just use  
5 investigative skills and figure out do I have due  
6 process. Now he has this hover above his head  
7 saying, "Oh, my God, if I use my investigative  
8 skills and I may be wrong I have a statute  
9 particularly pointing to civil liability for me  
10 and my department."

11 So it affects the officers use of his  
12 investigative skills because now we've put in  
13 statute -- not just common sense and case law, but  
14 we've put in statute that you better not detain.  
15 And by the way if you make the wrong judgment,  
16 officer on the street, your department's getting  
17 sued.

18 REPRESENTATIVE RUTHERFORD: Yes, but  
19 that's exactly what should happen. You should not  
20 detain people that simply defended themselves that  
21 are not wrongdoers.

22 Commissioner, you're exactly right and  
23 that turns on, in my situations, African American  
24 males who are guilt -- who are dealing with that  
25 implicit bias from police officers going, you

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know, "I'm not going to give you that benefit of the doubt."

And that police officer should be sued simply because he now is detaining Trayvon Martin, should he have shot George Zimmerman, saying, "Well, I'm not going to -- you're a black man in a hoodie I'm not going to give you that same defense."

The police should be sued when they are detaining and arresting people that are not wrongdoers.

COMMISSIONER HERIOT: The third area where I saw, again, getting off track and acting as if, you know, we're talking about stand your ground when in fact the argument that is being made would apply to self-defense generally was with the civil liability area.

You know, it's massively more important that, like, when people are exercising their right to self-defense just in an ordinary case where stand your ground wouldn't be involved, you've still got the problem of mistaken self-defense. You know, if the gun goes off and hits a third person or they were mistaken in the first place,

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they shoot someone reasonably believing that they are under attack, but wrong.

And, you know, I teach torts in law school. One of the cases in my book is Crovocia (phonetic) versus Raymond. It's not a stand your ground case. It's an old Colorado case from the early part of the 20th century where someone exercising self-defense reasonably, but mistakenly, they end up shooting someone and that person was not actually attacking them.

The law has been that as long as you're acting reasonably you're not liable. It doesn't strike me that we're really talking about something different here.

Now you can argue about whether or not that's good law. You know, maybe -- maybe it should be better policy to say that you're not criminally liable for use of self-defense, but if it turns out that you made a mistake, even if it was a reasonable one then you should be liable for civil damages.

If I am not mistaken, in ancient Rome that was what the law was. You had a right to self-defense as to criminal liability, but if you

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2 got it wrong and you shot somebody even though it  
3 was reasonable and it turns out to have been wrong  
4 you were civilly liable. And some people have  
5 advocated such a rule.

6 But that's really quite detached from  
7 the basic stand your ground issue. In a given  
8 state could choose to make civil liability  
9 available for mistaken use of self-defense that is  
10 nevertheless reasonable or they could choose not  
11 to. But it's not -- it's not the core issue we're  
12 concerned with and I think we make a mistake when  
13 we start analyzing particular states statutes here  
14 and have they been drafted the best way possible.  
15 As a federal commission we should be more  
16 concerned with is the concept of stand your ground  
17 a good concept or not. And, you know, if any of  
18 you have a comment on that?

19 SENATOR SMITH: Ma'am, I would disagree  
20 when you talk about the civil liability because  
21 you keep getting to reasonableness and under prior  
22 common law and course law -- case law even when  
23 you're talking about civil liability you say  
24 reasonableness. But under stand your ground and  
25 stand your ground specific, you don't even get to

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2           reasonableness because it's a blanket, a blanket  
3           of -- of absolution of liability, you don't even  
4           get to reasonableness.  If you're asserting stand  
5           your ground you never get to anyone determining  
6           whether you were reasonable.  And me trying to  
7           defend myself against you and I just start  
8           shooting everyone.  You don't get there because  
9           the statute written in Florida absolves you of any  
10          liability, even reckless -- reckless liability --

11                    COMMISSIONER HERIOT:  But my point is  
12          we're a federal commission, we don't like, you  
13          know, nickel and dime the state statute.  If you  
14          don't like that aspect of the statute then the  
15          Florida legislature gets to change that.  But  
16          that's not the basic concept of stand your ground,  
17          the basic concept of stand your ground is  
18          different from that.

19                    You know, if South Carolina has a  
20          different statute and a different approach to  
21          civil liability.  And Virginia, or Minnesota, or  
22          South Dakota have different approaches to that,  
23          this is not a commission convened to fly speck the  
24          -- the Florida statute.  That's not the core  
25          concept of stand your ground.

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SENATOR SMITH: I thought -- this is a

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commission on human rights and if there is a --

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COMMISSIONER HERIOT: Civil rights.

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Civil rights.

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SENATOR SMITH: Civil rights. If there

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is a statute in a state in this nation that

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encourages people to act recklessly, and even

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though it may be nickel-and-diming in Florida, and

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I would hope that Florida would change that. But

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if Florida doesn't have the fortitude to do the

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right thing by its people I would hope that this

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commission would at least speak to giving Florida

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that fortitude to say "you know, what this statute

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is wrong because it encourages people to be

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reckless --

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COMMISSIONER HERIOT: But the

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constitution doesn't actually work that way. We

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don't have authority to tell Florida how to --

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SENATOR SMITH: -- encourage --

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COMMISSIONER HERIOT: -- we have

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certain --

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COMMISSIONER CASTRO: Order. Order

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here. We're talking over one another. The

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record's not going to be clear.



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But in the interest of time if I could ask Representative Smith to just wrap up what you're saying.

And Mr. Abuznaid, did you have anything to respond to on this? Otherwise, I'll when -- then I'll move onto the next commissioner. But, if you have -- when he's done if you have something to say, then we'll move on to Commissioner Kirsanow in the interest of time.

Mr. -- Representative do you want to finish your statement?

SENATOR SMITH: -- no, no --

COMMISSIONER CASTRO: Okay.

Mr. Abuznaid.

MR. AHMAD NABIL ABUZNAID: Yeah, I'd just like to say that I hope that I wasn't implying that there's something wrong with self-defense. I actually think if self-defense was so good we should have left it that way. And so I don't think, for me, I get the Castle Doctrine, I get why that was important. I think that's why there was a distinction made that the Castle Doctrine would empower American citizens to protect their home. But stand your ground said,

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"You know what, the castle is your entire world now. The castle is the movie theater, the castle is your child's school."

There was a Broward County case where a kid got arrested for assault and battery and the -- I think it was in the Fourth Judicial Circuit, the case was overturned because of stand your ground. And so the reality is, it's irresponsible law. Self-defense is great, stand your ground is not.

COMMISSIONER CASTRO: Okay. We're going to move on to Commissioner Kirsanow followed by Commissioner Kladney.

Commissioner Kirsanow, are you there?

COMMISSIONER KIRSANOW: I am. I'm here. Thank you very much. Can you hear me okay?

COMMISSIONER CASTRO: Yes.

COMMISSIONER KIRSANOW: Okay. I think that the impetus for this hearing largely was the Trayvon Martin case. And I just want to be sure that we have on the record at least if one of the witnesses is aware of this and I'm not sure which one might be aware of it, but, Mr. Rutherford, do you know whether or not Trayvon Martin invoked

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stand your ground defense?

REPRESENTATIVE RUTHERFORD: George Zimmerman. My understanding is he did not invoke that, although --

COMMISSIONER KIRSANOW: I'm sorry, George Zimmerman.

REPRESENTATIVE RUTHERFORD: -- although law enforcement would have known about the existence of it. My understanding is that George Zimmerman did not invoke it, no.

SENATOR SMITH: Can I answer that? Can I --

COMMISSIONER KIRSANOW: Was it part of the charge to the jury?

REPRESENTATIVE RUTHERFORD: Yes.

SENATOR SMITH: There were two -- if I can chime in. There's two -- there's two things of the stand your ground. There's the procedural aspect of stand your ground which is invoking it and having the procedural hearing in front of a judge to invoke stand your ground.

George Zimmerman did not avail himself of that procedural aspect of stand your ground. But when you talk in Florida stand your ground is

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2 self-defense. And within the jury instruction  
3 that was used by George Zimmerman's case and any  
4 other self-defense case in Florida there's no  
5 separation between stand your ground and  
6 self-defense.

7 And so although he did not avail himself  
8 of the procedural aspect of stand your ground, he  
9 certainly availed himself of the substantive  
10 aspect of stand your ground. It was used in the  
11 Trayvon Martin case.

12 COMMISSIONER KIRSANOW: Second, I'd like  
13 to ask in terms of there's been a lot of  
14 discussion about, you know, someone shooting  
15 straight, or shooting recklessly, or shooting  
16 negligently, I guess I'll pose this to  
17 Mr. Rutherford who sounds a little bit like me. I  
18 hope for your sake very sincerely Mr. Rutherford  
19 that you don't look like me.

20 But the -- well, let me put it this way.  
21 I live -- I'm a black male living in what is  
22 generally considered in Cleveland a high crime  
23 neighborhood. And in the last, I'd say, three  
24 decades I've probably been in situations three,  
25 possibly four times where I could have invoked if



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2 black male living in Cleveland, I'm a black male  
3 living in South Carolina. And I have not had the  
4 -- and fortunately, had to defend myself anytime  
5 recently. But I would suggest that anyone that  
6 does is simply acting on common sense and  
7 self-defense and still faced with the test of  
8 reasonableness. Reasonableness does not go out of  
9 the window based on stand your ground.

10 And there are a number of cases where  
11 people have tried to use stand your ground  
12 procedurally and been turned down from doing so.

13 Stand your ground was used as a jury  
14 charge in the George Zimmerman case, but it was  
15 used to say that he did not have a duty to retreat  
16 outside of his home.

17 But, again, I ask who among us asserts  
18 that you should have to retreat outside of your  
19 home. Why are we encouraging thugs to approach  
20 people and telling people that they have a duty to  
21 retreat before they act on it.

22 Why are we saying that people must run,  
23 retreat, turn your back. It was stated in Florida  
24 it said "safely retreat." That was not the law in  
25 South Carolina, it was retreat. And in many other

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places where stand your ground was passed.

What we are saying is that you have a --  
an opportunity and a duty to defend yourself, to  
defend others, and in acting on that you will not  
be prosecuted. You will receive procedurally  
immunity from prosecution.

COMMISSIONER KIRSANOW: Thank you. And  
one last question. I heard, and I didn't know  
which witness that it was, indicate that the U.N.  
Human Rights Commission found stand your ground  
incompatible with the notion of right to life.

Did I hear that correctly?

MR. AHMAD NABIL ABUZNAID: Yep, that's  
correct.

COMMISSIONER KIRSANOW: Whoever  
testified to that do you know when the Human  
Rights Commission -- the U.N. Human Rights  
Commission made that statement?

MR. AHMAD NABIL ABUZNAID: Yep,  
absolutely. It was during the review of the  
ICCPR. It was held in March of 2014.

COMMISSIONER KIRSANOW: So this would be  
the same Human Rights Commission that has those  
human rights and pro-life exemplars such as

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Russia, Saudi Arabia, Pakistan, Libya, Syria, and  
Uganda, correct?

MR. AHMAD NABIL ABUZNAID: Could you  
repeat the question, please?

COMMISSIONER KIRSANOW: Is this the same  
U.N. Human Rights Commission that has the human  
rights exemplars on the commission such as Russia,  
Saudi Arabia, Pakistan, Libya, Syria, and Uganda?

MR. AHMAD NABIL ABUZNAID: Are you  
asking if those are the people that sit on the  
committee or are those the people --

COMMISSIONER KIRSANOW: Yes.

MR. AHMAD NABIL ABUZNAID: No, I believe  
the committee was made up of, you know, Israel --  
several other states, but I don't remember Russia  
being one of them, but it was several nations. I  
believe also that information could be found  
online.

COMMISSIONER KIRSANOW: I think it can.  
Thank you.

COMMISSIONER CASTRO: Thank you,  
Commissioner Kirsanow.

Commissioner Kladney.

COMMISSIONER KLADNEY: Thank you,



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Mr. Chairman. My -- my question seems to revolve around procedure -- due process. I don't -- I don't understand this -- I think it's Representative Rutherford who's talking about people shouldn't have to be arrested.

Well, in process today in criminal law police don't have to arrest anybody. They can investigate. They can turn their information over to the district attorney. The district attorney can decide whether to charge or not. And at least that's the process in my jurisdiction, it may not be that way in South Carolina.

But it seems to me -- and I think this is a question for the entire panel. That when you put a police officer who is trained to be an investigator, not a decision maker, in charge of making a decision, then his investigation, once he makes that decision in his mind is all angled toward that decision that he has made. And therefore, I assume when you have this immunity hearing he is going to be on the witness stand defending his decision, where in the past the police officer -- the neutral, would come to court in a preliminary hearing, which I assume would be

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akin to an immunity hearing. And a neutral judge would make a decision as to whether there was probable cause or there was self-defense.

Although I do understand that many criminal defendants refuse to provide -- at any case, in a preliminary hearing.

So if someone -- if you all could discuss this kind of aspect to -- in relationship to the law I would appreciate it. Try and enlighten me a little.

REPRESENTATIVE RUTHERFORD: In South Carolina you are -- a preliminary hearing, where a hearing is determined -- is held to determine whether the case proceeds to the grand jury is not a right and can be taken away by a prosecutor who simply seeks to indict.

At a preliminary hearing in South Carolina a defendant is not avail -- he cannot put up any evidence it is only put on by the state.

And a law enforcement officer who arrests someone unlawfully should be sued. A law enforcement officer that arrests someone who should not have been detained or arrested should

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be sued anyway.

I think this statute only makes it clear -- it does that in Florida, it doesn't necessarily do that in South Carolina.

But, again, procedurally, what this does is allow someone, in my cases, African American males to avail themselves of the judicial system in front of a general sessions judge, what people on the street would call a big court judge. I don't know if they're Supreme Court judges or circuit court judges in Florida. But they would be a general sessions judge who has the ability to give them immunity. Taking that decision solely away from law enforcement where it has -- where it was invested all up until this point. There's no one that can tell me --

COMMISSIONER KLADNEY: But, but, you're the one who says that the old self-defense law was -- it was case law, it was all over the place.

REPRESENTATIVE RUTHERFORD: In South Carolina, yes.

COMMISSIONER KLADNEY: When in fact I would assume that you had jury instructions explaining exactly what the elements of

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self-defense were.

REPRESENTATIVE RUTHERFORD: If you did not meet with the elements of self-defense in South Carolina you did not get a jury charge to that effect.

So a judge had to determine that you could even -- that he would even give that charge before he would do so.

COMMISSIONER KLADNEY: So -- excuse me. So what's -- where does stand your ground then become different than self-defense? If it is different from self-defense outside of procedurally, explain it to me.

I mean, you have to be in fear of harm --

REPRESENTATIVE RUTHERFORD: Outside --

COMMISSIONER KLADNEY: -- you get to defend yourself. And the charge to the jury is the definition of the law.

REPRESENTATIVE RUTHERFORD: Right. Procedurally self-defense differs from stand your ground because stand your ground is going to give you an immunity hearing. So procedurally it differs that way.

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Outside of that it differs because it takes the common law doctrine, the common law Castle Doctrine and extends that to wherever you may be. You never had a right to -- you never had a duty to retreat in your home. Now that duty to retreat goes away when you're outside of your home as well. It says that you have the right to live unmolested.

COMMISSIONER KLADNEY: So you -- you really are saying if someone starts angering me and I get angry and I throw a punch, he can take a gun out and shoot me. Is that correct?

REPRESENTATIVE RUTHERFORD: I'm saying that if someone angers you --

COMMISSIONER KLADNEY: Is that correct, yes or no? Yes or no, sir? Yes or no, if I throw a punch at someone can they take a gun out and shoot me?

REPRESENTATIVE RUTHERFORD: Yes. You should not throw a punch at someone.

COMMISSIONER KLADNEY: Thank you. That's fine. Thank you.

REPRESENTATIVE RUTHERFORD: Yes. The general assembly has consistently found in states

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where they've enacted this that you should have a right to live unmolested. That you should have a right to expect to be left alone with your home, your business, and your vehicle, and wherever you may stand. And this assertion that you should be able to walk around, whether it's a commissioner or anybody else, punching people in the face without the -- without them having the ability to defend themselves, to me, just does not make sense. We negate the fact that --

COMMISSIONER KLADNEY: -- you've never been in an alcohol-fueled situation and you've never seen a fight occur like that?

REPRESENTATIVE RUTHERFORD: I've never been in a what?

COMMISSIONER KLADNEY: Alcohol-fueled situation where alcohol is driving the parties?

REPRESENTATIVE RUTHERFORD: I don't drink, but I have been in a number of situations where people were fueled by alcohol and doing wrong.

In South Carolina we also allow you to carry your gun into a bar if --the bar owner does not put up a sign and prohibit you from doing

2 so.

3                   However, in doing that we mandate that  
4 concealed weapons permit holders that are going  
5 into a bar can have absolutely no alcohol. So if  
6 a concealed weapons permit holder in South  
7 Carolina was in a bar and had a weapon on them and  
8 was, as in your scenario, punched in the face,  
9 would they have a right to defend themselves?  
10 Absolutely.

11                   COMMISSIONER CASTRO: But if the gun's  
12 concealed --

13                   COMMISSIONER KLADNEY: Would anyone else  
14 on the panel like to comment --

15                   REPRESENTATIVE RUTHERFORD: -- the bar  
16 owner would have a sign on the door saying "No  
17 concealed weapon permits allowed." And the  
18 concealed weapons permit holder has a duty --  
19 having a concealed weapons permit must check the  
20 sign on the door before he goes in.

21                   COMMISSIONER CASTRO: Here's what I'm  
22 going to do. We're technically out of time, but I  
23 want to -- two commissioners -- Commissioner  
24 Kladney you need to wrap it up, I've got two  
25 commissioners who want to ask two brief questions,

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Yaki and Narasaki.

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So Commissioner Kladney if you could just finish your questioning and then I'll go to Commissioner Yaki and then Commissioner Narasaki and then we'll conclude the panel.

COMMISSIONER KLADNEY: I would just -- Mr. Chairman, I'd just like to let the other panelists comment on Representative Rutherford and my question if they could do so briefly.

MR. AHMAD NABIL ABUZNAID: This is Ahmad Abuznaid. I would just like to say that the issue here isn't concealed carry permits, the fact of the matter is even without that provision requiring concealed carry permit holders to not drink alcohol the gentleman could just step outside of the bar and then unload a clip into, you know, whatever person he was deemed afraid of.

So I think that, you know, we can get lost in discussing permits and whatnot, but the issue here is stand your ground and the fact that it's unreasonable.

REPRESENTATIVE RUTHERFORD: That would be neither stand your ground nor self-defense. You cannot walk out and shoot --



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MR. AHMAD NABIL ABUZNAID: But --

REPRESENTATIVE RUTHERFORD: -- that would not be stand your ground.

MR. AHMAD NABIL ABUZNAID: -- but if the altercation spilled out to the exterior of the bar and you were in fear of your life --

REPRESENTATIVE RUTHERFORD: -- if you're still getting beat up and assaulted outside of a bar, from the inside all the way to the outside, you should probably defend yourself.

MR. AHMAD NABIL ABUZNAID: But also stand your ground doesn't require that you're beat up. So the gentleman could be walking towards your direction yelling obscenities at you --

REPRESENTATIVE RUTHERFORD: Why is it that we are required --

COMMISSIONER CASTRO: Commissioner Yaki has a question and then we'll go to Commissioner Narasaki and conclude the panel. Thank you.

Commissioner.

COMMISSIONER YAKI: Yes, thank you very much. I remain -- I guess I remain troubled by some of what has been said here today. I don't think -- I think we do actually have an obligation

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2 to nickel-and-dime some of these statutes because  
3 we're here because Trayvon Martin and Jordan Davis  
4 were victims of these statutes and those people  
5 were not nickel-and-dimed.

6 I'm not going to ask a question I'm just  
7 going to make a very brief statement.

8 Mr. Rutherford, I appreciate your passion. I  
9 understand that you believe that what you're doing  
10 is in the best interest of African Americans who  
11 live in fear of walking the streets. But what we  
12 have here is data that shows that in all states  
13 that have stand your ground homicide rates go up  
14 rather than go down.

15 The data shows that if you are an  
16 African American claiming stand your ground  
17 defense you are much less likely to get it granted  
18 than if you are a white person claiming it and if  
19 your victim is black.

20 You talked about whether or not Trayvon  
21 Martin would be able to have used that, but  
22 Trayvon Martin is dead. And he was not able to  
23 say "I was acting in self-defense," when George  
24 Zimmerman approached him.

25 The problem with all this is that people

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2 are dying. More people are dying than would have  
3 died before. In your situation that you talked  
4 about if someone throws a punch at me I have the  
5 right, according to you, to take out a gun and  
6 shoot him.

7 Now if the person -- if I think the  
8 person's gonna throw a punch at me I have the  
9 right to take out a gun and shoot him. If I -- if  
10 the person threw a punch at me and missed and we  
11 walk outside and I see him walking toward me I can  
12 take out my gun and shoot him.

13 In all of these cases someone gets hurt,  
14 someone dies. And you're essentially giving  
15 someone who is not trained like a police officer,  
16 as Mr. Kladney was saying. Does not understand  
17 how to judge a situation, has not taken  
18 proficiency courses in shooting so as to minimize  
19 casualties to civilians, and yes, you're right,  
20 cops do sometimes miss and they shoot the wrong  
21 people. But for the most part they're trained,  
22 and we have an expectation that they should be  
23 trained to not sort of spray their gun anywhere.

24 And you're essentially giving ordinary  
25 citizens the right to draw and fire wherever they

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may be at any specific place and time.

That's the problem with stand your ground is that the castle is no longer the castle. The question of reasonableness when someone breaks into your house is a lot different than when you're in an open theater or in an auditorium such as this, the judgments are a lot different and the result is that someone dies.

And the stats show people die. More people are dying -- more people are dying because of this. And as great as you are as an attorney and as expensive as you are of an attorney -- even though you forgot your tie today -- to, you know, in terms of defending people who you believe were asserting their rights -- and I agree that they should be able to assert their rights if it was self-defense. Stand your ground is different from self-defense because the way it works, the way -- the situation in which it occurs, the environment in which it happens is much different than if you're inside your home or if you're in absolute imminent fear of someone else taking a gun at you and the gun is out there and you have to do something.

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Those are the exceptions that prove the rule of the old common sense Castle Doctrine. But stand your ground takes that and perverts that to an extent that I am concerned about. And especially for African Americans who do not get the benefit of it as white defendants do. Who are the victims of it more than whites are. I think those are the things that I'm concerned about.

COMMISSIONER CASTRO: Thank you, Commissioner Yaki.

Commissioner Narasaki, you have the last question.

COMMISSIONER NARASAKI: Thank you.

I just really want to thank all of the panelists for the discussion, it's been very illuminating. And it's clearly a very passionate subject for everyone.

So my understanding, and I appreciate Commissioner Heriot's efforts to try to untangle the issue of how stand your ground is different from the Castle Doctrine. I want to make sure I understand it correctly.

So my I understanding is (A), that it gives you more leeway to escalate, it doesn't

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require equal force, but you can more quickly  
escalate.

(B), you don't have to be in your home  
or in the vicinity of your home so that makes it  
more likely that innocent bystanders, in fact,  
will be around and more likely to therefore be  
collateral damage.

Three, my understanding is that there is  
more subjectivity to the fear that's allowed.  
That it's not a reasonable person standard. But  
in the case of -- so there was a case of a guy who  
shot a Chinese American neighbor. The Chinese  
American neighbor was actually going to his own  
home next door. And the guy who shot him said,  
"Well, I was in fear of my life because all  
Chinese know Karate and can kill me."

So that would be his subjective fear.  
But I hope most of us would not think that was a  
reasonable person's standard -- meet that  
standard.

So if this is all -- so I want to (A),  
ask Mr. Abuznaid, is this a correct understanding?

And (B), the argument seems to be  
because we're here -- the reason the commission is

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looking at this is because there's a question about equal protection under the law and whether in fact these laws are victimizing African Americans, are being applied differently in a way that hurts minority communities.

But the argument that seems to be being made by some is that in fact it is helping African Americans, so I want to know since you are clearly not in support of the law where -- how -- where's the conflict in that?

How is it that it helps -- does it help enough to change your mind?

MR. AHMAD NABIL ABUZNAID: So to your first question, that list did seem accurate. And I would just add in addition that stand your ground eliminated the duty to safely retreat, which is what we had in Florida. And I think for people that had issues with self-defense that would have been the change that I would have advocated for, just simply require someone to safely retreat if possible.

To your second question I think, you know, with everything going on in Ferguson, with everything going on in the State of Florida, young

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2 black and brown men and women don't feel safe.  
3 Now whether that is because of police brutality  
4 and excessive force, or vigilantes, or people like  
5 Michael Dunn who don't like thug or quote-unquote  
6 "thug music," which is hip hop.

7 People are being subjected to being  
8 threats of society when they really just want to  
9 live. They really just want to prosper peacefully  
10 in their communities. Trayvon Martin was walking  
11 to his father's home. I mean, if we are to accept  
12 that in any day in today's society a kid can get  
13 gunned down walking to his father's home simply  
14 because another man has the right to stand his  
15 ground, I think we've lost all faith in our  
16 society.

17 I think that, you know, the example was  
18 drawn up by the commission member about being  
19 punched in the face, now, what would you teach  
20 your child is what I would implore folks to think  
21 about. Would you teach your child to punch back  
22 or to fire their gun off? Or do you teach your  
23 child, "You know what the person that punched you  
24 was wrong, we're a society that does not condone  
25 violence, we condemn it. And we'd like to have a



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peaceful society."

Now maybe that's Utopian and could not exist, but I -- I just say that we've seen it now -- bubble into our schools. People are in fear of their lives and they deserve better and we should do better.

COMMISSIONER CASTRO: Thank you, gentlemen for a very engaging panel, we appreciate it. We went over a little time, but it was very informative.

Yes, Senator.

SENATOR SMITH: Mr. Chair, just two quick things if I can --

COMMISSIONER CASTRO: Quickly.

SENATOR SMITH: -- very brief. Commissioner Heriot brought up a great point, there is a thin line between stand your ground and common law self-defense and we're getting blurred in that line.

My only point would be that with the invocation of stand your ground and cases that subsequent -- you're going to see more and more of these cases. Between 2005 and Trayvon Martin there are very few cases. But now people have in

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their mind, at least in Florida, that they have this great "get out of jail free card." So we're working towards stopping what's coming not what has happened.

And lastly, the point that was made earlier about data collection and if that's something that you can address that would be tremendous, of maybe requiring these states to do data collection. Although I want other changes to stand your ground, but God bless you if you can get states to at least keep the data and that will help your job and my job as we go forward.

COMMISSIONER CASTRO: Thank you, Senator. That will be an excellent recommendation.

Thank you all and we appreciate your time. So as this panel cycles off we ask panel two to begin to come forward.

Commissioners will take a five minute break as the panel begins to assemble.

(Midmorning recess was taken. End of Volume I, proceedings resume in Volume II.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF POLK

I, Kathy Wescott, Certified Shorthand Reporter, do hereby certify that I was authorized to and did report in Stenotypy and electronically the foregoing proceedings and evidence in the captioned case and that the foregoing pages constitute a true and correct transcription of my recordings thereof.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 28th day of October, 2014, at Lakeland, Polk County, Florida.

Kathy Wescott, CSR  
Court Reporter

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THE UNITED STATES COMMISSION ON CIVIL RIGHTS  
BRIEFING ON STAND YOUR GROUND

Place: The Rosen Hotel  
9700 International Drive  
Orlando, Florida 32819  
9:00 a.m. - 3:30 p.m.

Date: October 17, 2014

Reported by:  
Kathy Wescott, CSR

(Volume II, Pages 1 through 99, a.m. session, Panel  
Number 2)

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3 Present:

4 Commissioner Michael Yaki

5 Commissioner Roberta Achtenberg

6 Marlene Sallo

7 Commissioner Marty Castro (Chairman)

8 Commissioner Karen K. Narasaki

9 Commissioner Patricia Timmons-Goodson

10 Commissioner Gail Heriot

11 Dr. Sean Goliday

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Appearing by phone:

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Commissioner David Kladney

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Commissioner Peter Kirsanow

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17 Panel Number 2:

18 David Harris

19 William Krouse

20 John Roman

21 Arkadi Gerney

22 Attorney Benjamin Crump

23 Katheryn Russell-Brown

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COMMISSIONER CASTRO: If we can get the commissioners to come back up to the podium, please.

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Okay. I'm going to call the second panel to order. Let me briefly introduce the panelist's in the order in which they will speak.

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Our first panelist is David Harris, Law Professor at the University of Pittsburgh.

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Our second panelist is William Krouse from the Congressional Research Service.

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Our third panelist is John Roman of The Urban Institute.

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Our fourth panelist is Arkadi Gerney of the Center for American Progress.

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Our fifth panelist is Benjamin Crump -- who is just taking his seat now -- attorney for Trayvon Martin, Jordan Davis, and the Michael Brown families.

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And our sixth and final panelist is Katheryn Russel-Brown, Law Professor at the University of Florida Law School.

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I will now ask each panelist to swear or affirm that the information that you are about to

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provide to us is true and accurate to the best of your knowledge and belief. Is that correct?

PANELISTS: Yes.

COMMISSIONER CASTRO: Okay. As you know you'll have eight minutes, each of you. So Professor Harris, please proceed.

MR. DAVID HARRIS: Thank you very much. I want to tell the commission I appreciate you having this hearing. And appreciate your invitation.

Stand your ground laws are the most far reaching changes we have had to self-defense law in this country in many, many decades.

The bottom line for these laws is that they lower the potential legal cost of using deadly force. There's a lot of talk already about the empirical evidence and there will be more. I won't go into that right now.

I've been asked to come here to talk about implicit bias, which was mentioned earlier by Commissioner Yaki and some others.

I want to ask what role, if any, would implicit bias have in magnifying, changing, focusing, the effect of stand your ground laws?

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2 Unconscious, unintended, but very real bias, how  
3 would that play into stand your ground laws in  
4 practice?

5 Let's first start by defining implicit  
6 bias. When we think about racism, typically, we  
7 think about, sort of, the old school, in your  
8 face, calling names sort of racism. But the last  
9 20 years of research into the way people think has  
10 really changed the whole way that we should be  
11 thinking about racism as well.

12 What this has told us, this research  
13 over the last 20 years, is that what scientists  
14 call "implicit bias" is actually far more common  
15 than any kind of old school sort of racism.

16 When we talk about implicit biases, what  
17 we are talking about is unconscious favorability  
18 or favoritism towards whites and a negative  
19 feeling toward blacks, just to use the same binary  
20 that we've been using here all morning.

21 It is unconscious, these biases are not  
22 known to the people in whom they operate. They  
23 operate and exist even in people who have  
24 perfectly strong egalitarian conscious beliefs and  
25 would articulate them to you.



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They operate without the knowledge of those who have them and they do -- they can affect actions.

So how do we know this? I'll tell you just a little bit about it, try to put it in a nutshell. We've been -- there's a lot of research on this subject, but by far the most prominent research involves a test called "The Implicit Association Test" or IAT.

This test involves a use of a computer and the viewing of partial pictures of faces along with positive words and negative words.

When I say "partial pictures of faces," I do have a little sample here. I've got copies -- I'm sort of old school myself, so no PowerPoint on this I'm afraid. I'll be glad to pass them around.

You can see it's from the base of the forehead, the eyes, the nose, and just below the nose. It's enough of the face so that it's clearly recognizable whether the person being pictured is either African American or European American.

What happens here is that test takers

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2 see on the screen, they see a face and a word and  
3 they are asked to make associations by clicking on  
4 a computer key. It's really not that complicated.  
5 At first they are -- please -- at first they are  
6 asked to associate a white face with a positive  
7 word or concept. And a black face with a negative  
8 word or concept.

9 And when they click the computer is  
10 measuring the speed at which they click and the  
11 differences might be in milliseconds, but a  
12 computer is perfectly capable of measuring things  
13 at that level.

14 They are then asked, the test takers  
15 are, to click when you have an association between  
16 a white face and a negative concept, a black face  
17 and a positive concept.

18 After all of the clicking and testing is  
19 done what you end up with is sort of a measurement  
20 of the strength of associations in this particular  
21 person's thinking.

22 The test has been taken by millions of  
23 people. I think the last thing that I read was 13  
24 or 14 million. You can take it online. I have.  
25 And your data is used as part of the overall

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2 results. You are asked for demographic data about  
3 yourself, but you are not identified.

4 The results are that you get a  
5 measurement of the test taker's thinking. Does it  
6 take the test taker longer to click on  
7 associations between black and positive words than  
8 it does white and negative words, and vice-versa.

9 And it produces a measurement of the  
10 degree of bias that a person has toward whites,  
11 toward blacks, positive or negative.

12 The results of these tests -- this  
13 testing I think always surprises people a little  
14 bit -- before they've heard of it before.

15 75 percent of all test takers over these  
16 millions of tests taken exhibit a bias to one  
17 degree or another against blacks and for whites.  
18 It is -- this bias toward whites, against blacks  
19 shows up in 88 percent of all white test takers.  
20 But, also, interestingly in about 40 percent of  
21 all African American test takers.

22 Now this does not mean, I want to be  
23 clear. This does not mean that racism is somehow  
24 excused because it's unconscious. It does not  
25 mean that because everyone shares these

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2 characteristics, it's fine. Or that the victims  
3 are somehow to blame for racist treatment. And it  
4 certainly does not mean that the impact of  
5 whatever racist treatment there might be is any  
6 less because it comes from an unconscious place.

7 What it does mean is that racial biases  
8 need to be understood as being much more common  
9 and found in many more people than we used to  
10 think. Even if they're unaware of it the effects  
11 can be the same.

12 Now let's talk briefly about effects in  
13 the remaining time. Can this affect conduct, and  
14 especially within the context of something like a  
15 stand your ground law. And the answer to it is,  
16 yes. Even though these biases are unconscious  
17 they operate.

18 Implicit -- excuse me. Implicit bias,  
19 the research on this ties neatly into work done by  
20 social psychologist's about what are called  
21 heuristics. Heuristics is just a fancy word for  
22 rules of thumb. We all use rules of thumb and in  
23 psychology the researchers think of this as ways  
24 to make quick decisions. Have a rule that allows  
25 you to make very quick decisions in an environment

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2 with very low information at a very high rate of  
3 speed and to preserve your cognitive resources.  
4 So we use heuristics all of the time to make  
5 decisions as human beings.

6 When you combine the idea that there is  
7 implicit bias and heuristics -- what some of the  
8 research has shown -- especially research by  
9 Philip Atiba Goff of UCLA, is what he has called  
10 the "suspicion heuristic." You have a negative  
11 view of blacks for the most part, implicit. This  
12 leads to beliefs that blacks are prone to  
13 criminality. That they are violent. And there is  
14 a lot of other research besides Mr. Goff's that  
15 goes in this same direction.

16 So what you get is an automatic very  
17 rapid association between blacks, that is not just  
18 about negativeness, but also about violence and  
19 criminality.

20 Now in the specific context of stand  
21 your ground laws what this will mean is that more  
22 people will think of black people they meet as  
23 dangerous, as criminal, and as violent. And that  
24 is going to result in more blacks being the  
25 victims in stand your ground shootings. It also

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2 has the other effect of when a white person or  
3 somebody goes to court and says, "I stood my  
4 ground," and the victim is black, the jury  
5 harboring those very same biases will be more  
6 inclined to acquit when the victim is black.

7 Thank you very much for your time. I  
8 look forward to your questions.

9 COMMISSIONER CASTRO: Mr. Krouse, you're  
10 next.

11 MR. WILLIAM KROUSE: Thank you for  
12 having me. I have the privilege to work as the  
13 Legislative Analyst at the Congressional Research  
14 Service housed within the Library of Congress.  
15 CRS provides nonpartisan research to Congress.

16 I need to make a small disclaimer here.  
17 The views, ideas, and the information that I'm  
18 about to present are my own and cannot be  
19 attributed back to the Library of Congress or CRS.

20 COMMISSIONER CASTRO: We understand  
21 that. Thank you.

22 MR. WILLIAM KROUSE: Thank you. Also  
23 this live presentation is not in any way intended  
24 to be an evaluation of stand your ground laws.  
25 Rather what I'm about to present to you are some

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very basic baseline statistics. We have data on murder and non-negligent homicides and also on the justifiable homicides.

The data are imperfect and are incomplete, but it does tell us some things and it cannot be ignored. So I want to discuss briefly data limitations and definitions and then murder and then justifiable homicides. And I want to stress that this is principally about justifiable homicides by private citizens and not law enforcement officers, also I may give you some preliminary data on both. And then I want to look at interracial and intraracial justifiable homicides that involve blacks and whites.

So my two data sources are the Uniform Crime Reports, the FBI vets this data every year and publishes it in the Uniform Crime Reports or Crime in the United States. It's available on the FBI website.

Whenever they get a report on a homicide they also go back to the state and local reporting agencies and ask for supplementary information on those homicides and that's published in the supplementary homicide reports.

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That information isn't -- isn't available as the Uniform Crime Reports, however, but through the efforts of certain academics it has been - FOIA'd and it's available on the University of Michigan Website.

The Supplementary Homicide Reports suffer from certain very serious limitations. One, Florida does not report in a manner that is accepted by the FBI. I think it has to do with a technicality on the offender/victim relationship, familial relationship. And it's just on that point alone according to the Bureau of Justice Statistics that the data is not compatible. So that seems to me something that could be fixed possibly.

Other states and localities more importantly do not participate, do not participate fully, and/or only participate intermittently in this Supplementary Homicides Reports Program.

Making things more difficult these reports do not always reflect the final disposition of these cases. Like the UCR, federal and travel (phonetic) law enforcements do not report to the -- Supplementary Homicides Report



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Program.

So I just wanted to give you the definitions here. I have one slight mistake here, it should be instead of "murder and non-negligent manslaughter" it should be "non-negligent homicide." At the time I was preparing these -- these slides there was a good deal of debate about what exactly non-negligent manslaughter meant or non-negligent homicide.

A non-negligent homicide will be a homicide that's not accidental, it's the willful killing of another human being. And then justifiable homicides by a police officer, will be a killing done in the line of duty. And then for private citizen it would be the killing of a felon during the commission of a felony.

That's the FBI definition. And so what I'm about to tell you is that when you look at these cases, case by case, you can often make distinctions of your own on whether these definitions would fully meet those cases or not.

In the UCR, the justifiable homicides are tabulated separately from murder and non-negligent homicides. So they're two -- in two

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different data presentations. However, in the Supplementary Homicide Reports it's all merged together but it's coded so that you can separate them out.

So I'm presenting this graph here just to give us the big picture backdrop on murder and non-negligent homicide victim rates. As we can see we had some bumps in the '70s, '80s, and '90s. And then violent crime in murder and firearm related murders trailed off with a couple of bumps in the 2000's.

Then I give you the raw data as published by the FBI and Justifiable Homicides. One would think that law enforcement agencies reporting on these matters would be fairly reliable. And it also has it by weapon.

We're less confident about the reliability of the data for justifiable homicides as reported by law enforcement agencies, by private citizen. However I want to say that the data that I'm about to present to you on justifiable homicides involving blacks and whites with firearms consists of about 80 to 90 percent of the incidents that are included in this table.

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So just for comparison sake I thought I'd line up justifiable homicides with murders and non-negligent homicides. And this is for 1987 through 2011, you can see that they trended somewhat similarly in the first part of that time period. And then when the murders trailed off the justifiable homicides continued to go up.

It has been suggested to me that this one possibility could be, that this is more zealous reporting by law enforcement. And so I just gave it for the shorter time period which is covered more recently with regards to the stand your ground laws.

And notice how the bumps in the murders go up tremendously when you shorten your time period. But, again, the justifiable homicides in either category continue to go up.

And then these are murders. We can see that most murders are intra -- intraracial when they involve blacks and whites. And that in a small number of cases they're interracial. And these are the justifiable homicides with firearms involving blacks and/or whites. And we can see that blacks and whites avail themselves of

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2 justifiable homicide almost on -- in equal  
3 numbers.

4                   However, in white-on-black incidents  
5 it's a ratio of about 6 to 1, to black-on-white  
6 justifiable homicides. That ratio remains about  
7 the same, this is the stranger on stranger murders  
8 in this slide. And when we look at the ratio of  
9 justifiable homicides, white-on-black versus  
10 black-on-white, that ratio stays about the same at  
11 6 to 1.

12                   And we're looking at in any given year  
13 white-on-black justifiable homicide incidents they  
14 range about from 25 to 30 with a slight increase  
15 in the latter five year period.

16                   So -- and we see again the cluster of  
17 white-on-black along with black-on-black and  
18 white-on-white justifiable homicides there.

19                   So I wanted to sum this up by saying  
20 that if you go to Gary Kleck in Point Blank, he  
21 estimates that we under-report justifiable  
22 homicides by private citizens by about two, three,  
23 maybe four-fold. So you're looking at, over this  
24 10 year period, about 250 cases or 25 cases a year  
25 of white-on-black justifiable homicides.

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2                   And in the interest of determining what  
3 sort of circumstances are going on here I would  
4 suggest that you might want to look at each one of  
5 those cases on a case by case basis. But if you  
6 were to look at comprehensive data you might be  
7 looking at anywhere between 50, 75, to 100 cases  
8 per year. So if you did it for a 10 year period  
9 that'd be a thousand cases.

10                   I have 10 seconds left and I just want  
11 to --

12                   COMMISSIONER CASTRO: You've gone over,  
13 but it's all right. Just wrap it up real quickly.

14                   MR. WILLIAM KROUSE: Okay. The  
15 Supplementary Homicide Reports data is available  
16 as I said on the University of Michigan website.  
17 And that concludes my presentation. Thank you.

18                   COMMISSIONER CASTRO: Thank you,  
19 Mr. Krouse.

20                   Mr. Roman, you have the floor.

21                   MR. JOHN ROMAN: Thank you very much. I  
22 want to thank the commission for accepting my  
23 testimony today. I want to apologize to the  
24 commission that my tie did not make it down here  
25 with me --

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COMMISSIONER CASTRO: What is it with the ties -- is there a tie thief around here?

MR. JOHN ROMAN: -- I apologize for the lack of decorum. And the ties in the lobby by the way are totally inappropriate.

So I work for The Urban Institute which is a non-partisan non-profit social and economic policy research organization. We were founded in the '60s to try and add evidence to debates about important social welfare questions.

I've worked in the crime and justice center at The Urban Institute since -- for 17 years. So this is exactly the kind of issue that we would like to weigh in on and bring data to the question to see if we can facilitate a better understanding of what we're trying to accomplish here.

I'm going to talk about the same data that Bill talked about, we used it in our analysis, so I thank you very much for using four minutes of your testimony that I don't have to explain what the data are.

But, I want to -- I want to make a point before I get into our analysis, which we did a

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2 couple of years ago, and that we've revisited a  
3 couple of times since then and it seems to be very  
4 stable and shows some of the things -- many of the  
5 things that Bill suggests.

6           And that -- that is the idea here that I  
7 think is under-reported, which is that the goal of  
8 a stand your ground law is to solve a social  
9 problem. And the social problem it portends to  
10 solve is that people are getting convicted for  
11 killing people when they were actually acting in  
12 self-defense.

13           There is no evidence to support the idea  
14 that that is actually ongoing. If you look at the  
15 exoneration literature you cannot find -- you  
16 might be able to find a couple of cases where  
17 somebody has been exonerated when they act in  
18 self-defense, but that's not why people are  
19 wrongfully convicted, they're wrongfully convicted  
20 for lots of other reasons.

21           So we set out to solve a problem that we  
22 don't even have any evidence was ever a problem to  
23 solve. So our first question of the day is, does  
24 stand your ground achieve its objective? Do more  
25 people who commit a crime are they found to have

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been justified in committing that homicide?

So we asked that question. And then we asked the question, is there an unintended consequence of these laws that people who act in self-defense or found to have acted as justifiably, ah, committing homicide, if there's racial discrepancies in the rates at which those justifiable homicide findings occur.

And then we want to ask if there are characteristics of people that differentiate them. Characteristics of the case that differentiate them with respect to the finding that a homicide is justifiable.

And I just want to make a couple of comments on the Supplementary Homicide Data. We used the same data that Bill talked about, 2005 to 2010, is our primary report. We've revisited it since then and added new data as it's become available and the findings don't really vary that much. So the one that we've documented the best is the 2012 studies. And that's what I want to talk about today.

In the 2005 to 2010 study there were 83,000 homicides in that six year period. In



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2 order to say anything about the race of the victim  
3 and the race of the offender, of course we have to  
4 know something about the offender. And we don't  
5 always know who did it so we can't always say  
6 that, so we end up with the data set of about  
7 53,000 people.

8 The Supplementary Homicide Data are  
9 limited in some important ways that are worth  
10 discussing. One is that, like Bill said, we have  
11 to rely on how local law enforcement codes these  
12 things and we have no way to independently  
13 validate whether what they've -- the decisions  
14 that they've made before a verdict occurs are  
15 accurate or not. So we sort of have to trust  
16 them.

17 There's a lot of missing data like I  
18 said. And then there's some very important  
19 caveats to be made about context that I want to  
20 revisit at the end, which will be in four minutes.

21 So what we find is that in two and a  
22 half percent of cases where there's a homicide,  
23 the homicide is ruled to be justified. One  
24 comment I do want to make is when we talk about  
25 white-on-white, white-on-black, black-on-white, or

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2 black-on-black, I received a lot of criticism  
3 about using those definitions because of course  
4 Mr. Zimmerman has some Hispanic origins and people  
5 said that that's an important matter. The FBI  
6 data are coded according to the guidelines from  
7 the census bureau and so there is no ethnicity in  
8 there, there's just simply race. So he would have  
9 been coded as white.

10 There are other important matters in the  
11 Supplementary Homicide Report that we wanted to  
12 control for when we did our more expansive  
13 statistical analysis like whether a firearm was  
14 used, whether there were multiple victims and  
15 offenders, whether these people were strangers or  
16 not, gender, age.

17 So what do we find? So -- my apologies.  
18 So we find some really interesting things, so what  
19 we find is -- the first question is, is stand your  
20 ground effective at doing what it intends to do,  
21 which is to increase the rate at which homicides  
22 are ruled to be justified. And it turns out that  
23 it is.

24 So the overall rate at which homicides  
25 are ruled to be justified in the data that we look

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2 at is two and a half percent. It's 3.7 percent in  
3 stand your ground states. And 2.1 percent in  
4 non-stand your ground states.

5 And I just want to make one quick caveat  
6 about what I mean by a stand your ground state.  
7 We looked at 6 years of data and lots of states  
8 went from being a non-stand your ground state to  
9 being a stand your ground state during the period  
10 that we examined. We think about each year and  
11 state independently.

12 So if a state is a non-stand your ground  
13 state in 2005 and 2006, passes a law in 2007, in  
14 those first 3 years it's in the non-stand your  
15 ground grouping. And in the last 4 years it's --  
16 3 years it's in the stand your ground grouping --  
17 because I think that issue has come up when people  
18 have been critical of this study.

19 Okay. And then we get into the  
20 unintended consequences of whether there are  
21 racial disparities that are associated with this  
22 change -- whether there are racial disparities  
23 with the application of the finding of justifiable  
24 homicide and then whether it changes over time.

25 The first question is -- is what is the

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rate at which black-on-black homicides are ruled to be justified? It's 2.4 percent. The overall average is 2.5 percent. It's no difference. White-on-white it's 2.2 percent, compared to 2.5 percent, basically no difference.

In homicides where the shooter is black and the victim is white, those are ruled to be justified 1.2 percent of the time. In cases where the shooter is white and the victim is black those are ruled to be justified 11.2 percent of the time. Ten times more likely if the shooter is white and the victim is black, than if the shooter is black and the victim is white.

If you look at the data before and after a state becomes a stand your ground state you see those same discrepancies. You see white-on-black homicides are justified 9.5 percent of the time. And black-on-white homicides are justified 1.1 percent of the time.

After a state becomes a stand your ground state the disparity gets even bigger. Black-on-white homicides are ruled to be justified at about the same rate they were in non-stand your ground states, 1.4 percent compared to 1.1.

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White-on-black homicides are ruled to be justified 16.8 percent of the time, where they were 9 percent before.

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So I just want to say that we ran a bunch of really complicated statistical analyses that I won't bore you with to try and make sure that we weren't confusing the effects of other things like the type of firearm used, or their age, or the, you know, other things, and we find the exact same thing. When we add additional years to the data, we find the same thing.

So if -- you know, so the question on the table is, in 9 seconds is this, do these disparities -- could these disparities be explained by processes other than racial discrimination? And the answer is if you look at other racial disparities across the system is -- these disparities are so much bigger than other disparities in terms of sentencing, and death penalty, and arrest rates, and stop and frisk's that it's really hard to believe that that is true.

Thank you very much. I look forward to your questions.

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COMMISSIONER CASTRO: Thank you,  
Mr. Roman.

Mr. Gerney.

MR. ARKADI GERNEY: Thank you. First of  
all I'd just like to thank the commission for  
having me here today and accepting my testimony.

My name is Arkadi Gerney, I'm with The  
Center for American Progress, a think tank, based  
in Washington.

My testimony is going to focus on the  
intersection of stand your ground laws with lax  
laws around concealed carrying of firearms that  
put guns in the hands of people who have prior  
criminal histories or run-ins with law  
enforcement.

And I'm going to start by illustrating  
one particular case.

In 2005 a young Florida man was -- went  
to a bar with a friend of his. His friend was  
arrested for underage drinking and -- and that man  
became agitated according to police reports, and  
pushed a police officer and was ultimately charged  
with two felonies.

Those felony charges were ultimately

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2 reduced and then later waived when the defendant  
3 entered a court-ordered alcohol education program  
4 and a court-ordered anger management class.

5 One month later he had a -- issues with  
6 his fiancée and that led to another run in with  
7 law enforcement. And ultimately a temporary  
8 restraining order filed against this person.

9 Under federal law, had the court issued  
10 a permanent domestic violence restraining order  
11 this man would have been barred from purchasing or  
12 possessing a firearm. But it was a temporary  
13 order and in most states that is not a bar to  
14 purchasing a firearm. And this man in fact did  
15 purchase a firearm. And in 2009 obtained a gun  
16 carry permit from the State of Florida.

17 Let's jump ahead to 2013. In 2013 this  
18 same man had an incident where according to police  
19 reports he threatened his estranged wife with a  
20 firearm. She ultimately declined to press  
21 charges. Two months later in 2013 the same man  
22 was arrested and charged with felony assault for  
23 pointing a shotgun at another woman, his  
24 girlfriend at the time, during an argument.

25 And then just last month this same man

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got in an argument with a driver and threatened to kill him. That driver called the police, but ultimately also declined to press charges.

This man did one other thing during this period which is, on February 26, 2009 he shot and killed an unarmed teenager named Trayvon Martin.

So George Zimmerman's history with firearms, run-in's with the law, are interesting. However none of these incidents resulted in a criminal conviction for Mr. Zimmerman. And under federal law this pattern of incidents is not sufficient to bar Mr. Zimmerman from possessing firearms.

But remarkably, none of these incidents and not these incidents in their totality have rendered George Zimmerman ineligible to have a special license from the State of Florida to carry a concealed firearm. A license that he has to this day.

In some states the temporary restraining order, the lengthy history of run-ins with the law, of the shooting of Mr. Martin would have been sufficient for that license to be revoked or never have been issued in the first place. But not in



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So the trial -- Mr. Zimmerman and his acquittal, I think leaves some -- has certainly raised questions about stand your ground laws. And as John, and others on this panel and the panels that you'll hear before you will talk about, I think, particularly two potential effects of stand your ground laws. And there's a growing body of evidence behind those effects, which is that they seemed to increase lethality and there seems to be a racially disparate impact in how they're applied.

But this other body of law -- this body of law that put the gun in Mr. Zimmerman's hands in the first place, this body of law that made him feel authorized to be a self-appointed armed community watchman is something that demands examination as well.

And in Florida we know that in stand your ground cases 63 percent of the defendant's used firearms to kill their victims. Stand your ground doesn't only apply to firearms. You can defend yourself under stand your ground laws or claim self-defense under stand your ground laws

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through any means, but we know from all kinds of evidence that firearms increases the lethality of that attempt at self-defense.

And we know that in Florida 1 in 3 people who committed a homicide using -- and used the stand your ground defense had previously been charged with committing a violent crime. So the archetype of the good guy with the gun, which does appropriately apply to most concealed carry permit holders, most concealed carry permit holders do not have prior run-ins with the law. Most concealed carry permits do not have a record like Mr. Zimmerman's, does not apply to all concealed carry permit holders.

And different states have very, very different processes for evaluating who should get this special license to carry a gun.

In the strongest laws the states have given the licensing authority, typically a local law enforcement agency, very broad discretion to determine based on the arrest record and other -- and other indicators whether or not someone should get a concealed carry permit.

Additionally some states provide some

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2 limited discretion to the licensing authority to  
3 issue or revoke a permit based on a certain --  
4 certain narrower categories of discretion. And  
5 most states apply some additional categorical  
6 prohibitions that go beyond the federal  
7 prohibitions on gun possession.

8 A number of states, at least, exclude  
9 people convicted of misdemeanor, crimes of  
10 violence, at least, if those convictions were  
11 recent. But not all states do that.

12 And what we know and -- or what I would  
13 leave you with is that it's not -- you know, the  
14 question before you is not whether someone should  
15 have a right to self-defense. We've had that  
16 right through common law for hundreds of years in  
17 this country. The question before us is not  
18 whether Americans should be able to get a permit  
19 to carry a concealed firearm.

20 In 1980 there are 18 states had no  
21 concealed carry, today all 50 states have some  
22 process for issuing concealed carry permits and  
23 some capacity for people to get them. All 50  
24 states.

25 The question is, what should the scope

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2 of the self-defense law be? Does it need to go  
3 beyond the traditional scope? And who should get  
4 that permit to carry a concealed gun?

5 Because when you put it together and  
6 you're putting guns in the hands of people who  
7 have clear -- a clear pattern and practice that  
8 suggests that they may create a risk to public  
9 safety, and you're reducing the threshold to use  
10 lethal force, more people are going to die.

11 COMMISSIONER CASTRO: Thank you,  
12 Mr. Gerney.

13 Mr. Crump.

14 MR. BENJAMIN CRUMP: Thank you to the  
15 commission for allowing me to testify this  
16 morning. And I apologize that my testimony is not  
17 in PowerPoint presentation. My staff has been  
18 very busy up in Ferguson, Missouri. So please  
19 accept my apologies for that, but we will submit  
20 the testimony that I present to you in a very  
21 short fashion.

22 I want to talk as the attorney for  
23 Trayvon Martin, as well as Michael Giles, two real  
24 individuals. Real life individuals. Young  
25 African American men who have been severely

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affected by the stand your ground laws.

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And I want to talk about, as an attorney, the application of those laws. And I

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want to talk about it from three frames of

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reference.

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Number one, from a constitutional

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perspective. Number two, from a judicial

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perspective. And number three, from a societal

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perspective.

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But I want to begin by borrowing what

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Mr. Roman said about stand your ground, because as

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I've said in many, many, occasions stand your

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ground was a solution looking for a problem.

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There was nothing wrong with self-defense. It had

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operated for over 200 years just fine. There was

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no need, and to this day, still there's no need

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for the stand your ground law.

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So we start with the constitutional

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application of how this law has been arbitrarily

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applied. Before the law's passage there was an

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average of 12 justifiable killings per year.

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Since stand your ground passed that average has

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grown to 36. To date 32 states have passed

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similar laws boosted by the National Rifle

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Association and the conservative corporate backed American legislative exchange counsel -- Alec (phonetic).

Since the shooting of Trayvon Benjamin Martin the law's constitutionality is being questioned.

Now the argument is that one has the right to defend oneself in the face of imminent danger and is treated as constitutional in nature. I, along with Miss Lucia McBath, who was supposed to appear before you, have joined forces with some other lawyers to bring a constitutional challenge in the State of Georgia to stand your ground.

And what we are looking at in the simplest sense of the word, is that the law is unconstitutionally vague and warrants its enforcement prohibited by a legal injunction. Because what's at issue is what constitutes a reasonable fear?

It is without question that the determination of reasonableness of ones fear and the implication of self-defense will differ an application if the decedent is an unarmed, elderly white woman as opposed to an unarmed young black

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2 man, our complaint states.

3 Does the reasonable person stand up with  
4 regard to the use of self-defense when an  
5 individual is standing one's ground offers  
6 different levels of protection to individuals  
7 based upon their race.

8 And I don't want to read our whole  
9 complaint, but I'm picking out parts that I think  
10 are pertinent.

11 By not defining what actions create a  
12 reasonable perception justifying the use of deadly  
13 force the act potentially deprives all of  
14 Georgia's citizens of the right to life without  
15 due process of law and contravention of the 14th  
16 amendment of the United States Constitution, as  
17 the law is so vague as to not apprise a person of  
18 common intelligence of the bowels of lawful  
19 behavior.

20 By creating a right to kill based upon  
21 an individuals reasonable fear without defining  
22 what circumstances would demonstrate reasonable --  
23 the act will potentially deprive individuals of  
24 their lives without due process of the law, as  
25 reasonable is not defined there is no way for an

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2 individual to comport his actions within the  
3 confines of the law and that's to prevent being  
4 slayed due to reasonable fear of another.

5 I submit to you ladies and gentlemen of  
6 this commission, it has been longstanding in the  
7 courts of America -- we go back to Bernard Goetz  
8 in New York, and the People-v-Goetz, cite 68 New  
9 York 2nd District. Courts around the country have  
10 accepted that race of an individual is relevant  
11 evidence in determining the reasonableness of a  
12 claim of self-defense.

13 So what do parents, American citizens,  
14 of little black and brown children tell them when  
15 they are confronted with people like Bernard Goetz  
16 or anybody else as it relates to the  
17 reasonableness of you being a threat.

18 You better fear -- the courts have said  
19 that you can -- that is a factor. And so I move  
20 on to the judicial application in consideration of  
21 my time.

22 Stand your ground is a pretrial motion.  
23 A pretrial motion. When you look at how it was  
24 applied in the Zimmerman case, they said, "We're  
25 not going to argue stand your ground." We're not



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2 going to bring it up -- first they said they  
3 would, and then they said, "No, no, we're not  
4 going to argue it." Because if it's applied the  
5 way that it's supposed to be applied you bring it  
6 up as a pretrial motion and it's before the trial  
7 ever begins. If you win it, you win it. You go  
8 home, there is no civil immunity attached to you  
9 or anything, you are completely exonerated.

10 But if you lose it you cannot bring it  
11 up again during the course of the trial. You  
12 can't wait 'til the jury instruction and say, "Oh,  
13 you have a right to stand your ground." That's  
14 why it's unconstitutionally vague from a judicial  
15 perspective.

16 Thirdly, and lastly, what my grandmother  
17 says is, "The real life perspective of how we  
18 apply these laws."

19 Trayvon Benjamin Martin didn't get the  
20 benefit of stand your ground. Marissa Alexander  
21 in Jacksonville, Florida who had an altercation  
22 with a documented domestic violent spouse, shot  
23 one of the shots in the air is facing 60 years in  
24 prison.

25 Michael Giles, even more extreme. A

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2 young 25 year old military officer serving his  
3 country. Has served twice in the middle east, was  
4 down in Tampa, Florida, came up to Tallahassee  
5 visiting his college friends, there was an  
6 altercation not involving him at all. The people  
7 in the altercation, by their testimony, attacked  
8 him. While he was being hit and kicked he pulled  
9 the licensed gun that he had a permit to carry,  
10 shot him in the leg. Glazed his leg, the gentleman  
11 was out the next day. He's says, "Stand your  
12 ground it doesn't work for black people." He was  
13 sentenced to 25 years in prison.

14 Because of time I don't have the  
15 opportunity to go into the facts of how egregious  
16 Michael Giles' case is. But he is sitting in  
17 prison now for 25 years and Trayvon Martin's  
18 killer is walking around free.

19 COMMISSIONER CASTRO: Thank you,  
20 Mr. Crump.

21 Professor Russel-Brown.

22 MS. KATHERYN RUSSEL-BROWN: Thank you  
23 for the opportunity to meet and speak with this  
24 revered and august group with a 57 year history.

25 I want to note that I'm also here in my

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2 capacity as the Director for the Center for the  
3 Study of Race and Race Relations at the University  
4 of Florida.

5 Next year 2015 marks the 150th  
6 anniversary of the passage of the 13th amendment,  
7 the amendment that abolished slavery. Section two  
8 of that amendment empowers Congress to uphold this  
9 amendment by legislating what would have been  
10 deemed badges and incidents of slavery.

11 And I would suggest that in some ways  
12 what we're talking about here today, what the  
13 argument is with regard to the impact of race, and  
14 in particular -- ah, I'll look at the stand your  
15 ground law, is about these -- these legacies and  
16 about badges and incidents of this legacy of  
17 slavery in this country.

18 I'd like to offer a few recommendations  
19 for the commission to consider with regard to  
20 addressing issues of racial bias.

21 First of all the need for racial impact  
22 statements. Many have written about this, Mark  
23 Mower at the Sentencing Commission -- excuse me,  
24 at the Sentencing Project in particular, has  
25 written eloquently about the need for racial

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impact statements. And what I would make the case for is that they shouldn't be limited to one particular type of -- or piece of the justice system, not just with regard to sentencing for example, but that racial impact statements should be required for any new laws. Anything that has to do with sentencing in the criminal justice system that there should be some attempt to look at what the outcome will be when these laws are adopted. And a few jurisdictions, a few states have in fact passed racial impact -- or passed the requirement for racial impact statements, including Iowa was the first.

And so we're obviously at a point now where we have stand your ground laws, at least, in 33 jurisdictions. At least half of the states have statutes on stand your ground laws so this is -- the law has already -- these laws have already been passed. So what we're really talking about now is post-implementation assessment of the racial impact of these laws.

And so I would suggest that at a minimum that any states that are considering stand your ground laws should have to have some kind of --

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2 should have to have some kind of -- do some kind  
3 of racial impact statements for them.

4 In some ways talking about stand your  
5 ground -- and I'm glad that I'm the last person on  
6 the panel in some ways because what has come  
7 before has been that -- what we're talking about  
8 goes beyond just one particular aspect of the  
9 criminal justice system, we're not just talking  
10 about stand your ground, because stand your ground  
11 doesn't operate in a vacuum. We're also talking  
12 about policing. We're also talking about race.  
13 We're also talking about images of race. We're  
14 also talking about history.

15 And so it's important to keep in mind  
16 that we're talking about pre-arrests. We're  
17 talking about arrests. We're talking about what  
18 happens within the justice system about the  
19 decision to charge. All the steps along the  
20 continuum of the criminal justice system to  
21 sentencing to post-sentencing. So all of this  
22 matters in terms of needing to take, really, a  
23 criminal justice racial census. Needing to  
24 consider what the bigger picture is.

25 Earlier this year there was a bill

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introduced, the Justice Integrity Act of 2014, HR-3907. And this bill is designed to -- it was designed to increase public confidence in the justice system. And address any unwarranted racial and ethnic disparities in the criminal process.

Now this goes into, obviously, detail into the bill, but that racial -- establish a pilot program on racial and ethnic data, defendants and victims. That this information would be gathered and a look at whether or not -- and to what degree race impacts outcome in cases and it would end in a report by an advisory group which, I'm sure members of the commission know that this group would include someone from -- from the commission.

So I would argue for making this justice integrity, judicial -- Justice Integrity Act Law. That Congress should pass it. That the states should have similar laws and that minimally that there should be some racial impact, racial impact statements should be made for any proposed criminal legislation.

Second, we need to have more than a

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2 conversation on race. There's a general ignorance  
3 about the role that race has played in the  
4 development in history of this country. You can  
5 graduate from high school in this country without  
6 ever learning about seminal aspects of U.S.  
7 history involving African Americans in particular,  
8 about slave patrols, about black codes (phonetic),  
9 about the Klan, about white race riots, about  
10 lynching, sundown towns, the Tuskegee Syphilis  
11 Experiment, redlining, freedom riders, white  
12 Flight, mass incarceration. These are things that  
13 young people can graduate from high school and  
14 really never have had any detailed discussion,  
15 conversation, reading about.

16 And this points to a large scale failing  
17 in our system of public schooling. And I think we  
18 missed an opportunity to teach on race. So every  
19 year or so we experience a major racial incident,  
20 typically, a criminal one involving the killing of  
21 someone African American or some language used  
22 indicating racial hatred. And so there's really  
23 -- in some ways a kind of an epic race fail.

24 And we seem to come back to the same  
25 place that we're talking about, images of race, in

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2 particular images of African Americans that the  
3 perception is that black somehow equals deviants,  
4 somehow equals crime, what I call the "criminal  
5 black man," one word. And that this is -- this is  
6 -- this is where we are.

7 I'd like to point out that in the State  
8 of Florida there is a mandate that there's  
9 supposed to be some history taught on race in the  
10 K through 12 curriculum. And that this should  
11 include the history of African Americans,  
12 including the history of African people before the  
13 conflicts that led to the development of slavery,  
14 the passage to America, the enslavement  
15 experience, abolition, and the contributions of  
16 African Americans to American society.

17 Well, why is this important? Because we  
18 can't wait for incidents and be reactive to these  
19 incidents involving race, involving images of  
20 race, addressing issues of implicit bias after  
21 they've happened. We have to do something about  
22 what people know about, what they experience with  
23 regard to race.

24 So let me just say in conclusion that  
25 with regard to one last recommendation and this



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2 supports what has been said already by Professor  
3 Harris and that is more data, more information on  
4 implicit bias. And I would just also like to add  
5 that in some of the research there have been --  
6 have included studies including police officers  
7 who have shown that they too make the connection  
8 between race and something negative about African  
9 Americans in that association.

10 Thank you for your time.

11 COMMISSIONER CASTRO: Thank you,  
12 Professor. At this point I'm going to open it to  
13 commissioners for questions.

14 And, Commissioner Yaki.

15 COMMISSIONER YAKI: Yes, thank you very  
16 much, Mr. Chair.

17 I have a question for the panel. I  
18 think -- I think it's fairly simple but it  
19 probably isn't. If you are -- one of the  
20 rationales for stand your ground has been that it  
21 will enhance the protection of people in society.  
22 And my question sort of goes to the heart of why  
23 we're here today. And that is, if you're an  
24 African American are your protections enhanced by  
25 stand your ground laws?

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2 MR. DAVID HARRIS: I know that others  
3 are going to testify Commissioner about the  
4 empirical evidence and some already have, but I  
5 think -- there is no evidence that this is  
6 protecting -- that it makes anybody safer in a  
7 sense because homicides increase in states with  
8 these laws. And it does not, as was also  
9 advocated, in the initial run up to these laws,  
10 they do not seem to stop other kinds of serious  
11 crime either.

12 So I think that there's no -- there's  
13 certainly no evidence that this is making anyone  
14 safer. And as far as whether it makes African  
15 Americans safer, just go back to Dr. Roman's  
16 research, there's real evidence that this  
17 introduces a level of bias into the system. It  
18 increases the bias that might already be there,  
19 because as a number of people said this morning,  
20 there is already background bias in the system but  
21 it makes it -- it just makes it more so.

22 COMMISSIONER CASTRO: Commissioner  
23 Heriot --

24 COMMISSIONER ACHTENBERG: I think he  
25 asked the panel --

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COMMISSIONER CASTRO: Oh, I'm sorry.

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MR. JOHN ROMAN: So I'd like to say

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something about that as well. I think that -- so

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I testified earlier that the evidence is that if

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you look at these cross-race patterns of victims

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and offenders that the stand your ground --

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application of a stand your ground law in any

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state increases the likelihood that any cross-race

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victim offender combination will be more likely to

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be found justified except for black-on-white

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homicides, which don't change.

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So I think two things are going on there

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that are really important. One thing that is

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going on there is that this law is in fact

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increasing the number of times that people are

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found to be justified for taking somebody else's

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life without any prior evidence that that was a

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problem.

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One, that people were being wrongfully

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convicted. And that applies to whites shooting

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whites, or killing whites. Blacks killing blacks,

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and whites killing blacks -- but not to blacks

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killing whites.

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So it's making a disparity that's

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2 already pretty big even bigger. And the other  
3 thing that it's doing that we haven't talked much  
4 about here is it's doing it in a really haphazard  
5 manner. So if you believe that -- that we've  
6 increased the number of justifiable homicides --  
7 homicides that are found to be justifiable and you  
8 don't see any prior evidence that there was a  
9 problem with wrongful convictions in these cases  
10 then basically what you've done is doubled the  
11 number of times that justice isn't served. And  
12 you've doubled the number of times that justice  
13 isn't served, but not for blacks when they're  
14 involved in a homicide with whites.

15 So it just seems to make the disparities  
16 more haphazard and less just.

17 MR. BENJAMIN CRUMP: No.

18 MR. JOHN ROMAN: That's a better answer  
19 than mine.

20 MS. KATHERYN RUSSEL-BROWN: No. No,  
21 there's no empirical evidence to support the  
22 claim. It's something that comes up whenever  
23 there's new criminal legislation that because  
24 blacks are disproportionately victimized by crime,  
25 by serious crime, that they will benefit if the

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2 law is harsher, but there's no -- there's no  
3 support for that.

4 COMMISSIONER CASTRO: Commissioner  
5 Heriot.

6 COMMISSIONER HERIOT: Thank you,  
7 Mr. Chairman.

8 Mr. Krouse, I need to understand a  
9 little better about the data collection that you  
10 were talking about for justifiable homicides. I'm  
11 feeling a little lost particularly when you said  
12 that justifiable homicides may be massively under  
13 reported.

14 I assume that's not true of actual  
15 homicides. I mean, the homicides -- the ones that  
16 are classified as murder and voluntary  
17 manslaughter -- for that matter involuntary  
18 manslaughter.

19 So could you tell me how this works? At  
20 what point do police departments report a  
21 homicide? I mean, sometimes I assume a homicide  
22 occurs, they don't know whether it is a  
23 justifiable homicide, a murder, or a manslaughter.  
24 How does this work?

25 At what point do they report it? If

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they report it early do they then go back and amend and say, "Okay, this was justifiable or this one was murder." How often do they do that?

MR. WILLIAM KROUSE: Well, there's no fixed procedure it's by agency by agency and they fill out a form for the FBI. And it can be at any process they decide they're going to report on it. So these reports reflect data collection at various stages of an investigation. But, you know --

COMMISSIONER HERIOT: Are they constantly being amended? I mean, I'm really quite lost here --

MR. WILLIAM KROUSE: No, they're not constantly being amended. So they send in the report --

COMMISSIONER HERIOT: So something could be reported -- there's a murder that turns out to be a justifiable homicide and it never gets recorded, right?

MR. WILLIAM KROUSE: There's a possibility that there are justifiable homicides that are recorded that are later found to be murders and vice-a-versa murders that are later

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2 found to be justifiable homicides. And neither  
3 the UCR nor the SHR reflect that.

4 COMMISSIONER HERIOT: So my  
5 understanding is that when it comes to justifiable  
6 homicides that there's no requirement that -- that  
7 police departments be doing that, and perhaps over  
8 time we've seen more and more police departments  
9 reporting those and that that could drive these  
10 statistics -- you suggested that in one of your  
11 charts.

12 MR. WILLIAM KROUSE: Well, I find it  
13 interesting that you used the word requirement  
14 because this is one of the -- one of the  
15 fascinating things about America and the FBI and  
16 state and local law enforcement, this is all  
17 grassroots. This is state and locals coming to  
18 the FBI, and the FBI saying, "Yeah, it's a good  
19 idea to collect this data. And to the extent that  
20 you'll provide it to us we'll be happy to compile  
21 it for you." Same with criminal history records.  
22 And I don't want to get into the legalities of  
23 Congress or the federal government requiring  
24 states to do certain things, but in general we  
25 don't require them to submit these records, they

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do it on their own.

                  However, as I pointed out, it's somewhat intermittent. We're much more confident about the just straight up murder and non-negligent homicide data than we are on the justifiable homicides. We're much more confident about the justifiable homicides by law enforcement. But Gary Kleck in Point Blank has estimated, and I think this is -- has stood to some academic scrutiny, that the justifiable homicides carried out by private citizens are under reported in both the UCR and the SHR.

                  COMMISSIONER HERIOT: So -- and over time I take it, you know, if it's true that we've had more and more agencies reporting this then we would get, probably, a bias in the stats that would make it look like the number of justifiable homicides is going up. Is that --

                  MR. WILLIAM KROUSE: It's been -- it's been suggested that that might be the case. Might be.

                  COMMISSIONER HERIOT: If I --

                  MR. WILLIAM KROUSE: But, we have no firm evidence that that is the case.



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COMMISSIONER HERIOT: But the chart that you showed I think -- sure -- the chart you showed was limited to a certain time period and I didn't get a chance to see it. How long a period was that?

MR. WILLIAM KROUSE: It's 2001 through 2010.

COMMISSIONER HERIOT: So do you have any information about whether or not there has been an increase or a decrease or -- or -- you know, are more and more agencies reporting this or is that not true?

MR. WILLIAM KROUSE: I didn't have an opportunity to glean that from the SHR data but that could be done.

COMMISSIONER CASTRO: Mr. Roman.

MR. JOHN ROMAN: So, it's a great question, right. I mean, these data are flawed. They're fundamentally flawed and I think you did a wonderful job earlier of describing how they're flawed. And it's -- it's voluntary reporting, you know, it's what we have.

But I think what's really important in understanding these data is that it's not the

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2 overall increase in the number of places that are  
3 reporting and the overall number of homicides that  
4 we have some understanding of, what matters is  
5 really, do the proportions change. Right?

6 If we go from, you know, two and a half  
7 percent justified to almost four percent  
8 justified, it sort of doesn't matter if we're  
9 getting better compliance or less compliance or  
10 whatever it is, what matters is that that  
11 proportion of the number of justify -- homicides  
12 that are found to be justified is increasing --  
13 ---regardless of whatever --

14 COMMISSIONER HERIOT: In the stand your  
15 ground states you're talking about there?

16 MR. JOHN ROMAN: Right. That's correct.  
17 Yes.

18 COMMISSIONER CASTRO: Okay. I'm going  
19 to ask a couple of questions, and we're going to  
20 have Commissioner Narasaki, Commissioner  
21 Achtenberg.

22 We're also going to want one of our  
23 staff members Dr. Goliday to ask some questions  
24 and then any other commissioners who indicate so.

25 My two questions -- the first one is one

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2 that I asked the earlier panel. Well, you know,  
3 as we are really talking about this in the  
4 black/white binary and I know there are  
5 limitations on the data that's being reported, but  
6 do you all have any information on the impact of  
7 these laws on Latino's or other ethnic minorities  
8 or religious minorities such as Muslim and Arab  
9 Americans?

10 Anybody?

11 MR. WILLIAM KROUSE: Well, sir, I can  
12 tell you that I've spent the past year very  
13 carefully looking at multiple victim murders in  
14 the wake of Newtown, and that's a very complicated  
15 question because I've went back and I've  
16 identified the names of the victims and the  
17 offenders in those incidents where four or more  
18 people were shot to death.

19 And when you look at that it's very  
20 difficult to tell. If you're Hispanic, that's a  
21 matter of ethnicity, it's not a matter of race.  
22 So you can be a black Hispanic, you can be a white  
23 Hispanic, for that matter you can be an American  
24 Indian Hispanic.

25 And when you look at people who are of

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2 Middle Eastern descent they're usually always  
3 considered white in the UCR. So there are  
4 limitations. And this all goes back to an OMB  
5 (phonetic) Circular. And it's the way that we  
6 collect data on race and ethnicity in the United  
7 States.

8 And I can't remember the exact year, but  
9 we haven't always collected data in the UCR or the  
10 SHR on ethnicity. It's a fairly recent thing,  
11 within the last decade or half.

12 COMMISSIONER CASTRO: Okay. Thank you.

13 Mr. Roman, I don't know if you've had  
14 the chance to -- I don't know if any of you have  
15 had the chance to see the written testimony of  
16 other witnesses that have appeared or will appear,  
17 but in the afternoon panel we have John Lott of  
18 the Crime Prevention Research Center. And in his  
19 written remarks -- I don't know, have you seen  
20 those, Mr. Roman?

21 MR. JOHN ROMAN: I have not.

22 COMMISSIONER CASTRO: I'm going to read  
23 you an excerpt and I'd like to hear your thoughts  
24 on it. He actually, specifically, addresses your  
25 report -- The Urban Institute Report.

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He says, "In contrast to the Tampa Bay Tribune data a recent Urban Institute study by John Roman claims to have found stand your ground laws appear to exacerbate those racial differences as cases all over are significantly more likely to be justified in stand your ground states than in non-stand your ground states."

"Roman acknowledges that his data lacks details available in the Tampa Bay Tribune data. The data here cannot completely address this problem because the setting of the incident cannot be observed. Indeed Roman's estimates contain virtually none of the information available in the Tampa Bay Tribune Report data set."

"For example, his data has no information on whether any eyewitnesses saw the confrontation or whether there existed physical evidence. And it has no information on who initiated the confrontation, where the attack occurred, or the type of case."

"Nevertheless even using the limited information Roman draws the wrong conclusion from his analysis to the extent to which the Urban Institute Study proves anything," he says, "It

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proves the opposite of what Roman claims."

Could you address those concerns?

MR. JOHN ROMAN: Sure. I would be delighted to. So I think -- so there's a couple of things going on here. So, you know, there's an old saying in statistics, "All statistical models are wrong, and some are useful."

And the question is, which of these statistical models are most useful? So the Tampa Bay Tribune analysis is really what we would call in the social science a convenience sample. They just got what they could get.

And if you want to understand the whole of the stand your ground issue, and the whole of the justifiable homicide you want to go to as broad a sample as you can obtain. Or if you want to go to a small sample that you want to dive really deeply into, you want to make sure that it's a random selection so that you can say things about the cases that you didn't get data on. So this is the choice that we have.

So the Supplementary Homicide Report data does not contain information about the context. That's a very important limitation of

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2 the data, and I think that we acknowledged that in  
3 the report. But it does contain -- it's not --  
4 it's not -- it's not a sampling strategy, it's  
5 every single homicide that occurred in this  
6 period -- it's a census.

7 So on one hand we have information about  
8 every single case that happened. On the other  
9 hand the Tampa Bay Trib looked at a couple hundred  
10 cases that they could get data on and try to draw  
11 some inferences from it. I think it all sort of  
12 helps to paint the picture.

13 But, you know, I mean, I teach  
14 statistics at the University of Pennsylvania and,  
15 you know, I would prefer that my students would  
16 work with data that's more of a census, and if  
17 they can't get that then sort of a random  
18 probability sample. And if they can't get that  
19 then a convenience sample like what the Tampa Bay  
20 Trib did would probably be the last resort for me.

21 COMMISSIONER CASTRO: Thank you.

22 MS. KATHERYN RUSSEL-BROWN: And related  
23 to that -- I just want to go back to the question  
24 that you asked earlier about moving past the  
25 black/white binary area. That in that data, that

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the Tampa Bay Times collected they do have information on Hispanic's as victims and as offenders using stand your ground.

COMMISSIONER CASTRO: Right. Ma'am, thank you. I did see that. And it's an interesting paradox there if I understand that correctly that Hispanic's are more likely to not be convicted when they're using the stand your ground laws, but they are also more likely to be the victims of shootings involving white shooters.

So I guess I'll ask Mr. Lott a question about that in the other panel, unless some of you have the answer to that, but --

So at this point I'd like to cede the floor to Commissioner Narasaki, then Commissioner Achtenberg, then Dr. Goliday.

Commissioner.

COMMISSIONER NARASAKI: Thank you. So I have a few questions that some of you can answer. I'm interested in whether there is implicit bias research about Asian's, Latino's, Native American's, and Arab American's that should cause us concern in relationship to the stand your ground laws?



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I'm also interested in hearing about --

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we've talked a lot about the data deficiencies,

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I'm interested in any recommendations you think we

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should consider about how do we address the gaps

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that exist?

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Should the federal government, for

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example, consider tying a grant for law

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enforcement support to better data collection on

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the state level?

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And then third -- so, this morning we

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had a member of the state legislature in South

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Carolina say, "Well, it may be true that

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eventually someone will be able to prove that they

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acted in self-defense and be able to clear

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themselves. That the challenge is that until that

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time they're held in jail, they have to spend

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funds defending themselves, and in some states you

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could be held for a very long time deprived of

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your freedom."

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And in his view -- I think he's a

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defense attorney it sounded like. In his view

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stand your ground has helped people in those

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situations who should be free, be free up front,

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instead of having to try to get themselves through

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what can often be a challenging criminal system.

And then my final question is to Crump, which is, you talked a lot about the unconstitutionally vague notion of reasonable perception. So this morning we had this debate about how different is stand your ground from the traditional self-defense laws. And so this notion of reasonable fear if you could explain that difference because we had a lot of debate about that this morning.

Thank you.

MR. DAVID HARRIS: Commissioner, I'll try on your first two questions. If you go to the existing website for the implicit association operations -- I think it's now called Project Implicit -- ProjectImplicit.org. You will see a number of different implicit association tests. I haven't been to that site in a little bit myself, but I remember that there are now implicit association tests about testing biases in all kinds of situations.

I do remember -- I think at one point there was one involving Asian populations, and another involving Muslims. There are gender ones.

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2           There are same sex relationship ones. So there's  
3           quite a variety of this and it's there for looking  
4           -- and the test taking, whether this would be a  
5           concern whether those kinds of implicit bias would  
6           be a concern in any stand your ground state, I  
7           would say, yes. The question is going to be  
8           whether you have any particular population in the  
9           stand your ground state that you're focusing on  
10          that is going to end up using the statute -- or as  
11          the victim in a shooting.

12                         And if you have a substantial enough  
13          population I would think that these questions of  
14          implicit bias would apply in those cases too.

15                         Your second question about tying federal  
16          funding to data collection, I think that that is  
17          an idea that has a lot of merit. And I would  
18          simply point out that the federal government not  
19          having the ability to tell local law enforcement,  
20          "You will do this, you will do that," or to tell  
21          states you're going to have certain kind of law.  
22          That's obviously what the Constitution says, but  
23          the power of the purse rules.

24                         When in a misguided attempt, perhaps one  
25          remembers, to have a 55 mile an hour speed limit,

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2 remember those days? The federal government said,  
3 "Well, you don't have to, but no more highway  
4 money." And guess what happened?

5 They had -- there was a controversy  
6 about the legal limit for drunk driving. The  
7 federal government wanting it to come down to .08  
8 in states that did not have that limit. "Well, you  
9 don't have to do it, but if you want that highway  
10 money think about it." And guess what happened?

11 So this is something that Congress has  
12 done, the Executive Branch has been part of for  
13 many, many years, and many different  
14 circumstances, and I think that this is one where  
15 they should do it too.

16 MR. WILLIAM KROUSE: I have just a  
17 couple of things to add insights there. One,  
18 Congress does have power of the purse but the  
19 discretionary plot is shrinking with every passing  
20 year.

21 Two, the amount of money that we devote  
22 to state and local law enforcement has shrunk --  
23 particularly in light of 9/11, and it's now in the  
24 Homeland Security bucket, if you will.

25 And third, the state and local law

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2 enforcement grant program has a number of ties  
3 added on to it already, penalties for this,  
4 penalties for that to encourage states, if you  
5 will, through a carrot and stick type process to  
6 do this or that.

7 I would suggest possibly is that one of  
8 these things is a priority that can be set for the  
9 FBI to just strengthen, to encourage the states  
10 that we need better data, that our data has  
11 somewhat diminished over the years and we could  
12 use better data. They oversee this and there's a  
13 compact that everyone enters into. So it's one of  
14 the great things about America, it's grassroots.  
15 But if you don't have strong leadership, and the  
16 National Academy of Sciences has two books on this  
17 and I recommend them to you on foreign related  
18 violence and the statistics that are available,  
19 and also what's happening in the Bureau of Justice  
20 Statistics, you might want to take a look there  
21 for different insights and pathways you might be  
22 able to take to encourage better data collection.

23 COMMISSIONER NARASAKI: If I can ask one  
24 more question. Because you explained the  
25 challenge with Hispanic data -- ethnic data,

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2 right, but Asian is a race category --

3 MR. WILLIAM KROUSE: Yes, Asian Pacific  
4 Island --

5 COMMISSIONER NARASAKI: -- yeah, so --  
6 right. So is there data available on how stand  
7 your ground laws effect them on both sides of the  
8 equation?

9 MR. WILLIAM KROUSE: Not specifically.  
10 I mean, you'd have to go and you'd have to look  
11 at, you know, Asian Pacific Islanders that were  
12 involved in justifiable homicides, you know?

13 From there you'd have to make a  
14 determination by looking at the reporting agency  
15 and the month and the date of the incident to  
16 determine what the circumstances were and  
17 determine whether stand your ground, Castle  
18 Doctrine, or some other factors were at play.

19 COMMISSIONER NARASAKI: But the data's  
20 there, just somebody has to look at it --

21 MR. WILLIAM KROUSE: Yes. It's there  
22 but it's incomplete and you would be looking at a  
23 very, very fine cuts from a percentage point of  
24 view.

25 MR. JOHN ROMAN: Can I -- can I just

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2 offer two thoughts on that? So -- so, I mean, I  
3 have the data here for -- so for the 6 year  
4 period, in Hawaii for instance there were 77  
5 homicides. Four were ruled to be justifiable. In  
6 the Virgin Islands there were 15, there were none.

7 So, I mean, we have all the data, we  
8 have the code, we could certainly do it. I'm much  
9 -- I'm much more comfortable, I think, in the  
10 quality of the data because I don't -- because --  
11 the thing to remember is, is the quality of the  
12 data changing in some way related to justifiable  
13 homicides over time?

14 The quality of the data may be changing,  
15 the volume of the data may be changing, but  
16 there's nothing that would make you think it has  
17 anything to do with justifiable homicide. Which  
18 is, you have to understand this data set is, you  
19 know, 80 variables. And the variable that we're  
20 talking about is 1 value 80, you know, in a list  
21 of 80 different circumstances. Right?

22 And so the idea that somehow the  
23 reporting is changing as a function of this 1  
24 value of this 1 variable with 80 levels, it's just  
25 -- it's impossible for me to believe.

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The other thing I would say is, and the other -- I would take slight objection to is, I think that you either have to mandate the data collection or it won't happen.

In the late 1990's, back when I was a young man. The Bureau of Justice Statistics embarked on an exercise to create the NIBRS, National Incident-Base Reporting System, which is basically the Supplementary Homicide Report data, it's actually even more complete than that for every kind of crime. And they pushed it out to the states, and they asked the states to do this, and the states wouldn't do it. Right?

They got partial compliance in 8 or 9 states and total compliance in just a couple of others. We live in a completely different IT world then we did in 1998, and 1999, and 2001 when this thing really basically petered out. Right?

The cost to local police agencies to comply with this kind of data collection requirement is so trivial compared to what it was in 1998 that I just don't see it as being a huge ask. And it would inform -- last thought, I'm sorry -- it would inform so many different



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2 questions beyond just what we're talking about  
3 today that are really important in reforming these  
4 criminal and juvenile justice systems.

5 MR. ARKADI GERNEY: Just to add, we  
6 released a report in September of last year which  
7 had a number of recommendations, and one of them  
8 basically mirrored what Mr. Krouse just said,  
9 which is to have a year long process to work with  
10 the states to improve the data collection around  
11 justifiable homicides, but at the end of that if  
12 it didn't improve to withhold some portion of  
13 discretionary burn justice assistance grant money  
14 which is the principle justice department grant  
15 funding streamed to the states.

16 COMMISSIONER CASTRO: Anybody else?  
17 Mr. Crump.

18 MR. BENJAMIN CRUMP: I think that she  
19 asked a question about reasonable fear and so I  
20 can address that. I'll refer to the academic,  
21 great data, and this is a fascinating  
22 conversation. I thank the civil rights commission  
23 for doing this, but I want to point specifically  
24 as it relates to the reasonableness of the fear.  
25 I did get an opportunity to talk about Michael

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2 Giles, so hopefully I can interject that in my  
3 response.

4 Michael Giles, 25 year old African  
5 American, never convicted of a crime his whole  
6 life. Mother and father, military. Brother,  
7 military. He's in the military. A good citizen.  
8 From everybody's standpoint this bar fight that he  
9 has nothing do with, he's attacked, the testimony  
10 is the guy was looking for the next person he saw  
11 to knock out. His testimony is that he lunged at  
12 him with the full weight of his body trying to  
13 knock him out. While he's on the ground and  
14 people are kicking and hitting him he takes the  
15 permit -- the gun that he has a permit in his  
16 ankle, and shoots the guy in the leg. He is --  
17 scratches his leg. He's let out of the hospital  
18 in a matter of hours.

19 He goes to court, stand your ground, if  
20 it should apply to anybody it's him. I mean,  
21 let's be real when you think about what happened  
22 to Trayvon, somebody's following you and say they  
23 all get away -- Mr. Gerney broke it down very  
24 clearly the history of Trayvon's killer.

25 You look at the history of Michael

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2 Giles, there's nothing there. But when you come  
3 to the reasonableness of fear and how this law's  
4 been applied, it's startling because the testimony  
5 was first based on attempted murder. The victim  
6 got on the stand and said, "No, he wasn't trying  
7 to kill me. If he was wanting to kill me he could  
8 have shot me." So the prosecutor had to drop  
9 that. But the prosecutor still insisted on going  
10 forward on the case, on aggravated battery.

11 And so what you have -- what happened,  
12 the jury came back because they thought "Well,  
13 aggravated battery is lesser and they don't have  
14 to deal with the sentencing." And they convicted  
15 him not knowing that he was going to get 25 years.

16 So I know I'm going a little around your  
17 question but I want to bring it back because you  
18 look at Marissa Alexander, you look at Georgia,  
19 you look at all of these things and you say,  
20 "Well, if Mr. Giles would have been a white male  
21 would he have got greater stand your ground  
22 consideration?" If Marissa Alexander had been a  
23 white female would she have gotten greater stand  
24 your ground consideration?

25 And I'm sorry I don't have all of the

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data because as I understand it they don't really want the data. They don't want to present it out there because I know the Congressional Black Caucus asked that question about, "Well, who are the victims of stand your ground and who are the beneficiaries of stand your ground?" And they asked the state and the state didn't get anything back. As it relates to the -- representative -- State Representative from South Carolina, you look at that and you scratch your head and you say, "Well, we do want it to be an important thing when somebody decides to take somebody's life." When you decide to kill somebody, that you don't want it to just be so arbitrary that we have a law that says you don't have to try to solve it with conflict resolution, you don't have to try to resolve it peacefully, just take your gun out and shoot them because remember --- we have self-defense." Under self-defense, you know, the law is different you have a duty to retreat if it's reasonable and safe that you can do so. But under stand your ground you have no such duty. So we have a lot to do with the application, what's real and how it's being applied. So I would hope

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2 that as far as collecting the data is important,  
3 but looking at how these courts around America,  
4 not just in Florida, but around America -- in  
5 Louisiana we have stand your ground cases all the  
6 time I'm involved in. Arizona -- and when the  
7 victim is black or brown they are criminalized and  
8 the implicit biases are put on thick. The person  
9 who's dead on the ground as an excuse to justify  
10 what the killer has done.

11 COMMISSIONER CASTRO: Okay. So I'm  
12 going to go to Commissioner Achtenberg, followed  
13 by Dr. Goliday, followed by Commissioner  
14 Timmons-Goodson. And do any of the commissioners  
15 on the phone want to get on the list?

16 COMMISSIONER KIRSANOW: Peter Kirsanow  
17 here, I think I may have a question.

18 COMMISSIONER CASTRO: Okay, Commissioner  
19 Kirsanow.

20 Commissioner Achtenberg, you have the  
21 floor.

22 COMMISSIONER ACHTENBERG: Thank you,  
23 Mr. Chairman. I have in the great tradition of my  
24 colleagues, I have two questions.

25 My first question is to

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Dr. Russell-Brown. You say in your written testimony that if there were ways to make implicit bias explicit that might have some salutary effect on all of these matters.

Could you further describe ways of making implicit bias explicit that might be things for this commission to consider when we get to recommendations should we conclude that implicit bias is actually an equal protection or due process problem when it comes to the administration of justice and the racial disparities that may -- that the statistics may suggest exist.

MS. KATHERYN RUSSEL-BROWN: The point that I'm -- the point that I'm making there is that we need to -- I guess it's always -- play the piano with all ten fingers. Right? That we need to consider implicit bias. We need to look at it. We need to see what impact it has on people's perceptions of fear, calculating fear, the empirical research, the sociological research, criminological research, supports that whites see African Americans as symbols of fear, that there are these direct associations and indirect

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2           associations made. So the implicit bias and the  
3           perceptions of what race means, that's there. But  
4           in terms of, sort of, nuts and bolts, you know  
5           making the connection to what's actually going on  
6           in the criminal justice system I think that we --  
7           and that's why I made the recommendation about the  
8           racial impact statement. We have to take a look  
9           at what's actually going on on the ground.

10                   Now at the same time that -- that this  
11           needs to happen we're also talking about needing  
12           to have -- the idea of having some kind of  
13           national data base to gather information.

14                   So in addition to, if there is new  
15           legislation related to criminal laws that there  
16           should be some racial impact statement.

17                   There also needs to be -- there also  
18           need to be databases that gather information so we  
19           can evaluate what's actually going on.

20                   So the idea here is that we need to be  
21           mindful of the fact that there is something about  
22           race -- that race does matter in the  
23           administration of justice. And that people's  
24           attitudes about crime, attitudes about race, then  
25           in turn impact what does actually happen.

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So we need to look at these different

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places. And that's the main point.

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COMMISSIONER ACHTENBERG: Thank you very

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much.

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And, Mr. Crump, I'm intrigued by the

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issue of the case that you filed in Georgia

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questioning the constitutionality of the Georgia

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stand your ground law. Is that the context?

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MR. BENJAMIN CRUMP: Yes, ma'am.

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COMMISSIONER ACHTENBERG: Could you

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articulate more extensively the rationale that

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you're proffering there and could you make some

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suggestions if you will for issues that this

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commission might consider addressing as it relates

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to the constitutional principles at issue in your

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Georgia case?

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MR. BENJAMIN CRUMP: Absolutely. The

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biggest inference, I guess, if you want to try to

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frame it, by creating a right to kill based on an

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individuals reasonableness, fear without defining

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circumstances with -- demonstrate reasonable --

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the act that potentially deprives individuals of

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their lives without due process. And once you do

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that the cost of that infringes on the fundamental



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2 due process right of life. It must be reviewed  
3 under strict scrutiny. And I think that's where  
4 this commission can speak very robustly on that  
5 issue because I think stand your ground, it's  
6 always been this sort of question whether this is  
7 constitutional on so many levels.

8 But this whole thing of just the  
9 reasonableness, like, how do you qualify that to  
10 make it uniform and not be arbitrary so we have  
11 everybody getting equal justice and it's not one  
12 thing in this court, and South Florida one way in  
13 this court, and North Florida one way, and Georgia  
14 one way, and Arizona one way, and Arkansas one  
15 way, and South Carolina, because when you start  
16 looking at it being applied like those things --  
17 being applied like that, but yet you go back to  
18 the Constitution of the United States -- and  
19 saying -- where is a Constitutional privilege to  
20 Americans being deprived here. Being, I think,  
21 you can bring it to uniformity of everybody in the  
22 state saying we're not saying you can't have a  
23 stand your ground law, but your stand your ground  
24 law gotta be un-vague, it has to be clear, it has  
25 to tell people what and when they can take

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somebody's life and it be uniform.

You can't say just because it's a black person I think, "Oh, those -- those black men are more dangerous than white men so we can give you a little extra discretion to shoot a black man."

And that's troubling on so many levels. And as we look at this lawsuit we -- we -- it's about a 40 page complaint so I can't give you all of the details, but I'm glad that you all provided me with a lot of experts to choose from when we go before the Georgia Supreme Court.

But it is one of the things -- I'll say in conclusion and -- where is it is here -- in conclusion, when we talked about the Castle Doctrine it was objective as my classmate Miss (Inaudible) -- you know, we got taught in law school, the Castle Doctrine it was objective because you were in the house. And so if the person had a mortgage or they had a lease and stuff, it was real objective. Didn't have to guess about whether the person -- whether it was their house and there was an issue of self-defense. It was their house and why are you in their house threatening them.

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2                   It gets a lot more subjective when you  
3 say, "I'm walking down the street in Sanford,  
4 Florida, in a gated community and I think  
5 somebody's not supposed to be there, and I go  
6 confront them, and I make sure that when I shoot  
7 -- because that's the message that we're sending,  
8 that the person is dead because if they live --  
9 Marissa Alexander -- it's a lot harder to win your  
10 stand your ground argument when somebody can argue  
11 that "I wasn't a threat to your life."

12                   So when you look at that it becomes very  
13 subjective. And when it becomes that subjective  
14 it becomes too vague and it doesn't pass the  
15 constitutional muster. And that's what we're  
16 raising to the stand your ground law has been  
17 unconstitutional.

18                   We haven't got a writ of certiorari yet,  
19 but we're hoping that the court is going to let us  
20 argue it, we're waiting. The commission can speak  
21 to that issue and help so much this group of  
22 lawyers and parents who are crying out to say "We  
23 can't bring our children back but let's try to do  
24 something for their legacy so it won't happen to  
25 your children."

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2                   COMMISSIONER ACHTENBERG:    So the  
3                   subjectivity is in the place where this defense  
4                   can now be proffered as well as the fact that it  
5                   used to be an objective standard and now it's a  
6                   subjective standard.    We heard in the prior panel  
7                   the State Representative from South Carolina  
8                   acknowledged that if I -- if somebody punches me  
9                   in the face, and I'm in public I can take my gun  
10                  out and shoot them.    And he went on to say that if  
11                  I think the person is going to punch me in the  
12                  face and my -- you know, there's no -- there's no  
13                  reasonable standard that's applied to that.    If I  
14                  think the person is going to punch me in the face  
15                  and I pull my gun out and shoot him that's  
16                  justifiable under their stand your ground law.

17                                Is that your understanding of the way  
18                                the law operates?

19                                MR. BENJAMIN CRUMP:    Absolutely.  
20                                Miss Achtenberg you brought up a very important  
21                                point and that's the third prong.    In self-defense  
22                                you have a duty to retreat if it was reasonable  
23                                and safe that you do so.    And who could argue with  
24                                that being a bad law, that you don't kill  
25                                somebody, if you can get away you have a duty to

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2 do so if it's reasonable and it's safe. Now if  
3 it's not reasonable and safe you can defend  
4 yourself. But if it's reasonably safe you can do  
5 it.

6 In the Castle Doctrine said you don't  
7 have to retreat if you're in your house, but  
8 self-defense says you can. So now stand your  
9 ground, just as you said -- say -- even if I think  
10 you're going to be a threat to me, if you say a  
11 word to me and I think that you can follow through  
12 with the threat I can just kill you. I don't have  
13 to say, "Let me get in my car and drive away."

14 You know, we have -- there have been  
15 cases where people in the car could easily drive  
16 away, but they shot the person. "I felt  
17 threatened, and why did I have to run." -- think  
18 about the matter in Texas with the young man  
19 breaking in the neighbors house. The police tell  
20 him, "Don't go over there." He goes over there  
21 anyway, says, "I know my rights, I can stand my  
22 ground."

23 Where does it end? The theater with the  
24 popcorn. You know, I thought that he was a threat  
25 to my life. And so it's so subjective, so now

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there are three prongs that tag it constitutionally. One is on the reasonableness of the fear. The second is on this subjective criteria, now that it is no longer with the Castle Doctrine -- self-defense. And the third is certainly that no duty to retreat at all, whatsoever, just take a gun out and shoot the person.

COMMISSIONER ACHTENBERG: Thank you.

COMMISSIONER CASTRO: Mr. Crump, if you don't already know him Jerry Gonzalez of our State Advisory Committee in Georgia is sitting in the third row back there, you might also want to talk to him.

Next we have Dr. Goliday, Commissioner Timmons-Goodson, Commissioner Kirsanow, Commissioner Yaki, and then we'll be close to finishing up on this panel.

DR. SEAN GOLIDAY: Thank you. Many of my questions have been addressed but I do have --

COMMISSIONER CASTRO: Could you speak up a little louder in --

DR. SEAN GOLIDAY: -- many of my questions have been addressed but I do have just a

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couple of questions for Mr. Krouse and Mr. Roman.

Given the methodological issues you (inaudible) with the existing data sources, what would be a likely data source to kind of help us address some of the unanswered questions regarding conclusions currently being made about justifiable homicides?

And the second part of the question is, how can we work to bring that to scale or at least if not to scale, in theoretically important states -- that just kind of start looking at this issue beyond the federally sponsored data collection efforts.

MR. JOHN ROMAN: Those are hard questions. So with respect to the first question, you know, you could potentially reverse engineer some of this stuff, right? And we're talking about in most places where there just aren't that many homicides a year. You could potentially, you know, fund a study that could go and look at the conda (phonetic) newspaper report legal filings about the nature of some random sample of these reports, learn something about the context about them, and try an answer this really critical

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question, right? Which is, are homicides of whites-on-blacks different than homicides of blacks-on-whites. Right? If one is more likely to be in context of self-defense than the other then the racial disparity is appropriate.

The racial disparity is so, you know, gargantuan that it's hard to believe that would be true. But you could potentially do that. There are some confidentiality issues there that I would be a little concerned about. Beyond that I don't know what else you could do.

The bigger issue here and we face this throughout the criminal/juvenile justice system is that states know what they spend and they have no idea what they buy. And they don't know what they're buying in terms of law enforcement. They don't know what they're buying in terms of community placements for juveniles, or sentencing, or corrections, they don't think about outcomes, they don't share data, they don't share knowledge.

And a lot of what's going in the world that I inhabit these days is trying to get to force states, counties and local governments to articulate what it is they're trying to accomplish



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and that means making them share data.

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If you share data it forces you to see  
all of your worts. And I think any

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effort that this commission can make to force

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local, county, and state jurisdictions to -- to

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collect, analyze, share and think about data

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around these kinds of issues will force other

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reforms that are also really important as well as

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to help us articulate the answers to the questions

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that we can't today.

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MR. DAVID HARRIS: If I could interrupt

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just a second. I apologize to the commission I'm

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going to have to depart for an airplane. I'm

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thankful for the opportunity to testify here and

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I'd be glad to answer any questions in writing.

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Thank you.

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COMMISSIONER CASTRO: Thank you,

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Professor.

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Yes, Mr. Crump.

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MR. BENJAMIN CRUMP: I just -- I got a

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response from Lucia McBath and she again wanted to

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apologize, but they just sentenced the killer of

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her son, Michael Dunn, to 105 years on top of a

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life sentence. She asked me to share this with

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the commission.

COMMISSIONER CASTRO: Thank you.

Any other responses to Dr. Goliday's questions?

MR. WILLIAM KROUSE: Well, I agree with Dr. Roman that we need better data. There's a need to improve our crime statistics. And if I lived in a perfect world and I could dedicate myself to this issue I would go and I would look at each one of those SHR records and contact the reporting agencies and try and find out what the circumstances were.

I mean, you're looking at stranger-on-stranger, white-on-black, firearm related justifiable homicides over that 10 year period there's 250 in the SHR. Then I would try and do a literature search to get some sort of reading on the error rate there as to how many weren't reported. And that would give me some idea of the prevalence, because right now I don't think that we can be too confident about the prevalence of private citizen justifiable homicides in general when that filters down to every other category.

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So that's what I would work on. And that's what I've been doing for the past year on mass shootings and it's -- it's astounding what you find. And in this country where we put such a primacy on self-defense you would want to know where those numbers are falling I would think. And you'd want to have confidence in those numbers.

And the Bureau -- I've had discussions with the Bureau of Justice Statistics, the NIBRS Program is advancing where we can start to do data samples on different questions and do some statistical sampling, but that's on a nation-wide basis that's not state by state.

And so I would hope that, you know, we'd start to look at these things a little more carefully in the future and at some point I will given the time and resources.

COMMISSIONER CASTRO: Okay. Professor -- I'm sorry. Commissioner Timmons-Goodson.

COMMISSIONER TIMMONS-GOODSON: Yes. Thank you very much, Mr. Chair. I had this question for Professor Harris, but I'd like for those that are present if you'd like to take a

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stab at it I'd appreciate it.

As I listened to Attorney Crump and others talking about reasonableness, objective standards, subjective standard, in describing fear it just seemed to me that it was extremely relevant that implicit bias is extremely relevant.

It leads me to ask that given that people often don't recognize and can't easily eliminate implicit bias I was wondering whether any of you might see anyway in which we might alter our stand your ground laws to both take into account this very valuable research information that we now have the benefit of, and take advantage of it in a way that will both allow us to protect those that fear, attack, and also to avoid the unnecessary deaths of the alleged attackers. Any takers?

MR. ARKADI GERNEY: Well, I think, you know I would say, and I think Mr. Crump spoke to this earlier to a degree, I think one of the problems with stand your ground laws and the great burden it places on jury's, but also the shooters themselves at the moment they're making their decision and to act reasonably is the great

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2 increase in the gray area and the uncertainty that  
3 it creates. So when it was only the Castle  
4 Doctrine and you had this location restriction it  
5 made it easier for people who were applying stand  
6 your ground laws in the course of shooting someone  
7 in their home -- or self-defense laws in the  
8 course of shooting someone in their home, but also  
9 for a jury that would go look at it later to try  
10 to figure out what happened. It was a narrower  
11 set of circumstances, the scope of what could be  
12 reasonableness, this gray area was much narrower.

13 And then when you bring in the, you  
14 know, the work of Mr. Harris and others and  
15 implicit racial bias, when you have an enormous  
16 scope of what possibly could be reasonable, the  
17 scope of what could be biased is much larger. The  
18 rule -- there are not bright lines here.

19 And the consequences of not having  
20 bright lines can -- can -- can hurt people either  
21 way. That can mean wrongful convictions because  
22 these very vague laws are applied very differently  
23 depending on what particular jury you happen to  
24 get. What particular defendant you happen to get.  
25 And the uncertainty itself is a huge part of the

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problem.

COMMISSIONER CASTRO: Any other responses?

MR. BENJAMIN CRUMP: The only thing that I might add to that is when you think about the Castle Doctrine as opposed to what we have now with the stand -- oh, I'm sorry, self-defense as to what we have now with stand your ground, and in many of these cases the objectiveness was, can the jury say "Did you have a duty to retreat? Was it safe?" But that's just thrown out now. And so it makes it that more subjective. I just fear them. So the only issue is, how can you prove fear in somebody and if it's a genuine fear or if it's a fear that -- I go back to Trayvon. I just thought that black people walking in my gated community weren't supposed to happen based on there was a robbery by a black person months before. If you remember the trial, which definitely couldn't understand why that was allowed to come into court. But because of that it somehow justified him stopping to detain any young black person walking in his gated community.

And so you go from that very objective

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2 fact -- that self-defense saying, "hold on," but  
3 if you had no duty to engage him and you could  
4 have got away then the jury can say you're guilty  
5 because this wasn't self-defense. But now with  
6 stand your ground is just such much gray --  
7 there's no bright line as Mr. Gerney said for the  
8 jury -- to help the jury understand it.

9 MS. KATHERYN RUSSEL-BROWN: To answer  
10 your question or my comment -- or to answer your  
11 question is to retain the reasonable fear aspect,  
12 that it should be an objective standards, that it  
13 just shouldn't be that a person indicates that  
14 they, themselves, were fearful. I mean, the law  
15 should work in an objective way.

16 I think Pennsylvania, which has a stand  
17 your ground law as well, has included that in it  
18 there must be some showing of a weapon. There  
19 must be something objective about this fear.

20 MR. BENJAMIN CRUMP: And, Mr. Chair --  
21 if I could -- also remember that the initial  
22 aggressor aspect of it. Most states say that you  
23 can't be the initial aggressor and still claim  
24 self-defense. But I submit to you if the person  
25 is dead on the ground how can you prove who was

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the initial aggressor?

MR. ARKADI GERNEY: Or if you're in --  
there are some states that allow invocations of  
stand your ground if you're in the commission of a  
crime. So, for example, if you're in the process  
of dealing drugs and that confrontation arises and  
you fear for your life you can legitimately claim  
a stand your ground defense in some states,  
not in others.

So I think all of those would be things  
that would narrow the circumstances.

COMMISSIONER CASTRO: Okay. So  
Commissioner Kirsanow, and then Commissioner Yaki.

COMMISSIONER KIRSANOW: Thank you,  
Mr. Chair. I'm very interested in this notion of  
implicit bias, but unfortunately Professor Harris  
I understand has left. It seems to me that the  
implicit bias is a possible contributing factor  
for racial disparities in stand your ground  
confrontations where the attacker is black.  
Interested in kind of disaggregating the  
contributing factors, it seems to me that it could  
be likely another contributing factor to  
disparities in stand your ground confrontations,



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2           could be that someone reasonably may believe that  
3           they had to defend themselves where an attacker is  
4           armed with a gun as opposed to being unarmed or  
5           where someone is being confronted in their home or  
6           there's a home invasion as opposed to being on the  
7           street. So I kind of wonder if, maybe, this is  
8           best put to Mr. Roman. In that context, isn't it  
9           true that the Tampa Bay Tribune data show that the  
10          blacks killed in stand your ground confrontations  
11          are 26 points more likely to have been armed with  
12          a gun as opposed to whites killed in stand your  
13          ground, in nearly 3 to 1 margins are blacks more  
14          likely to be killed in home invasions and  
15          burglaries as opposed to whites killed in stand  
16          your ground confrontations?

17                       MR. JOHN ROMAN: Sure, I'm happy to take  
18          a crack at that. So -- so two thoughts on that.  
19          One is to say supposing that those data that you  
20          just quoted are exactly right and reflect the  
21          reality that we live in. The -- the -- and that  
22          blacks who are killed are 3 times more likely to  
23          be, you know, involved in a felony.

24                       The fact is that, is a white shooter of  
25          a black victim is 10 times more likely to have

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2 that be ruled justified than if it's a black  
3 shooter of a white victim. So even if you believe  
4 the 3 to 1 is correct, there's still -- or what  
5 remains is an enormous racial disparity that's a  
6 little hard to understand.

7 I'd also point out Mr. Crump left, which  
8 is unfortunate, so I can't say this -- but we were  
9 interested in trying to get to the other data that  
10 you just asked about -- (inaudible) -- and think  
11 about what are the other attributes of these  
12 incidents that we can observe in the data that  
13 tell us something about the likelihood that a  
14 shooting is ruled to be justified. And in  
15 addition to the cross race stuff, if the shooter  
16 is older than the victim the likelihood that it's  
17 ruled justified goes way up. If they're strangers  
18 it goes way up. If it's a firearm it goes way  
19 up. If it's a member of law enforcement it goes  
20 way up. To the point where if you were to create  
21 -- and it's a very small number of cases across  
22 these six years. But if you were to create a fact  
23 pattern that mirrored the Trayvon Martin/George  
24 Zimmerman incident where you had two strangers, a  
firearm was used in a homicide, the shooter is

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2 white, and as we discussed Mr. Zimmerman would be  
3 classified in the state as being white. The  
4 victim is black, the shooter is older than the  
5 victim, you would find that in those cases it's  
6 ruled to be justified a little more than a third  
7 of the time. 34 percent of the time compared to  
8 2.5 percent overall of all homicides.

9 So in the fact pattern in the Trayvon  
10 Martin/George Zimmerman case, you know, that is  
11 actually the fact pattern that we can observe in  
12 the data that is most likely to yield a  
13 justifiable homicide.

14 And even if you believe this sort of 3  
15 to 1 ratio, which may very well be true, you know  
16 like I said they had a convenience sample --  
17 cases. It's hard to generalize from that, but if  
18 it's true, boy, you know, 34 percent compared to 3  
19 percent when the facts are reversed is still an  
20 enormous disparity.

21 COMMISSIONER CASTRO: Commissioner Yaki,  
22 you have the last question. Your mic's not  
23 working. There you go.

24 COMMISSIONER YAKI: This is for  
25 Mr. Gerney. Doesn't the presence, availability,

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access to a gun make the problems of implicit bias in stand your ground cases even more problematic?

I mean, it's one thing to say, "I may have an unconscious reflexive action against someone because of their race." It's another thing when you have that unconscious reflexive action when you have a Smith and Wesson strapped to your hip.

MR. ARKADI GERNEY: Yes. And it's another thing when, in an increasing number of states, concealed carry permit holders can bring those guns into bars.

So, I think, yes, I think that's exactly right. And when you look at, you know, generally at crime data in the United States you find that the United States is in the middle range in terms of highly industrialized countries in terms of crime. And in terms of violent crime there is one place where it's way out of the normal range which is murder and where it's 45 times higher. Firearm murders, you know, 10 times higher.

And so, yes, a gun changes the equation. And if we're, you know, if we're going to have a -- if we're going to have a society where guns in

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2 bars are the norm and we have stand your ground  
3 laws, and we have extremely lax standards for who  
4 can get a permit to carry a gun you're going to  
5 have confrontations. I think there was a  
6 reference to the alcohol-fueled confrontations  
7 that happen all of the time in bars and other  
8 venues that will have lethal consequences and  
9 obviously that's bad for everybody involved,  
10 whether it's determined to be a justified shooting  
11 or an unjustified shooting, you've basically got  
12 two lives ruined at the end of that equation.

13 COMMISSIONER CASTRO: Well, thank you.  
14 We want to appreciate all of the information that  
15 you all provided us this morning. And thank you  
16 for appearing, we're now going to take a brief  
17 break for lunch. We will reconvene at 1:50, that  
18 is 10 minutes to 2:00 back here in this room.

19 Thank you, everybody.

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21 (End of Panel Number 2, Volume II. Lunch recess,  
22 Proceedings will continue in Volume III.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF POLK

I, Kathy Wescott, Certified Shorthand Reporter, do hereby certify that I was authorized to and did report in Stenotypy and electronically the foregoing proceedings and evidence in the captioned case and that the foregoing pages constitute a true and correct transcription of my recordings thereof.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 28th day of October, 2014, at Lakeland, Polk County, Florida.

Kathy Wescott, CSR  
Court Reporter

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THE UNITED STATES COMMISSION ON CIVIL RIGHTS  
BRIEFING ON STAND YOUR GROUND

Place: The Rosen Hotel  
9700 International Drive  
Orlando, Florida 32819  
9:00 a.m. - 3:00 p.m.

Date: October 17, 2014

Reported by:  
Kathy Wescott, CSR

(Volume 3, pages 1 through 100, p.m. session, Panel  
Number 3)

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3 Present:

4 Commissioner Michael Yaki

5 Commission Roberta Achtenberg

6 Marlene Sallo

7 Commissioner Marty Castro (Chairman)

8 Commissioner Karen K. Narasaki

9 Commissioner Patricia Timmons-Goodson

10 Commissioner Gail L. Heriot

11

12

13 Appearing by phone:

14 Commissioner David Kladney

15 Commissioner Peter Kirsanow

16

17 Panel Number 3:

18 Elizabeth Burke

19 John Lott, Jr.

20 David LaBahn

21 Ilya Shapiro

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COMMISSIONER CASTRO: Are Commissioner's  
Kirsanow and Kladney on the phone.

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COMMISSIONER KLADNEY: Just talking  
baseball.

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COMMISSIONER CASTRO: Okay. Good.

8

COMMISSIONER YAKI: Go Giants.

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COMMISSIONER CASTRO: It is 1:57 and we  
are coming back from the lunch recess for our  
afternoon panel. So just housekeeping for the  
panelists that are here, I assume many of you were  
probably here this morning, but in case you  
weren't you'll each have 8 minutes to speak. That  
will be governed by the series of warning lights  
here. Green mean starts. Yellow's going to be  
your two minute warning to begin to wrap up, and  
three is, please conclude. There will be an  
opportunity to elaborate when we as commissioners  
begin to ask you questions.

21

So let me briefly introduce the  
panelists in the order in which they will speak.

23

Our first panelist is Elizabeth Burke  
from the Brady Center to Prevent Gun Violence.

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Our second panelist is John Lott, who's

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-- right there -- the Crime Prevention Research

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Center.

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Our third panelist is David LaBahn from

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the Association of Prosecuting Attorneys.

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And our fourth panelist is Ilya Shapiro

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from the CATO Institute.

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Our fifth panelist was not able to make

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it, Ronald Sullivan, who was from Harvard Law

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School. Well, I presume we'll get his statement

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for the record.

12

I'll now ask each of the panelists to

13

swear or affirm that the information that you are

14

about to provide us is true and accurate to the

15

best of your knowledge and belief.

16

Is that correct?

17

PANELISTS: Yes.

18

COMMISSIONER CASTRO: Okay. Thank you.

19

Miss Burke, please proceed.

20

MS. ELIZABETH BURKE: Thank you. And I

21

would like to --

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COMMISSIONER CASTRO: You need to speak

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into the mic, please.

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MS. ELIZABETH BURKE: Thank you so

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much --

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COMMISSIONER CASTRO: A little closer.

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MS. ELIZABETH BURKE: So I didn't forget

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a tie today but I did bring a small electric fan

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that I had intended to place here, but I didn't

6

want to set anything off.

7

In all seriousness --

8

COMMISSIONER YAKI: -- you just insulted

9

our host air conditioning -- so --

10

(Laughter)

11

MS. ELIZABETH BURKE: I'd like to thank

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the commission for convening these panels to study

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the legality and appropriateness of the stand your

14

ground laws.

15

As you know my name is Elizabeth Burke

16

and I'm an attorney with the Brady Center to

17

Prevent Gun Violence. And I'm a litigator with

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our Legal Action Project.

19

The Brady Center was at the forefront of

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opposing Florida's enactment of stand your ground.

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Which we called at the time, appropriately, a

22

"shoot first" law.

23

The tragic shooting deaths of Trayvon

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Martin and Jordan Davis really realized our fears

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about these laws. If a law is found to have a



2           pernicious and disparate impact on certain groups  
3           in our society it must certainly be identified and  
4           challenged.

5                     Any law that creates a more dangerous  
6           society should be viewed with suspicion and  
7           subjected to the kind of thorough review that  
8           we're doing here today.

9                     So to go back a bit. Before stand your  
10          ground in order to justify the use of force in  
11          defense of self it was under the longstanding  
12          Castle Doctrine, which was derived from common  
13          law, a person was entitled to stand his ground in  
14          his or her home where nobody else had the right to  
15          be.

16                    In public places, however, where  
17          everyone has the right to be, there the law  
18          imposed a reasonable requirement to avoid conflict  
19          if possible.

20                    The law also required that a defendant  
21          prove that he believed force was necessary for his  
22          defense and he needs to prove his force was  
23          reasonable.

24                    Those were part of the tenets of  
25          common law of -- self-defense. There was logic to

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2 those requirements, that a defendant should show  
3 that his fear was reasonable, after all we  
4 shouldn't allow someone to unnecessarily shoot  
5 someone else simply because the shooter sort of  
6 wrongly perceived himself to be in harms way.

7 Self-defense law was intended to  
8 minimize conflict and preserve life. And those  
9 are objectives that one would hope everyone could  
10 agree on.

11 Stand your ground did away with these  
12 sensible requirements. At its core the law allows  
13 people to treat public spaces as their castles,  
14 thereby attempts to eliminate the duty to avoid  
15 conflict when possible.

16 As Trayvon Martin's killer George  
17 Zimmerman knew about stand your ground laws it  
18 could well be that these laws emboldened him to  
19 continue to follow Trayvon even after the 911  
20 dispatcher told him to stay in his car.

21 Additionally, under certain cases of  
22 stand your ground the law's now give a stand your  
23 ground shooter the right to use deadly force and  
24 they are presumed to have a reasonable fear.

25 In other words, they don't really even



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2 that has been used to prop up stand your ground  
3 and say this isn't really a departure from  
4 self-defense, when in fact it is, because those  
5 are pretty stark circumstances, I think everyone  
6 agrees, if you're on your own property being  
7 attacked by three people you have a right to  
8 defend yourself.

9 Similarly in Brown -- in the Brown case  
10 that Justice Harlan, we heard that famous quote  
11 from Justice Harlan. In that case Mr. Brown had  
12 been attacked by this other person twice before  
13 and had been told that he was going to be killed  
14 by him. So he had a gun at the ready.

15 And when that person came on to his work  
16 site he, unfortunately, had to use the gun. Even  
17 though he saw the person, was able to go get the  
18 gun, came back and defended himself.

19 And the Supreme Court said at that  
20 point, "You don't have to wait to be attacked."  
21 Although, in that case Mr. Brown was being  
22 stabbed.

23 So that's just background as we hear  
24 these important quotes that are held up as well,  
25 the law supports stand your ground. In fact, this



2 is a departure. So when we review changes to the  
3 self-defense doctrine, it's important to look at  
4 them in the context of our current gun laws and  
5 realize that any consideration of relaxing  
6 self-defense laws should be viewed in the context  
7 of an increasing arming of American citizens.

8 There's been, as Mr. Gerney mentioned in  
9 the last panel, a recent revision to who can carry  
10 a concealed weapon in public. And as you know now  
11 we have concealed carry's the law of the land in  
12 almost every state. Many states have a  
13 shall-issue regime in that there really isn't even  
14 an opportunity for police to say "this is a  
15 dangerous individual who should not have a gun."

16 More and more, even in constitutional  
17 carry states, a person who's allowed to own a gun  
18 can carry it anywhere they don't even have to have  
19 a permit. They don't have to make an application.  
20 And there's actually no point of contact for  
21 police to try and prevent tragedy.

22 Finally, and I see my time is running  
23 short. So when you look at stand your ground laws  
24 within the combination of sort of the lax  
25 concealed carry laws and the increasing

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2 militarization and lethality of the weapons, and  
3 then you combine that with the civil immunity  
4 discussion we were having earlier where the stand  
5 your ground laws shift the cost of violence. They  
6 take away the potential risk to a shooter by  
7 giving him civil immunity. And they -- therefore  
8 they eliminate the generally accepted American  
9 rule and leave really only the wealthy individuals  
10 able to bring actions against shooters in an  
11 effort to bring change to society.

12 So this -- this combination of shifting  
13 immunity and lax concealed carry laws are  
14 combining to make a very dangerous situation in  
15 states that have also enacted stand your ground.

16 So, again, as I said we're very  
17 interested in continuing the discussion on this.

18 And I'd like to get back quickly if I  
19 could to the dramatic testimony about someone  
20 punching you and you being able to then shoot  
21 them. If we think about that in a land with  
22 concealed carry, someone -- you know, a drunken  
23 stranger punches you and you shoot them and you've  
24 now taken a life, and I contend that's no small  
25 matter for either party, right?

2                   If you don't have a gun with you -- if  
3                   you don't have concealed carry allowed everywhere,  
4                   someone punches you, you have a black eye, and a  
5                   complaint for assault. You know, and that's  
6                   really what we need to think about when we put in  
7                   place laws that relax self-defense, but at the  
8                   same time increase access to guns we're just  
9                   creating a more dangerous society.

10                   COMMISSIONER CASTRO: Thanks,  
11                   Miss Burke. Thank you.

12                   Mr. Lott, you have the floor.

13                   MR. JOHN LOTT: Well, thank you very  
14                   much Mr. Chairman and commissioners for inviting  
15                   me here today to talk.

16                   I'm -- have a PowerPoint here that I  
17                   think may help a little bit. Let me just make a  
18                   couple of quick comments before I get into that.  
19                   And that is, people many times today have talked  
20                   about Florida as starting some new law, in fact,  
21                   there have been stand your ground type rules even  
22                   in common law going back to some states since  
23                   they've been part of the Union. California, for  
24                   example. In other states have essentially had  
25                   this is not some new experiment that's going on

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for the first time here.

You know, there's a reason why states have adopted stand your ground laws, it's not something that just sprung up. There's issues about certainty for the person who's using a gun defensively when you go and you say that people have to, you know, reasonably retreat as far as possible you create doubt in people's minds. How far should I actually have to retreat? And as the appendix in my testimony to you all goes through a number of cases where there's been real issues about prosecutors bringing cases when, you know, there's been differences, you know when -- somebody's been knocked down three times and the prosecutor said, "you still could have gotten up and tried to run away a fourth time." And the person thought that the third time he had been knocked down, at that point he pulled out the gun to go and defend himself.

Now, if we look at the Tampa Bay Tribune data which has been talked a lot about today. They have cases from -- that were brought from 2006 to 2014. Blacks make up about 16.7 percent of Florida's population. They make up about 34

2 percent of the stand your ground cases. So  
3 they're -- they're much more likely than the  
4 average Floridian, blacks are, to go and use stand  
5 your ground. And they're more successful when  
6 they do use it. Blacks who use stand your ground  
7 are 4 percentage points more likely not to face --  
8 not to have criminal charges than a white in that  
9 same situation.

10 Earlier today among, for example on the  
11 first panel -- he pointed out that -- what was  
12 mentioned a couple of other times is that if you  
13 look at the Tampa Bay Tribune data 67 percent of  
14 those who killed a black faced no penalty, but  
15 only 57 percent of people who killed whites faced  
16 no penalty.

17 It appears to be discrimination going on  
18 there. But what you have to take into account is  
19 that it's primarily blacks who kill blacks, and  
20 whites who kill whites in these stand your ground  
21 cases.

22 So for example, if you look at the Tampa  
23 Bay data, a little bit over 76 percent of the  
24 cases for blacks involve a black killing a black.  
25 In the case of whites, it's slightly over 80

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2 percent of the time there.

3                   And when you take that into account what  
4 you find is that even though you're not likely to  
5 you get a conviction when a black is killed, it's  
6 because it's blacks who are killing blacks. And  
7 in fact, blacks who use a stand your ground  
8 defense are more successful in -- in bringing it  
9 than whites are. Hispanics are actually the  
10 highest in terms of success for doing that.

11                   So, here's the bottom line. If you want  
12 to go and declare discrimination in terms of  
13 differential rates, in terms of who the vic -- who  
14 was shot, why isn't it also discrimination in  
15 favor of blacks and Hispanics in terms of the ones  
16 who are the ones who shot in that case. I would  
17 argue that it's pry not discrimination in either  
18 of the cases.

19                   If you look at the Tampa Bay Tribune  
20 data one of the things that really doesn't get  
21 talked is all the other differences across these  
22 cases. So blacks who were killed were 26  
23 percentage points more likely to be armed with a  
24 gun than a white who was killed. Blacks were also  
25 25 percentage points more often than whites to be

2 in the process of committing a robbery, home  
3 invasion, or burglary.

4 You know these types of things as well  
5 as other things suggest that maybe there was a  
6 reason that they were shot. That there was a  
7 reason why, you know, the black victim or whoever,  
8 shot these individuals in order to protect  
9 themselves.

10 And these differences continue to exist  
11 even when you look at the, you know, blacks or  
12 whites doing the shooting. Now I run some  
13 regressions that I show you because the  
14 overwhelming discussion here is just looking at  
15 simple averages.

16 And as I say there's huge differences in  
17 these cases. You know, whether the person who's  
18 being shot had a gun for example, you'd think  
19 would be important. Whether there were witnesses  
20 there. Whether there was forensics evidence that  
21 was involved.

22 You had -- there's lots -- it's a very  
23 rich data set. There's lots of things you can try  
24 to account for. And the thing is once you account  
25 for those things there's no statistically

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2 significant difference between either on the  
3 victim's side or the people who are using the  
4 stand your ground defense between whites and  
5 blacks, they're essentially exactly the same in  
6 terms of how the law is treated. Once you control  
7 for all of the differences in the cases there.

8 Now one thing we've heard a fair amount  
9 today about are justifiable homicides. And  
10 there's some real problems with the data. First  
11 of all the number of states and number of  
12 jurisdictions that are reporting this have  
13 increased fairly significantly over time.

14 I'll just show you. Here's just a  
15 number of states. Basically it goes from, you  
16 know, 29, 28 at the beginning, up to as high as 36  
17 towards the end of the period. If you weight  
18 those states by population it's actually even more  
19 of a dramatic of an increase.

20 Plus you have to realize that for a lot  
21 of these states you may only have one police  
22 district in the entire state that's reporting the  
23 data.

24 On average you end up having some place  
25 between about 14 and 18 percent of police



2 departments in the country reporting justifiable  
3 homicides. And it's been changing too in terms of  
4 the composition. You're getting police  
5 departments for more heavily minority areas  
6 reporting towards the end of the period than you  
7 did at the beginning. So if I see an increase in  
8 justifiable homicides in total or if I see an  
9 increase in justifiable homicides involving  
10 minorities, a large part of that, if not all, is  
11 simply due to the fact that you're having more  
12 places reporting. And more places reporting for  
13 areas where minorities are living.

14 Now I'm not going to go through Roman's  
15 stuff right now, but I'll just mention the Texas  
16 A & M study for a minute. Even they, in their  
17 paper, recognize that there were many states that  
18 had stand your grounds before 2005, but yet they  
19 don't include any of them in their sample.  
20 There's no explanation for why they include no  
21 states before 2005. There's no explanation in  
22 their paper for why they don't include crime data  
23 or anything else before 2000.

24 Those are -- all seem like important  
25 things. There's no explanation why they don't

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2 include stand your ground cases which have been a  
3 result of court decisions that were there. And  
4 there have been other issues. Brady Campaign,  
5 others have mentioned other gun control laws like,  
6 right to carry, you argue it's very important in  
7 terms of interpreting these laws whether you take  
8 into account stand your ground rules.

9 This Texas A & M study had no other gun  
10 control laws that were involved there. So there  
11 are other problems that I could point to with  
12 regard to it.

13 What happens when you try to look at the  
14 whole period of time -- I have data that goes back  
15 to '77. From '77 through 2012 for all of the  
16 states that changed their laws during that entire  
17 period of time. And I try to account for other  
18 gun control laws. 13 in fact said -- ah, right to  
19 carry laws. And when you try to do that this is  
20 the change that you see in terms of murder rates  
21 for example. I also have evidence there, you  
22 know, before and after, so the line there is year  
23 zero when the different states adopt the laws and  
24 you can see how murder rates are falling in the  
25 states that adopt stand your ground rates -- laws,

2 relative to the states that don't and how it was  
3 beforehand.

4 I appreciate your time. Thank you very  
5 much. But the bottom line is that the most  
6 vulnerable people in our society are the ones who  
7 are taking the greatest advantage of the stand  
8 your ground laws and using it most successfully.

9 COMMISSIONER CASTRO: Thank you. Doctor  
10 -- I'm sorry, Mr. Labahn.

11 MR. DAVID LABAHN: Thank you Chairman  
12 Castro and members of the commission for the  
13 opportunity to testify before you today.

14 My name is David LaBahn and I'm the  
15 President and CEO of the Association of  
16 Prosecuting Attorneys. We're a private nonprofit  
17 whose mission is to support and enhance the  
18 effectiveness of prosecutors in our effort to  
19 create safer communities.

20 APA is the only national organization to  
21 include and support all prosecutors, whether  
22 appointed or elected, as well as their deputies  
23 and assistants.

24 On behalf of APA I'm pleased to have the  
25 opportunity to address the issues surrounding the

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2 vast expansion of self-defense referred to as  
3 stand your ground or Castle Doctrine laws. In our  
4 materials we use the phrase Castle Doctrine  
5 because we feel this legislative expansion  
6 includes more than merely stand your ground, as  
7 the expansion has taken the common law right to  
8 protect ones home to any place that one has a  
9 right to be.

10 As prosecutors we seek to do justice for  
11 victims and to hold offenders accountable for  
12 their actions, especially in cases where a life  
13 has been violently ended whether by a firearm or  
14 other deadly means.

15 During my tenure as the Director of the  
16 American Prosecutors Research Institute we  
17 convened a symposium of prosecution, law  
18 enforcement, government, public health, and  
19 academic experts from a little over 12 states.

20 This 2007 symposium was summarized in a  
21 2008 report co-authored by my Vice-President,  
22 Steven Jansen. In it we expressed serious  
23 reservations about the potential impact of the  
24 expanded legislation on youth aged 14 to 18.

25 Quoting from the report, "Specifically,

2 law enforcement considers this age group to be  
3 particularly desensitized to violence and more  
4 prone to quote "unprovoked violence" as a result  
5 of being quote "disrespected." The Castle  
6 expansion will not have a deterrent effect on  
7 juveniles and young adults claiming to be  
8 "disrespected" as a reason for occurrence of  
9 assaults, but instead could create a legal shield  
10 from criminal and civil immunity."

11 This concern from 2007 has been borne  
12 out in the application of an otherwise neutral  
13 statute because of the subjective nature of stand  
14 your ground. Disparities in age, race, religion  
15 and other cultural factors create situations where  
16 the subjective perceptions of being in imminent  
17 danger are due to disparities between individual  
18 and now lead to senseless violence including the  
19 taking of another's life.

20 Since 2009, APA has been tracking the  
21 legislative progression of stand your ground and  
22 assisted prosecutors who have been working to  
23 enforce these expansive new laws. I have attached  
24 to my testimony APA's Statement of Principles  
25 regarding stand your ground laws as these laws

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2 have raised a number of troubling and dangerous  
3 concerns.

4 Prosecutors and their professional  
5 associations have overwhelmingly opposed stand  
6 your ground laws when they were in their  
7 respective legislatures. The concerns expressed  
8 include the limitation or even -- I'm sorry, the  
9 limitation or elimination of prosecutors' ability  
10 to hold violent criminals accountable for their  
11 acts.

12 However, even with this opposition, many  
13 states have passed stand your ground laws. Many  
14 of these laws include provisions that diminish or  
15 eliminate the common law "duty of retreat,"  
16 changed the burden of proving reasonableness to a  
17 presumption, and provide blanket civil and  
18 criminal immunity. By expanding the realm in  
19 which violent acts can be committed with the  
20 justification of self-defense. Stand your ground  
21 laws have negatively affected public safety and  
22 undermined prosecutorial and law enforcement  
23 efforts to keep communities safe.

24 These measures have undermined standard  
25 police procedures, prevented law enforcement from

2           arresting and detaining criminals, and have  
3           stymied prosecutors deterring them from  
4           prosecuting people who claim self-defense even  
5           while killing someone in the course of unlawful  
6           activity.

7                         In some states, courts have interpreted  
8           the law to create an unprecedented procedural  
9           hurdle in the form of an immunity hearing which  
10          effectively transfer the role of the jury over to  
11          the judge. Moreover, because these laws are  
12          unclear, there have been inconsistent applications  
13          throughout the states and even within respective  
14          states. Prosecutors, judges, police officers, and  
15          ordinary citizens have been left to guess what  
16          behavior is legal and what is criminal.

17                        Even with the best efforts to implement  
18          these broad measures, defendants, victims'  
19          families and friends, investigators, prosecutors,  
20          defense attorneys, trial courts, and appellate  
21          courts have been forced into a case-by-case  
22          analysis with no legal certainty as to what they  
23          can expect once that life has been taken.

24                        Stand your ground laws provide safe  
25          harbors for criminals, prevent prosecutors from

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2 bringing cases against those who claim  
3 self-defense, even after unnecessarily killing  
4 others. For example, in 2008, Florida case, a 29  
5 year old drug dealer named Tavarious China Smith  
6 killed two people in two separate incidents. The  
7 first was drug-related, and the second was over a  
8 retaliation for the first. Though he was engaged  
9 in unlawful activity in both instances prosecutors  
10 had to conclude that both homicides were justified  
11 under Florida's stand your ground law.

12 Unfortunately, this example is not an  
13 anomaly. A recent study concluded that the  
14 majority of defendants shielded by stand your  
15 ground laws had arrest records prior to the  
16 homicide at issue.

17 Stand your ground began here in Florida  
18 in 2005. And it is our position that the common  
19 law did sufficiently protect people's rights to  
20 defend themselves, their homes, and others. The  
21 proper use of prosecutorial discretion ensured  
22 that lawful acts of self-defense were not  
23 prosecuted, and I've not seen any evidence to the  
24 contrary.

25 After reviewing the legislative history



2 of the Florida provision, the very case used to  
3 justify this broad measure, it involved no arrest  
4 or prosecution. The law enforcement community  
5 responded properly to the shooting and the  
6 homeowner was never arrested or charged in his  
7 lawful exercise of self-defense.

8 Because the provisions of stand your  
9 ground measures vary from state to state, I'll  
10 attempt to summarize some of the provisions which  
11 have caused prosecutors difficulty in uniformly  
12 enforcing the law.

13 First, the meaning of "unlawful  
14 activity" needs to be clarified. Many states have  
15 extended stand your ground laws to people who are  
16 in a place where they have a right to be -- and  
17 you have a right to be and non-engaged in unlawful  
18 activity. Can a drug dealer defend his open air  
19 drug market? I believe we already had that  
20 discussion earlier. If the individual is a felon,  
21 does that felon have a right to possess and kill  
22 another with a firearm?

23 Secondly, immunity is rarely granted in  
24 criminal law, with the few exceptions existing in  
25 order to encourage cooperation with law

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2 enforcement and the judicial system. The  
3 legislatures should remove the immunity provisions  
4 and clarify that self-defense is what it's always  
5 been under common law, it's an affirmative  
6 defense.

7 Third, the replacement of the  
8 presumptions with inferences eliminate -- would  
9 eliminate many dangerous effects. This coupled  
10 with an objective rather than a subjective  
11 standard will improve accountability while  
12 protecting the right to self-defense. And that's  
13 subjective versus objective is a huge issue which  
14 you've heard about today. That -- that is a key  
15 provision that this commission should examine.

16 And finally, the statutes should be  
17 amended to prevent the initial aggressor from  
18 claiming self-defense. Some laws allow a person,  
19 including Florida statute, to attack another with  
20 deadly force and later use stand your ground to  
21 justify the killing of the person he or she  
22 attacked if that person responds with like force  
23 and the initial aggressor cannot escape.

24 Taken together, I believe these reforms  
25 to the various stand your ground laws will help

2 minimize the racial disparate and detrimental  
3 effects and restore the ability of investigators  
4 and prosecutors to fully enforce the law and  
5 promote public safety, while continuing to respect  
6 the rights of law-abiding citizens to protect  
7 themselves and their families.

8 On behalf of the APA and the prosecutors  
9 we represent, I want to thank you for holding the  
10 hearing on the legislation -- and the key with  
11 this legislation -- that this is legislation and  
12 we would like to see things which promote --  
13 promote safe communities rather than promote the  
14 use of deadly force.

15 The final issue that I'd like to address  
16 would be the Jordan Davis case. In my opinion,  
17 the Jordan Davis case is the loss of two lives not  
18 one. Jordan, obviously was shot dead. This was  
19 the loud music case. He was shot dead because  
20 they were listening to rap music and because he  
21 disrespected Mr. Dunn. At the same time, Dunn is  
22 now, and we just heard today, is going to serve  
23 105 years to life. His life is also gone. He was  
24 celebrating, I believe, his son's wedding, he's now  
25 going to spend the rest of his life in prison.

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Because of stand your ground he felt he had that right and he's on tape saying, "I'm the victim here." That he had the right to take a gun and shoot dead another individual because, in the case of Dunn, he had been disrespected.

Thank you, sir.

COMMISSIONER CASTRO: Mr. Shapiro.

MR. ILYA SHAPIRO: Chairman Castro and distinguished commissioners, thank you for this opportunity to discuss stand your ground laws and potential racial disparities in the constitutional right to armed self-defense.

It's most appropriate that we're having this hearing in Orlando, which is so close to the tragic incident that ignited the current incarnation of this public policy debate.

Indeed, since George Zimmerman was found not guilty of killing Trayvon Martin stand your ground laws have been under attack. President Obama injected race into the discussion, claiming that the outcome would have been different had Martin been white.

Attorney General Holder then claimed stand your ground laws undermine public safety and

2           sow dangerous conflict in our neighborhoods. Both  
3           want these enhanced self-defense laws reviewed,  
4           which of course means repealed.

5                       In my written statement I reviewed some  
6           of the alleged racial disparities in the  
7           application of these laws. Since I'm a  
8           constitutional lawyer rather than a criminologist,  
9           however, I'll leave that statistical analysis here  
10          to my panel colleague John Lott. And also  
11          PowerPoint's unconstitutional in most uses.

12                      Instead let me provide you a legal  
13          overview of stand your ground so everyone's on the  
14          same page.

15                      Notwithstanding recent efforts to  
16          politicize the issue there's nothing particularly  
17          novel, partisan, ideological, racist, or otherwise  
18          nefarious about these laws. All they do is allow  
19          people to defend themselves without having a  
20          so-called duty to retreat -- a concept that's been  
21          part of U.S. law for over 150 years.

22                      About 31 states now have some type of  
23          stand your ground doctrine. The vast majority in  
24          common law before legislators took any action.  
25          Some, like California and Virginia, maintain stand

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your ground without any legislation.

Of the 15 states that have passed stand your ground since 2005, the year that Florida's model legislation was enacted, a majority had democratic governors. Leading progressives who signed such bills include; Jennifer Granholm, Janet Napolitano and Kathleen Sebelius(phonetic).

Louisiana and West Virginia passed them with Democratic control of both state houses. Even Florida's supposedly controversial law passed the state senate unanimously and split Democrats in the State House.

When Illinois strengthened its stand your ground law in 2004 State Senator Barack Obama joined in unanimous approval.

Conversely, many so-called "red states" do impose a duty to retreat in public. And even in more restrictive states such as New York courts have held that retreat isn't required at home or when preventing serious crime like rape or robbery.

Indeed, it's a universal principle that a person can use force when she reasonably believes it's necessary to defend against an

2           imminent use of unlawful force; Where there's no  
3           duty to retreat, as in most states, she's further  
4           justified in using deadly force if it's necessary  
5           to prevent forcible felonies. That's the norm  
6           throughout the country. Deadly force may be used  
7           only in cases of imminent death or great bodily  
8           harm that someone reasonably believes can only be  
9           prevented by using such force.

10                         It's not an easy defense to assert. In  
11           almost all states it's a defense. It's not some  
12           sort of immunity like Mr. LaBahn said. It's not a  
13           get out of jail free card that you play and then  
14           you're scot-free. And it certainly doesn't mean  
15           that you can shoot first and ask questions later.

16                         Everyday criminals assert flimsy  
17           self-defense claims that get rejected by judges  
18           and juries regardless of whether the given state  
19           has a stand your ground law. These laws aren't a  
20           license to be a vigilante or behave recklessly.  
21           They just protect law-abiding citizens from having  
22           to leave a place where they're allowed to be.

23                         In other words, in most states, "would be"  
24           victims of violent crime don't have to try to run  
25           away before defending themselves. That's why the

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2 debate over stand your ground--the real one, not  
3 the phoney war that we've been having lately, is  
4 nothing new. That's been going on back and forth  
5 for centuries. In ancient Britain, when the  
6 deadliest weapons were swords, a duty to retreat  
7 greatly reduced violent incidents and blood feuds.  
8 Firearms were also not as widespread in Britain  
9 until recently. So British law continues to  
10 reflect the historic deference to the  
11 constabulary, by which the King owes a duty of  
12 protection to his subjects.

13 That's obviously not part of our  
14 tradition. In this country at any given time  
15 about half the states have had stand your ground  
16 laws. So today's split is well within historical  
17 norms. Despite what gun prohibitionists claim, the  
18 no retreat rule has deep roots in American law.

19 As Miss Burke alluded at the Supreme  
20 Court stand your ground dates to the unanimous  
21 1895 case of Beard versus the United States, in  
22 which the great Justice John Marshall Harlan the  
23 sole dissenter in Plessy (inaudible) v-Ferguson  
24 affirmed the  
25 right to armed self-defense.

25 In places with a duty to retreat crime



2 victims can be imprisoned just for defending  
3 themselves. And among those who often lost out  
4 under that old rule were domestic violence victims  
5 who turned against their assailants. Feminists  
6 pointed out that "you could have run away" may not  
7 work well when faced with a stalker or someone you  
8 live with.

9 Stand your ground laws are thus designed  
10 to protect law-abiding citizens. They're less  
11 controversial in the context of a home. It's bad  
12 enough to have your home burglarized but to then  
13 have to hire an attorney and fend off a misguided  
14 prosecutor or a personal - injury lawyer defending  
15 an injured criminal is too much to ask.

16 That's how we have the Castle Doctrine -  
17 recognized by all states -- which holds that you  
18 don't need to retreat when your home is invaded.  
19 When you extend that doctrine to public spaces - as  
20 again, most states do - that's where you get stand  
21 your ground.

22 What's been overlooked in the current  
23 debate is that these laws only apply to people  
24 under attack. So as Justice Oliver Wendell Holmes  
25 wrote for again a unanimous Supreme Court in

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Brown versus United States, "Detached reflection

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cannot be demanded in the presence of an uplifted

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knife." And the facts of those cases, while

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interesting, don't detract from what the legal

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principles they stand for. Nearly a century later

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and regardless of ones views on the scope of the

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Second Amendment I don't think we can demand more

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of crime victims trying to defend themselves.

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Of course any self-defense rule bears

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the potential for injustice. For example in a

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two-person altercation one may be dead and the

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other dubiously claim self-defense.

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These cases, like, Trayvon Martin's

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implicate the self-defense justification generally

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rather than the existence of a duty to retreat.

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If George Zimmerman was the aggressor then he

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committed murder and has no self-defense rights at

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all a whether the incidents took place in a stand

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your ground state or not.

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If Martin attacked Zimmerman the only

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question is whether Zimmerman reasonably believed

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that his life was in danger, not whether he could

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have retreated. And if Zimmerman provoked the

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confrontation, even if Martin eventually

2           overpowered him, he lost the protection of stand  
3           your ground law.

4                       And it's not even clear, whether he knew  
5                       about that law or that people that do  
6           invoke it -- sure, their defense attorneys might,  
7           but it's not that common that, people on  
8           the street know that with any specificity.

9                       Of course the Martin/Zimmerman  
10          altercation is but one case and a high profile  
11          incident where stand your ground didn't actually  
12          play a part, so we shouldn't draw any policy  
13          conclusions from it.

14                      Hard, emotionally wrenching cases make  
15          not only for bad law but for skewed policy  
16          debates. While demagogues have used Trayvon  
17          Martin's death to pitch all sorts of legislative  
18          changes, what they really seem to be targeting, as  
19          it were, is the right to armed self-defense.

20                      With stand your ground laws, yes,  
21          prosecutors may need to take more care to show  
22          evidence to counterclaims of self-defense, not  
23          simply argue that the shooter could have  
24          retreated. So it's not surprising that a  
25          prosecutor's organization would be against the law,

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2 and it makes prosecutors work harder sometimes.

3 For those who value due process in  
4 criminal justice, which should emphatically  
5 include members of historically mistreated  
6 minority groups, that's a feature not a bug.

7 Thanks again for having me. I welcome  
8 your questions.

9 COMMISSIONER CASTRO: Thank you.

10 Mr. Labahn, is your opposition due to  
11 the fact that you don't want to work harder?  
12 Could you elaborate on --

13 MR. DAVID LABAHN: Not at all. Thank  
14 you for asking me that question. It's not an  
15 issue of working harder or not, the question is  
16 what is right and just. And to sit here and  
17 listen to things like, the Trayvon Martin had  
18 nothing to do with stand your ground is completely  
19 irrelevant.

20 Trayvon Martin had everything to do with  
21 stand your ground legislation. In fact it could  
22 not be more stark when one of the jurors was  
23 interviewed and said, "I -- I -- We had to  
24 reconcile this." Again, that subjective belief  
25 that he was under attack. That Zimmerman's head

2 was being pounded, and the fact that he could use  
3 the deadly force. That is right out of Florida's  
4 stand your ground legislation. And even more  
5 particularly Florida is dead on point that they  
6 provide the use of force by aggressor within their  
7 statute.

8 So again to sit here and listen that  
9 aggressors cannot use stand your ground in Florida  
10 is completely irrelevant and not accurate.

11 Thank you for allowing me to respond.

12 COMMISSIONER CASTRO: You're welcome.  
13 Commissioner Yaki.

14 COMMISSIONER YAKI: Thank you very much,  
15 Mr. Chair.

16 A couple of comments. One, I was struck  
17 by Mr. Shapiro's reference to worrying about bad  
18 law coming out of sensational cases when in fact  
19 the stand your ground law was based on a  
20 sensationalized case involving two people in their  
21 RV in 2004, which was whipped up wildly in the  
22 media. And as several articles show or it was  
23 misrepresented quite amazingly to legislators.

24 But I wanted to talk -- ask Mr. LaBahn  
25 something and that is, you point out the

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2           difficulties in the prosecutor aspect of this but  
3           isn't there another way to look at this is --  
4           isn't this in some ways a delegation of your  
5           authority, the jury's authority, a judge's  
6           authority, a cop's authority, to a private  
7           individual to make decisions in a split second on  
8           whether or not to take the life of someone?

9                         MR. DAVID LABAHN:   Yes.   Yes, it is.  
10           And that is something that --it's the -- this is  
11           the only place that I know that you could have  
12           immunity where your activity is itself potentially  
13           criminal.

14                         So what you just said and the decision  
15           to take a life is an incredible solemn decision.  
16           I've had plenty of opportunities in my career to  
17           carry a firearm, I've chosen not to do it because  
18           I'm not willing to take that responsibility  
19           because taking another's life I -- I don't know  
20           that there is another decision that is that grave.

21                         But what you've done with this law by  
22           putting immunity in here, not an affirmative  
23           defense, but literally immunity, you're telling  
24           somebody that they can make a decision to do an  
25           otherwise criminal act and then seek this hearing,

2 as we've heard earlier in the panel "I want to get  
3 out real quick. I want to take a life. I want to  
4 stand behind -- it cannot be properly  
5 investigated. I cannot be detained. And I want  
6 to be able to walk free on a life and death  
7 decision." It is -- I don't know how to express  
8 it, it is so extraordinary.

9 COMMISSIONER YAKI: I mean it sounds  
10 like something where -- where an officer receives  
11 hours, and hours of training on the use of deadly  
12 force, on the use of determining whether someone  
13 poses a threat to them or not, and here we are in  
14 a situation where, essentially, in a public space  
15 where there could be any one of us standing  
16 around, you're giving the power to a single  
17 individual with very little guidance on what  
18 constitutes reasonable, what constitutes a threat,  
19 what constitutes deadly, and letting them make a  
20 decision.

21 MR. DAVID LABAHN: And thank you for the  
22 comparison between the law enforcement individual,  
23 which is only quasi immunity, and absolute  
24 immunity for a private citizen.

25 So if a law enforcement officer takes

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2 another life, first it must be within the course  
3 and scope of the employment, that law  
4 enforcement's employment. And in addition to that  
5 it is an objective standard. Would a reasonable  
6 officer in the same or similar circumstances have  
7 been required to use deadly force.

8 So, yes, from -- this is extraordinary  
9 to say without training, as you talk about very  
10 little guidance, that's what I tried to say in my  
11 statement. The courts here in Florida have  
12 bounced all over the place trying to figure out  
13 what this statute means, but with very -- with no  
14 training you get absolute immunity.

15 COMMISSIONER YAKI: And let me just take  
16 this one step further. And it goes to -- and in  
17 the context of a law enforcement officer  
18 committing such an act we have remedies within the  
19 department of justice to examine the behavior of a  
20 police department and whether or not in exercising  
21 that they're doing it in a way that has -- that  
22 has an unfair or disparate impact in terms of  
23 race.

24 When you take that out -- out of that  
25 equation and you're doing into a situation where



2 we have -- we're trying to get statistics that may  
3 or may not get reported or -- you can't get to  
4 that analysis about whether or not there is any  
5 racial -- any -- any overall racial animus  
6 involved to the extent that you can -- when a  
7 police officer had -- by reporting for an entire  
8 department justice can come in and determine  
9 whether or not that person or that department is  
10 acting in a way that is contrary to equal  
11 protection.

12 MR. DAVID LABAHN: Yes. And that would  
13 be the comparison here between the -- if you want  
14 to call it the Zimmerman case or the Trayvon  
15 Martin case and what's going on right now in  
16 Ferguson. Because in Ferguson you're seeing all  
17 that. You've got an officer under investigation  
18 on that and you have the justice department  
19 looking at the 1983 action, potentially, yes.

20 COMMISSIONER YAKI: Thank you.

21 MS. ELIZABETH BURKE: If I could just  
22 give you a quick quote from the President of the  
23 National District Attorneys Association when he  
24 was asked -- he stated that the stand your ground  
25 laws basically give citizens more rights to use

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deadly force than we give police officers and with less review.

COMMISSIONER CASTRO: Did you want to say something, Mr. Lott?

MR. JOHN LOTT: Yeah. You know, with regard to training, police have a much more difficult job than civilians do. If you're ever going to take a concealed carry class in Florida one of the things that they're going to emphasize is that you're not the police. The reason why you're being given a gun is to maximize the distance between yourself and the attacker there.

Police, when they come to a crime scene can't simply brandish a gun and watch the criminal run away. Police have to be willing to pursue the individual and to come into physical contact with them. And that's the vast majority of what police training involves is, how do you deal with somebody when you're coming into physical contact.

When you're talking about a woman who's dealing with an attacker, or an elderly person, the large strength differential that's going to exist there is going to mean once you're in physical contact you've completely lost control of

2 the situation at that point.

3 So to go and make comparisons between  
4 the amount of training and -- that civilians and  
5 police have, I think, is misleading.

6 I want briefly to say something about  
7 the Zimmerman case. Everything that David was  
8 just referring to in the case, you know, an  
9 aggressor, the different statements that he made  
10 were already true under the pre-existing  
11 self-defense law in Florida. What changed was  
12 whether or not there was a duty to retreat. The  
13 duty to retreat was never brought up in  
14 Zimmerman's case. In fact, even the prosecution  
15 basically conceded that Zimmerman was on his back,  
16 there was no place for him to go and retreat at  
17 that point.

18 That was the change in the law. And to  
19 go and reference the parts of the stand your  
20 ground law that were already in effect there, and  
21 I'm sure Ilya can probably say more about this  
22 too, but it doesn't seem to me to be exactly on  
23 target there.

24 COMMISSIONER CASTRO: Mr. LaBahn did you  
25 want to respond?

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2 MR. DAVID LABAHN: I don't see how you  
3 separate one from the other. So when you put in  
4 the inferences, the subjective, the no duty to  
5 retreat and the very next section that -- that --  
6 you know, as he said, "Well they didn't -- they  
7 didn't amend that." How do you say, "Well, we  
8 gave all these new benefits and we expanded it,  
9 yet we didn't limit the ability of the aggressor  
10 to use force and so we didn't intend for  
11 aggressors to use force," to me is absolute  
12 nonsense.

13 I spent ten years in the legislature  
14 working on a lot of different statutes, it is an  
15 entire package. And the other thing that I think  
16 is continually misleading is to say it's not a  
17 stand your ground case because they didn't have a  
18 stand your ground hearing.

19 There is a lot more to it than just a  
20 stand your ground hearing. It's the -- it's  
21 subjective, objective, presumptions, you can't  
22 wrap an entire bill package and just say "This is  
23 the only one we want to talk about, it's all  
24 included."

25 COMMISSIONER CASTRO: Miss Burke, did

2           you want to say something?

3                       MS. ELIZABETH BURKE:   Yeah, and just --  
4           I just wanted to bring up an additional point on  
5           sort of historical self-defense coming -- growing  
6           out of common law and then being sometimes  
7           codified in state law.   But there was always a  
8           first aggressor limitation in, sort of, historical  
9           self-defense law, in that you could not be the  
10          first initiator of violence and then later turn  
11          around and invoke self-defense.

12                      And I think that's extremely important  
13          when we're reviewing the Trayvon Martin case.   I  
14          mean, let's face it this was a very bad result on  
15          every level.   And the stand your ground laws in  
16          Florida are clearly at issue in that case.

17                      COMMISSIONER CASTRO:   Commissioner  
18          Narasaki.

19                      COMMISSIONER NARASAKI:   Thank you,  
20          Mr. Chair.

21                      So my question is to Mr. Lott and  
22          Mr. Shapiro.   It's a series of questions that are  
23          connected.   So first is, I'm interested to  
24          understand whether you agree that it's important  
25          to have accurate comprehensive data to determine

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whether in fact equal protection is affected or not affected by this new law.

I know that -- that Mr. Lott is very critical of some of the analysis so I'm interested in particular whether the federal government should require data collection for -- connected to being able to get federal law enforcement funding, and if not, what would you do to correct the data situation?

Second is, do you support clarifying the law that shooters who want the benefit of stand your ground should not be pursuing the person that they are shooting, that once they begin to pursue them they become the aggressor, that they lose protection of the law?

The third is, I'm interested in understanding whether you believe that people should be able to claim immunity for civil liability when a person accidentally kills someone who's an innocent bystander?

And whether you have concerns about the fact that now that you've increased the area and circumstances under which someone can start shooting other people, whether that in fact is an

2 increased danger.

3 And the last is, are either of you  
4 concerned by the that fact Mr. Zimmerman, given  
5 his history seemed to have legal access to a gun?

6 MR. ILYA SHAPIRO: I'll -- start.  
7 And I'll defer the very first question about data  
8 to John, because that's clearly his bailiwick.

9 And I'll start with the last question  
10 because it goes to show how a lot of the  
11 questioning I think conflates a lot of different  
12 issues. Stand your ground laws are a very  
13 kind of narrow technical/legal point.  
14 Self-defense justifications are more broad and  
15 affirmative defense are also more broad.

16 Gun regulations and restrictions which  
17 a whole other sort of debate that's,  
18 beyond the scope of this hearing. You know, stand  
19 your ground laws are very narrow and very  
20 technical. The only difference in stand your ground  
21 jurisdictions versus non-stand your ground  
22 jurisdictions is what do you have to do if you're  
23 being attacked and it's possible to retreat  
24 If it's not possible to retreat, like in

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2 the Zimmerman/Martin case then it's only about  
3 whether, Zimmerman -- committed the  
4 attack or whether he reasonably believed that his  
5 life was in danger, these sorts of considerations  
6 are concomitant to traditional self-defense  
7 considerations, not stand your ground laws in  
8 particular.

9 On the immunity point. For civil  
10 liability, well I think the laws there haven't  
11 really changed. If you're engaged in reckless or  
12 willfully gross negligent behavior you can be  
13 liable even if you're not intending to hurt  
14 somebody else.

15 But if you're acting reasonably or,  
16 -- exercising your right to  
17 self-defense, then, no, you shouldn't have  
18 liability. So the question the familiar  
19 question under tort law that exists in both stand  
20 your ground and non-stand your ground  
21 jurisdictions, again -- so if tort law needs to be  
22 changed somehow or recodified that's a separate  
23 issue from, the stand your ground law  
24 and its operation.

25 And as to shooters shouldn't be pursuing



2 or aggressors who should lose the right to stand your  
3 ground, absolutely, I agree with that. And I  
4 think that most if not all states have that in  
5 their stand your ground laws. And that's why the  
6 911 operator told Zimmerman not to pursue.

7 And that, as John was saying, is one of  
8 the major differences between people who lawfully  
9 -- citizens, private citizens who lawfully carry  
10 guns and the police -- the police have to engage  
11 and citizens do not.

12 COMMISSIONER NARASAKI: I'm sorry, you  
13 might have said it and I missed it, but did you  
14 answer my question about whether you were troubled  
15 that he had an access to a gun?

16 MR. ILYA SHAPIRO: Oh, Zimmerman?

17 COMMISSIONER NARASAKI: Yes.

18 MR. JOHN LOTT: I can answer that --

19 MR. ILYA SHAPIRO: I'm sorry?

20 MR. JOHN LOTT: I can answer that.

21 MR. ILYA SHAPIRO: -- I  
22 don't know the full facts of his -- you know, I  
23 understand that he had some alcohol issues in the  
24 past. I don't know if he had committed any  
25 felonies or done anything that was -- rose to the

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level of being deprived of a particular civil right to armed self-defense. You know, I'm -- you know, given what's -- what's happened since maybe there is more history to that. But in the abstract, you know, I guess, no.

COMMISSIONER NARASAKI: So -- and perhaps Mr. Lott would like to, I think, correct your understanding of what the Florida law says on civil liability. Unless the people that have been testifying all morning are wrong in how they characterized it to us.

MR. JOHN LOTT: Yeah, well I'm not a lawyer so I'll let Ilya speak for himself on that.

I -- I can answer the empirical questions that you raised. You know, to me the issue of Zimmerman getting a permit or not, you know, obviously Florida has given out -- what is it, like 2.6 million concealed handgun permits -- or permits to 2.6 million people since they first started being issued on October 1, 1987.

Right now there's like 1.4 million people who actively have permits. The average person who's had permits over that time has had a permit for something like 12 and a half years. So

2           you've -- 2.6 million people for all of those  
3           years. Florida, their website for example, has  
4           detailed data on revocations over time. If you  
5           look at firearms revocations between January 1,  
6           2008 and the end of 2011, they had 4 firearm  
7           revocations. But, revocations for any type of  
8           firearms related violation. That comes to  
9           revocation rate of about 1/10,000th of 1 percent  
10          in terms of the permits that were there.

11                         If you look at the entire period of time  
12          from 1987 on there was 168 revocations. You're  
13          talking about something that's akin to about a  
14          thousandth of a percent.

15                         So the bottom line to me -- and most of  
16          those revocations were for things that had  
17          absolutely nothing to do with violence. Most of  
18          them were people accidentally carrying a permit  
19          concealed handgun into a gun-free zone. Or people  
20          forgetting to have their permit with them when  
21          they would be stopped by police or something.

22                         And, so the issue here is are there --  
23          is there a safety problem in terms of people with  
24          permits somehow getting permits improperly, is it  
25          something that you can even measure.

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If you look at firearms revocation rates  
for Floridians it's actually --

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COMMISSIONER NARASAKI: I -- I actually  
just wanted to know whether you're troubled or  
not, I don't need the whole --

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MR. JOHN LOTT: No, I'm not troubled in  
general because if you look at the way the  
Florida's system's working it seems to work  
incredibly well. I mean --

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11

COMMISSIONER NARASAKI: Well, 4  
revocations out of 2,000 and whatever and there's  
no problem, okay.

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MR. JOHN LOTT: Million. So the -- the  
rate that permit holders in Florida are involved  
in crimes with their permit concealed handgun is  
1/7th the rate that police officers end up getting  
into trouble for firearms related violations.

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COMMISSIONER CASTRO: Ah --

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COMMISSIONER NARASAKI: Could he answer  
the data question --

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COMMISSIONER CASTRO: Yeah, would you  
please.

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MR. JOHN LOTT: Yeah, I'm sorry. The  
data question, look more data's great. Okay. I

2 use data all the time on stuff. I don't mind  
3 having data. The only thing I would ask is that  
4 if you're going to have data it needs to be more  
5 than just justifiable homicide and race.

6 COMMISSIONER NARASAKI: Right. So you  
7 would support tying federal funding to trying to  
8 get better data, is the question?

9 MR. JOHN LOTT: I'll leave that up to  
10 the politicians on how to -- what's the best way  
11 to try and go and do that. I'm just saying, sure  
12 there's a benefit from having more data in terms  
13 of being able to study things.

14 COMMISSIONER CASTRO: Commissioner  
15 Heriot, then Commissioner Achtenberg. And do any  
16 of the commissioners on the phone want to ask a  
17 question?

18 COMMISSIONER KIRSANOW: Yes, Kirsanow  
19 would like one question.

20 COMMISSIONER CASTRO: Okay.

21 COMMISSIONER KLADNEY: Kladney would  
22 like a question.

23 COMMISSIONER CASTRO: Okay. So  
24 Commissioner Heriot you're next, followed by  
25 Commissioners' Achtenberg, Kirsanow, and Kladney.

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COMMISSIONER HERIOT: Thank you,

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Mr. Chairman. I actually have just a quick

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question for Dr. Lott.

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The previous panel, Dr. Roman,

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criticized an aspect of your work and I just

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wanted to give you a chance to comment on that.

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MR. JOHN LOTT: Sure. And I appreciate

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that. Look, there are multiple things that John

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brought up. One of the things that he was --

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brought up was the superiority of using the

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justifiable homicide data for the United States as

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a whole versus the Tampa Bay Tribune data that was

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there, saying that it was, you know, an arbitrary

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quote "selective sample" that had been done for

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the Tampa Bay Tribune.

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The Tampa Bay Tribune article is

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essentially the universe of stand your ground

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cases. It's not a sample. It has all the cases

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there. The problem that you have, if you want to

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talk about real sample issues, that's what the

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justifiable homicides -- in some years you have 14

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percent of the police jurisdictions in the country

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reporting justifiable homicide rate data. And

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there's even massive problems as Bill was talking

2 about earlier in response to questions from  
3 Commissioner Heriot, with regard to the fact that  
4 they don't go back and correct these things  
5 systematically. There's all sorts of errors even  
6 in that small percent that you have there. And so  
7 the question is, what places report? Why did they  
8 report it? What are the errors in their data  
9 that's there?

10 But here's -- here's the big problem and  
11 Commissioner Castro when you read that quote and  
12 as the end of it there it actually gets the  
13 opposite results, if you have a copy of his paper  
14 and I don't know if for some reason it didn't get  
15 up there. If you look at Table III of his  
16 reports, what he has is, he has a column for the  
17 rate of justifiable homicides for black-on-white,  
18 white-on-black, for non-stand your ground states,  
19 and for stand your ground states. If you look at  
20 the coefficients for the non-stand your ground  
21 states essentially, when a white kills a black he  
22 has a coefficient of like 41, and the coefficient  
23 of 7 for blacks killing whites. So it's a ratio  
24 of about 5.4 to 1. So it's saying whites who kill  
25 blacks are 5.4 times more likely to be found

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justified in terms of the homicides than blacks.

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But then if you look at the stand your ground states the ratio of the coefficients actually falls to 4. So rather than exacerbating it, he simply doesn't -- didn't read his coefficients correctly.

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And so -- also when he talks about 10 to 1, his regressions actually show 4 to 1 difference for stand your ground rather than the 10 to 1 that he was saying. And the problem that you have there is that when you bring up the type of things that Commissioner -- a commissioner earlier was asking him about the 3 to 1 differences just in terms of whether the person was armed. You pretty much can explain away the differences even just for one of the factors that are there.

And so -- and he also doesn't take into account whether all of the things that are statistically different in the right way and makes mistakes there in that too.

So his results actually showed the opposite of what he was claiming. Rather than the stand your ground laws exacerbating it, it actually reduces the difference in the coefficient



2           between black and whites that are there.

3                         And, you know, there are other issues  
4 we've been talking about with the general issues  
5 about justifiable homicide data. He does not  
6 attempt to account for any of the changes that are  
7 occurring over time in the data. He doesn't  
8 adjust it for the different places that are  
9 reporting over time. Lists -- he takes the data  
10 as if he doesn't understand any of the problems in  
11 the underlying data.

12                         I'll just give you one other trivial  
13 example. As I mentioned, over time more states  
14 are reporting the data. You have more  
15 jurisdictions reporting the data. Well, if stand  
16 your ground states tend to be adopting the, you  
17 know, relatively later in the period compared to  
18 the other states that are there just by having the  
19 time trend in there you're going to end up having  
20 them have higher rates of justifiable homicide  
21 than the earlier ones would be. And, you know,  
22 that's just a simple example of the types of  
23 biases that you create in there if you don't try  
24 to de-trend these things in terms of things like  
25 the number of places that are reporting.

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COMMISSIONER CASTRO: And just let me

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add for the record since Dr. Roman's not here

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right now we're going to ask him to supplement his

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response based on what you've explained today --

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MR. JOHN LOTT: I wish we could have

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debated on here. I've been emailing your staff --

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COMMISSIONER CASTRO: Well, we're going

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to -- well, this is not a debate, this is a

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hearing. But maybe one day we'll have a debate

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and you all could come in and we'll sell popcorn,

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but we're going to ask Dr. Roman to have the

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opportunity to present us with data along the

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lines of responding to what you said that way we

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have a complete record when we evaluate the data.

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Commissioner Achtenberg.

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COMMISSIONER ACHTENBERG: Thank you,

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Mr. Chairman. Mr. LaBahn I'm curious, does the

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Prosecutors Association typically take the kind of

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definitive position that you've taken with regard

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to stand your ground laws based on bad data, bad

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facts, and the fact that, you know, there's really

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not a departure here from the common law, at least

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according to some lawyers.

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I mean, I was quite frankly, quite

2           intrigued by the position of the Prosecutors  
3           Association, understanding as I do that you're not  
4           part of the group of typical suspects, you know,  
5           to be taking the position that you're taking.

6                         I'm wondering how you could explain to  
7           us how it is that your organization came to take  
8           this position?

9                         And then, secondly, could you talk to  
10          the commission about what it is you think the  
11          commission might be in a position to do about  
12          something that you seem to see as egregious as  
13          your prior testimony indicates.

14                        MR. DAVID LABAHN:   Okay.   Thank you.   So  
15          first the question of taking legislative positions  
16          based upon bad data or -- or something in that way  
17          and also my organization itself.

18                        First, on behalf of APA, The Association  
19          of Prosecuting Attorneys, our National  
20          Association, we do not have a position on stand  
21          your ground laws.   We have the Statement of  
22          Principles that is attached to my materials, but  
23          we do not either support or oppose, because as I  
24          said in my testimony, a lot of the states have  
25          implemented the laws, there's a separation of

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powers, once legislature passes this, the Executive Branch needs to enforce it.

As it relates specifically for instance here in Florida. Florida to Florida prosecutors -- the State Association opposed the legislation and the legislature went ahead and passed it anyway. And the majority of the states that have passed legislation back then, generally law enforcement has been opposed to it. The reason why, it isn't necessarily based on data, it is -- an example, what happened here -- this is legislation searching for a problem, instead of legislation addressing an issue or a problem. Having --

Even hearing that California is a stand your ground state surprises me immensely. I was a 10 year prosecutor there in that state, I prosecuted plenty of homicides and lots of violence, especially in Southern California.

I then spent 10 years at the State Association. I was running the California District Attorneys Association when the proponents of this legislation -- it was 2006, they brought it to Sacramento and they tried to put the bill

2 in. We laughed at it. We laughed that you're  
3 going to have criminal immunity and civil immunity  
4 for taking somebody else's life. We thought it  
5 was almost funny that -- you've got to be kidding  
6 me.

7 So to hear it's a stand your ground  
8 state, I would submit to you it's not. What  
9 happened in California, it went to its very first  
10 committee, which was the judicial committee and  
11 the judicial committee it never even got a motion  
12 because the trial lawyers had control of that and  
13 you're going to give civil immunity to -- the  
14 legislation was over.

15 What we instead would say is, and I  
16 would ask this committee is, this isn't is an  
17 entire legislative package, it's not as narrow.  
18 You could have changed the Florida law or it could  
19 have been done by just putting in a duty to  
20 retreat or wiping out that duty to retreat.

21 But that's instead not what this was.  
22 This is an entire package including the -- and  
23 we've talked about subjective versus objective.  
24 In the world of a prosecutor that's a huge change.  
25 That's not a minor little detail. In fact we've

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2 got to prove that beyond a reasonable doubt. The  
3 -- any place that the individual has a right to  
4 be, that's a vast expansion when you take Castle,  
5 which had been the home or even some of them even  
6 look at home, a place of employment, and some have  
7 even extended it to cars.

8 But then when you legislatively say  
9 "anyplace that you have a right to be," that's,  
10 again, a very vast expansion and a very big  
11 concern as it relates to how is this going to  
12 actually end up in the courts.

13 The presumption. The presumption of  
14 reasonableness in your own home. You don't need  
15 to have any sort of reasonable fear under this  
16 legislation and this draft. It was -- it was  
17 instead said if it's in the house you can shoot  
18 anybody no matter what you feel about them. If  
19 they don't have a right to be in your home you can  
20 shoot them dead. That presumption is  
21 extraordinary, you know?

22 And then, finally, as we just discussed  
23 the immunity. Just as when you are working to  
24 -supplement your record, I would ask that you look  
25 at the entirety of the Florida legislation and see

2           whether or not it's as has been suggested here  
3           that they just added duty to retreat or whether  
4           they added the four pieces. And that's what we've  
5           been doing on behalf of the Association is we have  
6           been tracking -- we've been working with various  
7           states on what does their legislation mean. And  
8           it's all up to each State Association whether they  
9           support it or oppose it or even the individual --

10                         But we have specific columns, if you go  
11           to our website, of the states that have done the  
12           expansion, and on the four points which states did  
13           which expansion.

14                         And that's why we start our research at  
15           2005, because I would submit to you prior to 2005  
16           the concepts that have been talked about today,  
17           especially these immunity provisions, presumptions  
18           and such, didn't exist before this legislative  
19           piece came forward.

20                         So that is the reason why we did it. We  
21           would -- and always on behalf of prosecutors I'm  
22           now working in Washington, we're always ready to  
23           come to the table. There are plenty of problems  
24           within our justice system. We like to have the  
25           data behind it. We like to know what the problem

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is.

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And, especially, on behalf of

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prosecutors we're trying to make things safer.

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And that's why we continually come to the table to

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try to make the justice system work better. Not

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easier, not faster, but better. And work on

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legislative reforms.

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This has never been one that we have

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seen to be a problem, and hence need to work on a

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reform.

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ILYA SHAPIRO: Can I clarify something?

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COMMISSIONER CASTRO: Sure.

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ILYA SHAPIRO: Mr. LaBahn said that he

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was surprised that I classified California as a

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stand your ground state. As I think I was

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explicit, a lot of the stand your ground states

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are common law stand your ground states.

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And among the 31 or so states that you

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count as -- that I count as stand your ground

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states, there's a lot of variation in the

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legislative package or what the common law

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protects or what have you. So I don't remember

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the California specifics right now, but whether

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it's, you know, just protecting in your car or



2 place of employment, like Mr. LaBahn said, those  
3 31 states include protections beyond the home.  
4 That's what basically works as stand your ground,  
5 and that's why this innovation in the law which as  
6 I said isn't an innovation it's 150 years old, is  
7 just pushing the normal Castle Doctrine in the  
8 home which certainly doesn't --

9 COMMISSIONER ACHTENBERG: So you're  
10 talking about an expansion of the places from  
11 whence one can claim the stand your ground  
12 defense. Is that what you're talking about in  
13 terms of California?

14 Do we have the subjective standard? Do  
15 we have immunity?

16 COMMISSIONER YAKI: It's -- it's -- a --

17 COMMISSIONER CASTRO: Go ahead.

18 Commissioner Yaki, go ahead, please.

19 COMMISSIONER YAKI: I need -- I need to  
20 -- with all due respect to Mr. Shapiro that --  
21 he's wrong. It's not -- California is not a stand  
22 your ground state. There are -- there are  
23 instances in -- there are some very vague jury  
24 instructions that talk about the fact that if  
25 you're being -- if someone's trying to kill you,

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2           you don't have to sit there and be killed, but it  
3           doesn't -- it's not a situation that -- that  
4           imposes the same kind of immunity from liability.  
5           They're all different -- they're all different --  
6           this is where -- this is where in some ways we're  
7           conflating the idea of self-defense with stand  
8           your ground. It is not a stand your ground state.

9                         It is like many other states, a  
10           self-defense state, but California Supreme Court  
11           has never opined to this day the extent to which  
12           that extends beyond -- beyond the home.

13                        COMMISSIONER CASTRO: Commissioner --

14                        MR. ILYA SHAPIRO: I've never -- sorry.

15                        COMMISSIONER CASTRO: No, go ahead.

16                        MR. ILYA SHAPIRO: I've -- I've never  
17           claimed that California is a stand your ground  
18           state, if we're defining stand your ground as  
19           accepting the package legislation modeled after  
20           Florida. That's certainly not what I intended to  
21           mean.

22                        COMMISSIONER CASTRO: Commissioner  
23           Achtenberg, I'm sorry, I cut you off.

24                        COMMISSIONER ACHTENBERG: No, that's  
25           fine Mr. Chairman. That clarification is

2 sufficient.

3 COMMISSIONER CASTRO: Okay.

4 Commissioner Kirsanow.

5 COMMISSIONER KIRSANOW: I think that

6 Commissioner Kladney had his hand up first.

7 COMMISSIONER CASTRO: Okay. You have

8 very good eyesight Commissioner Kirsanow.

9 (Laughter).

10 COMMISSIONER KLADNEY: Such courtesy, I

11 have to tell you.

12 I'd like to ask. I think it's

13 Mr. LaBahn, from the prosecutors office and

14 anybody else on the panel. I just want to get

15 this clear, when we refer to the Florida statute,

16 and I'd like to refer to the Florida statute

17 because I think from the testimony that I've heard

18 there's like -- like every state there's little

19 changes to statutes all over -- that are similar

20 in nature, but they aren't exactly the same, but

21 -- so it's my understanding that the stand your

22 ground law allows an eggshell shooter to walk away

23 from a shooting because their psychological

24 perception of the world and individuals for the

25 shooting, whatever it was, regardless of what

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society believes to be a reasonable threat.

Is that correct?

MR. DAVID LABAHN: Yes. Especially if you are describing that eggshell, and because it's a subjective standard there still is a reasonable -- does that person reasonably believe that an eggshell person who believes that they're under imminent danger has the right to use deadly force.

MS. ELIZABETH BURKE: And can I just -- can I expand --

COMMISSIONER KLADNEY: Yes, in a second. Let me just ask -- add one more question there.

And then a police officer who is not elected by the people makes a decision as to whether an arrest takes place or not?

MR. DAVID LABAHN: Yes. Again, specifically in the Florida statute, which hasn't been addressed here, but it's extraordinary. The Florida statute flat out says that -- and it gets it backwards. It says that -- let me find the exact language.

"As using this subsection -- and it's 776.032 No.1. "As used in this subsection, the term criminal prosecution includes arresting,

2           detaining, custody, and charging or prosecuting  
3           the defendant."

4                         And then in Number 2 it comes forward  
5           referencing Number 1. It says, "A law enforcement  
6           agency may use standard procedures for  
7           investigating the use of force as described in  
8           subsection 1, but the agency may not arrest the  
9           person for using force unless it determines that  
10          there is probable cause that the force that was  
11          used was unlawful."

12                        And then 3, which was talked about,  
13          there's attorney fees and court costs and  
14          everything else if that arresting -- if that  
15          agency makes a mistake.

16                        This turns the law enforcement agency,  
17          and as you said, the officer, yes, it makes that  
18          patrol officer almost judge/jury and it's not  
19          their job. They ought to be investigating the  
20          shooting, not getting to the point of a probable  
21          cause determination, especially right after the  
22          shooting itself.

23                        And that's why you have situations like  
24          was seen on TV with George Zimmerman, they -- they  
25          had initially taken him into custody, and then

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2 they took his cuffs off and had him walk home --  
3 or let him go home.

4 It puts the agency in a very strange  
5 position. And they really ought not to be making  
6 that decision, especially at the time of the  
7 shooting. It ought to be properly investigated  
8 and then submitted. That's the way the process  
9 should go and it really should never be the patrol  
10 officers trying to make some sort of decision at  
11 the scene. "Do we arrest him, not arrest him, do  
12 we have probable cause, or not have probable  
13 cause?"

14 COMMISSIONER CASTRO: Miss Burke, you  
15 had something that you wanted to add?

16 MS. ELIZABETH BURKE: Yes, I did just  
17 want to draw attention to the fact that 776.012 is  
18 the reasonable expectation that you -- you know,  
19 you believe that your life is in danger.

20 But, 776.013, which is a presumption of  
21 fear in the home goes even -- even went a step  
22 further under Florida's stand your ground law, in  
23 that if you are in your home and you shoot and  
24 kill someone you're presumed to have a fear. So  
25 you don't actually have to be afraid at all.

2           There is a legal presumption created which then  
3           the state would have to overcome.

4                        So that just takes things a step  
5           farther.  And certainly much farther than any  
6           common law definition of self-defense.

7                        COMMISSIONER CASTRO:  Commissioner  
8           Kladney, are you done?

9                        COMMISSIONER KLADNEY:  I am,  
10          Mr. Chairman.

11                       COMMISSIONER CASTRO:  Okay.  Now it's  
12          your turn Commissioner Kirsanow.

13                       COMMISSIONER KIRSANOW:  Thanks,  
14          Mr. Chair.  I would also like to thank all of the  
15          panelists this has been very informative.

16                        I'm willing to be persuaded that stand  
17          your ground is a bad idea.  And I've got a great  
18          deal of interest in and respect for Mr. LaBahn's  
19          perspective for example.  Although, those of us  
20          who are in the first lines of defense for our  
21          families and neighborhoods like mine I'm not quite  
22          yet persuaded that standing alone, stand your  
23          ground is a bad idea.  But that's not the --  
24          that's not the commissions charge, it's whether  
25          stand your ground results in discriminatory

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2 treatment of those involved in the confrontation  
3 or of an equal protection violation.

4 So I've got a couple of questions for  
5 Mr. Shapiro. First, Mr. Shapiro, are you aware of  
6 any evidence that any quote - unquote "stand your  
7 ground legislation" that's been enacted has been  
8 done so with any discriminatory intent?

9 MR. ILYA SHAPIRO: I'm not.

10 COMMISSIONER KIRSANOW: Are you aware of  
11 any stand your ground legislation that is not  
12 (inaudible) neutral?

13 MR. ILYA SHAPIRO: I am not.

14 COMMISSIONER KIRSANOW: And Mr. Lott you  
15 talked about coefficients with respect to -- I  
16 can't recall whose data it was. I think it was  
17 Mr. Roman.

18 Do you know whether or not the Tampa Bay  
19 Tribune data or any other data show whether or not  
20 or were just aggregated by, for example, the  
21 effective concealed carry laws, use of drugs by  
22 the attacker, whether the attacker had a weapon or  
23 the type of weapon that he had or any other things  
24 that may have had a bearing on a one-to-one  
25 correlation in black to white statistics in this



2 issue?

3 MR. JOHN LOTT: Well, the Tampa Bay  
4 Tribune data had very detailed data on whether a  
5 weapon was present, what type of weapons were  
6 present, who initiated the attack, what types of  
7 data was available, whether you had witnesses,  
8 forensic information that was there, what property  
9 it occurred on, when it occurred, what time it  
10 occurred. It has very detailed information on  
11 those things.

12 You know, with regard to the Roman  
13 stuff, I'll just mention the coefficients. I  
14 reproduced his table -- in fact, I just have a  
15 screen shot in my report, so if you want to look  
16 at it you can see it in my report.

17 COMMISSIONER KIRSANOW: Thank you.

18 COMMISSIONER CASTRO: Any other  
19 commissioner -- Commissioner Timmons-Goodson, go  
20 ahead.

21 COMMISSIONER TIMMONS-GOODSON: Thank you  
22 very much, Mr. Chair.

23 As I sat here it occurred to me, I was  
24 wondering if any of our witnesses would care to  
25 offer any thoughts on how they see implicit bias

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as it relates to these stand your ground laws.

MR. DAVID LABAHN: I'll -- I'll go first on that. That's why I'm most troubled by the subjective standard is the implicit bias is going to play into that -- I'm going to say every time. It is -- what that person is perceiving, and let's go with the Jordan case, because that's the verdict that came back, and ultimately even with stand your ground, after a second trial, the jury came back and said, "No, we don't think that it was imminent or reasonable." But it was -- the conversation -- it was a white older male shooter and young black victim. And the fact that there were 4 in the minivan when they were playing the music. The -- the -- the shooter was in there first. The van comes in, they're playing loud music. He calls it rap music, thug music, I think there's different things that this panel has said. And he asked the person to please turn the music down. And they initially did. And then they turned the music back up. And that's when now things started to escalate. Again he asked them to turn the music back down. This time they did not. He started yelling at him. And Jordan



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2 But for someone who's not comfortable with that,  
3 and that different sort of cultural feeling they  
4 can feel that that's an aggressive movement toward  
5 them. And because here we're talking about the  
6 use of deadly force that likely can take  
7 somebody's life.

8 So the more different the individuals  
9 are the more likely that this provision will come  
10 into place. And that's why when you look at the  
11 shootings that have got a lot of attention there  
12 has been both a racial and an age difference.

13 COMMISSIONER TIMMONS-GOODSON: Thank  
14 you.

15 Mr. Lott.

16 MR. JOHN LOTT: Yeah, with regard to the  
17 implicitness or explicitness you can look at the  
18 data rather than an anecdotal story. And because  
19 the Tribune data has the age, has the many other  
20 differences there with regard to the individuals.  
21 All the differences that were just raised are in  
22 -- essentially in the Tribune data set.

23 So you can control for those to see  
24 whether they make a difference. And in fact, even  
25 after you control for those things you find no

2 statistically significant difference in terms of  
3 the way -- the sentence depends upon either the  
4 race of the victims or the race of the person who  
5 fired the gun.

6 COMMISSIONER TIMMONS-GOODSON: Are you  
7 saying that you can control for implicit bias --

8 MR. JOHN LOTT: Well, it should be -- if  
9 there's implicit bias it should be observed in the  
10 final outcomes, right? It should be observed in  
11 terms of whether or not somebody's less likely to  
12 end up with punishment than another person. If  
13 he's saying that there's implicit bias because an  
14 older white male is going to be given deference in  
15 this case, then it should affect the probability  
16 that that older white male's going to end up  
17 facing a penalty or not.

18 COMMISSIONER TIMMONS-GOODSON:  
19 Mr. LaBahn it looked like you wanted to say  
20 something.

21 MR. DAVID LABAHN: Yes, if -- if I may.  
22 I was not suggesting that older white males are in  
23 any way always going to be bias towards young  
24 black males. Instead what was going on in my mind  
25 and I think we heard this statistic was 34 percent

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2 of the cases where the age difference, when the  
3 individual was older and you had the racial  
4 difference, that 34 percent of those cases in fact  
5 were deemed to be justified. That's where I  
6 suggest is -- the implicit bias comes in when you  
7 move it from being an objective standard, would a  
8 reasonable person in the same or similar  
9 circumstances have acted in that way. To the  
10 subjective standard is, what did that individual  
11 believe. That -- once you've got a subjective  
12 standard now the implicit biases weigh in on that  
13 decision to take another life.

14 MR. JOHN LOTT: The reason --

15 MS. ELIZABETH BURKE: Could I --

16 MR. JOHN LOTT: -- the reason why you  
17 don't take a statistic just like that by itself is  
18 there's so many other things that differ across  
19 these cases. Whether it's somebody's armed, who  
20 initiated it, other aspects, you know, whether  
21 it's black-on-white or white-on-black. Those are  
22 the reasons why you use the whole data set to try  
23 to control for those other factors.

24 And I'm saying, when you control for  
25 them the data set's publically available or you can

2 run your own regressions on it.

3 When you use all of the data that's  
4 available on the Tampa Bay Tribune data set there  
5 you don't find any statistically significant  
6 difference in the outcome. You may think by just  
7 looking at one average there, you can infer  
8 something there, but you're leaving out a huge  
9 number of other factors that the Tampa Bay data  
10 set records.

11 COMMISSIONER CASTRO: Commissioner Yaki,  
12 and then Commissioner Heriot.

13 COMMISSIONER YAKI: I'll let  
14 Commissioner Heriot go first.

15 COMMISSIONER CASTRO: Okay.  
16 Commissioner Heriot, go ahead.

17 COMMISSIONER HERIOT: Oh, okay. I'm not  
18 sure where all of this subjective versus objective  
19 stuff is coming from in the statute. I'm looking  
20 at the Florida statute here and it says, "A person  
21 is justified in using or threatening to use force,  
22 except deadly force against another -- let me get  
23 to the point -- "to the extent the person  
24 reasonably believes that such conduct is necessary  
25 to defend himself or herself."

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2                   Where's the part about subjective? Can  
3 you direct me to that?

4                   MR. DAVID LABAHN: Sure. It is -- it is  
5 -- that is a subjective standard, that it's the --

6                   COMMISSIONER HERIOT: Reasonableness is  
7 a subjective standard?

8                   MR. DAVID LABAHN: It's a --

9                   COMMISSIONER CASTRO: Let's not talk  
10 over one another, please, everybody. Let the  
11 witness speak.

12                   MR. DAVID LABAHN: And -- that's what  
13 the courts have inferred. This is -- that the  
14 person reasonably believes --

15                   COMMISSIONER HERIOT: That's nonsense.

16                   MR. DAVID LABAHN: -- that is a  
17 subjective standard not an objective standard.  
18 The Beard Case was talked about earlier --

19                   COMMISSIONER HERIOT: In what universe  
20 is that -- that a subjective standard? I mean,  
21 that's nutty, it's got to be reasonable. How do  
22 you determine reasonableness -- it's always with  
23 reference to what a reasonable person would do.

24                   MR. DAVID LABAHN: No, no, no, it's not  
25 a reasonable person standard. It is a person's --



2 COMMISSIONER HERIOT: I beg to differ --

3 MR. DAVID LABAHN: -- there is -- very  
4 significant difference between a person who  
5 reasonably believes and a reasonable person  
6 believes. And the statute is what the person  
7 believes, not what a reasonable person is. I will  
8 quote you the language out of Beard so you can see  
9 the difference. The Beard --

10 COMMISSIONER HERIOT: I'm a torts  
11 professor. You know, this is what I do for a  
12 living, is I talk about what's the reasonable  
13 person standard. You know, you're talking to the  
14 wrong person. And if you think this is going to  
15 be a question of --

16 COMMISSIONER CASTRO: -- could you just  
17 let him respond.

18 COMMISSIONER HERIOT: Clearly not.

19 UNKNOWN PHONE SPEAKER: Let him answer  
20 the question.

21 COMMISSIONER CASTRO: Mr. LaBahn, go  
22 ahead.

23 MR. DAVID LABAHN: I -- I -- I don't  
24 know if I can come back, because when it is a  
25 reasonable person standard it says reasonable

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2 person. It doesn't say person who reasonably  
3 believes. It's been very clear. There hasn't  
4 been any question. You can look at the  
5 Zimmerman --

6 COMMISSIONER HERIOT: There is now.

7 MR. DAVID LABAHN: -- yeah, you can look  
8 at the Zimmerman case, this was intended to be and  
9 is, a subjective standard not an objective  
10 standard. If it was an objective standard you  
11 would not have the prosecutors -- have so much  
12 difficulty with it. And if this panel comes back  
13 and says "objective standard is preferred," that  
14 would be a great assist.

15 COMMISSIONER CASTRO: Commissioner Yaki  
16 and then Commissioner Narasaki.

17 COMMISSIONER YAKI: Yeah, I'm a little  
18 troubled by -- I was even troubled by Mr. Roman's  
19 criticism of the Tampa Bay -- and by the way, it's  
20 the Tampa Bay Times not the Tribune, I think that  
21 they would be upset that their -- that they were  
22 part of a different news organization.

23 The data that they have is actually data  
24 that I find very useful because it goes into a lot  
25 of subsets and hard data, charging sheets,

2 et cetera that I think are not necessarily those  
3 that are reported as part of the normal databases  
4 that are collected by the federal government.

5 In fact it's one where I believe that we  
6 have the ability to go even further and use that  
7 kind of model for research in terms of other  
8 jurisdictions as well.

9 I think it's important to put that in  
10 there because one of my issues with regard to  
11 trying to take the notion of implicit bias and  
12 simply apply it at one part of the stage, is that  
13 when you look at how the stand your ground statute  
14 is formulated implicit bias can be there at any  
15 particular stage. It can be at the moment that a  
16 person decides that someone is a threat to them.  
17 It can be there the moment when the investigating  
18 officer upon hearing the persons assertion of  
19 stand your ground, makes a decision right then and  
20 there, "Well, it was a -- it was a -- "This person  
21 talking to me is white, the person attacking was  
22 black," not that he's a racist, but there could be  
23 right then and there a decision, "Okay, I'm going  
24 to let this person go and worry -- and then decide  
25 later on whether or not there's probable cause."

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2 And going to the point where the judge makes a  
3 decision at an immunity hearing. It can be at any  
4 different locale, and I think that's why we need  
5 to look at the data in all sorts of areas to  
6 determine whether or not there is that kind of  
7 thing there. But that's just a statement about  
8 that.

9 My question was actually for -- for  
10 Ms. Burke. And it goes to -- could -- should we  
11 -- would we even be talking about the impact of  
12 stand your ground if it were not for the  
13 correlation between stand your ground laws and the  
14 status of gun laws in the states in which it  
15 exists?

16 MS. ELIZABETH BURKE: Right -- I mean,  
17 stand your ground -- stand your ground clearly has  
18 grown up around a time when the gun laws are  
19 becoming more lax. Guns are becoming more  
20 available. There's no longer -- for a person to  
21 carry a concealed weapon. There's no longer a  
22 necessity to show that you have fear. That you  
23 need that be armed on a public street.

24 It used to be if you needed a concealed  
25 weapon that you could apply for a permit. That

2           you would go to your sheriff, your police officer,  
3           they would know you from the community, and they  
4           would make a determination of high moral character  
5           of a non-dangerous personality, and the fact that  
6           you needed a gun, perhaps you were being stalked,  
7           perhaps you worked in a very dangerous  
8           neighborhood and moved cash at night. There was  
9           all sorts of reasons that a reasonable society  
10          would say "this person needs to be armed for their  
11          self-defense." And that situation was working  
12          very well.

13                         But, at the behest of the gun lobby  
14          those laws have been relaxed in a historic sweep  
15          throughout our country. And at this point there  
16          is really no telling how many people walk around  
17          now with concealed weapons on them at all times.

18                         And implicit bias then becomes a deadly  
19          bias, I think, because suddenly a fear that maybe  
20          would have made you uncomfortable and scared and  
21          you'd get in your car and leave, now people are  
22          holstered up and they feel the right to if anybody  
23          disrespects them to, you know, shoot them.

24                         And the issue of civil liability and the  
25          fact that this law protects people from negligent

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2 shooting is another travesty because, you know, I  
3 thought it was a very interesting discussion with  
4 the prior panel about the 15 year old in the car  
5 behind the thugs who was shot and killed and had  
6 no recourse -- her family had no recourse to bring  
7 a suit against anyone.

8 One of the panelist's said, "Well,  
9 that's how it should be. You know, someone acting  
10 in self-defense isn't going to have insurance for  
11 that." But, in fact, we see concealed carry  
12 insurance as a new product. You carry your gun  
13 with you everywhere, so the websites say, you  
14 know, you're more likely to be involved in an  
15 incident and need legal representation. So for  
16 \$14 a month now you can have insurance against  
17 just exactly that kind of shooting, right, of  
18 spraying a crowd and then saying, "Gosh, I was  
19 terrified."

20 So, in answer to your question, I think  
21 you'd have to see them arm in arm.

22 COMMISSIONER CASTRO: Mr. Lott and then  
23 Commissioner Narasaki.

24 MR. JOHN LOTT: Yeah, thanks. Just as a  
25 response to Miss Burke. We have data

2 cross-states. We have data in terms of the  
3 different rules, the types of rules that she's  
4 looking at. Let's them look to see what revocation  
5 rates differ. And in fact there's no  
6 statistically significant difference in terms of  
7 revocation rates for the states that have the  
8 types of rules that she's having or the states  
9 that are more liberal.

10 MS. ELIZABETH BURKE: Mr. Lott -- I  
11 mean, Mr. Zimmerman's gun has not been revoked.  
12 His license has not been revoked so I would  
13 question the viability and the inappropriateness  
14 of the revocation laws.

15 COMMISSIONER CASTRO: And I've got to  
16 believe that the revocation procedures, processes  
17 and resources vary state by state, so they may not  
18 even have folks who are regularly investigating in  
19 some of these states as revocations. So I don't  
20 know how that can be a distinction point, but --  
21 Commissioner Narasaki.

22 COMMISSIONER NARASAKI: Yes, thank you.  
23 I actually find it that it doesn't necessarily  
24 prove that the system is working if there aren't  
25 any revocations. I actually believe that proves

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2           that perhaps it's not working.  It's like when my  
3           90 year old grandmother in California got her  
4           drivers license renewed without an exam.  That  
5           did not make me feel any better about the driver's  
6           in California and getting on the road.

7                         So I have a question about -- well,  
8           first, on the issue of reasonable amount versus  
9           reasonable belief.  You know, Professor Cynthia  
10          Lee's written a book about the extent to which a  
11          reasonable man-standard still has some  
12          subjectivity, right?  Depending on what group is  
13          deciding what a reasonable man would do.  But, it  
14          has more objectivity than saying, "Well, putting  
15          myself in the position of someone who's an older  
16          white man, not used to being around minorities,  
17          feeling threatened and disrespected, I might say,  
18          you know, I wouldn't feel threatened, but I could  
19          see that that guy might reasonably feel  
20          threatened.  That to me is a very different  
21          standard, and in fact rewards people for being  
22          biased, and I'm concerned about that.  I don't  
23          think that's something that should be rewarded.

24                         What I am interested in understanding is  
25          that, in the issue of implicit bias, it's not just



2           how the justice system treats you, but it's also  
3           the question of when are you going to get shot.  
4           Right? And that's the irrevocable fact that in a  
5           split second your bias allows you to shoot someone  
6           and then the legal system either treats that --  
7           treats everybody fairly or not fairly after what  
8           happened. So I think that's maybe where we're  
9           sort of parting ways, Mr. Lott.

10                         I do want to know though, do you believe  
11           that there's implicit bias? Do you believe that  
12           there's bias in the system that would cause you  
13           any kind of concern, if in fact implicit bias  
14           exists? Or is it just that you're trying to argue  
15           that the data doesn't prove that in fact it's  
16           resulted in any inequity?

17                         MR. JOHN LOTT: I'm happy to accept that  
18           there's surely biases that people have in many  
19           different ways. I'm just saying in this  
20           particular case we have a very useful data set  
21           that we can go and look at to see whether it  
22           effects the final outcome.

23                         I want to talk for a minute in terms of  
24           your example with your grandmother getting the  
25           driver's license. What we would do then is we

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2 would look to see what happens to accidents, we  
3 could look at accident rates for people who are 75  
4 to 80. Okay? We can do the exact same thing --

5 COMMISSIONER NARASAKI: Her 85 year old  
6 sister ran into a police and she did not get her  
7 license revoked either.

8 MR. JOHN LOTT: No -- but, even if you  
9 don't look at revocations, you can look at things  
10 like murders. You can look at accidents. You can  
11 look at what happens in murder rates or accidents  
12 in other states based upon the types of rules.

13 And in fact what you find is that the  
14 states that have easier rules for getting permits  
15 actually have bigger drops in murder rates because  
16 you have more people being issued permits.

17 And so it's the exact opposite -- if you  
18 -- the ultimate thing that you care about then  
19 when you were talking about what happens with  
20 stand your ground laws somebody gets shot -- well,  
21 let's look to see what happens to all murders.  
22 When you look at that and you control for the gun  
23 control laws that Miss Burke says needs to be  
24 accounted for there -- you see drops there in  
25 murder rates -- you have fewer lives lost. And I

2 agree that's a very important bottom line.

3 So it's not just looking at revocations,  
4 I agree revocations are just one possible way of  
5 looking at it, but you need to look at other  
6 factors and I look at all of those different  
7 things.

8 COMMISSIONER NARASAKI: Can I just ask  
9 you for a clarification on that because we have  
10 thousands of pages that the great commission staff  
11 have pulled together for us to prepare for this  
12 hearing, and I really want to thank the staff for  
13 the incredible job that they've done so far, but  
14 in my reading I recall repeatedly seeing that in  
15 fact in stand your ground places murder went up,  
16 am I wrong? Am I confused?

17 COMMISSIONER CASTRO: No, you're right.

18 COMMISSIONER NARASAKI: So I'm confused  
19 by what you're arguing.

20 COMMISSIONER CASTRO: I'm sorry,  
21 Miss Burke did you want to respond?

22 MS. ELIZABETH BURKE: -- 8 percent --

23 MR. JOHN LOTT: Well, can't I just  
24 respond --

25 MS. ELIZABETH BURKE: -- I think it was

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the --

MR. JOHN LOTT: The Texas A & M study. And what I tried to do -- oops, there it is. What I tried to do was just go through and tried to explain to you kind of what happened with the Texas A & M study -- there's also a Georgia study, but both of them are very similar.

Texas A & M really looked at only laws between 2005 and 2010, no explanation for why they didn't look at other periods. A very narrow window in terms of crimes -- rates that they looked at. They didn't control for any other types of laws that Mrs. Burke -- Miss Burke was just making argument needed to be accounted for because it would affect the rate and the possible problems that would occur. There's -- it's really amazing cherry picking that goes on --

COMMISSIONER NARASAKI: But -- but, homicides either went up or down.

MR. JOHN LOTT: No, but -- the point is -- let me give you an example. They not only look at stand your ground laws, it's been a misnomer they also look -- have in there Castle Doctrine states. So someplace like Illinois for example,



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2 say that, let's get away from Mr. Roman's data and  
3 let's go back to Mr. Krouse from the Congressional  
4 Research Service and his slides which showed that  
5 -- that overall there's been an uptick in the  
6 homicide rates starting around 2005. And then --  
7 and that certainly beginning in 2005 there's a  
8 very big uptick in terms of justifiable homicides.  
9 And now -- I just want to say this one thing which  
10 is, what Mr. Lott said actually kind of goes to  
11 the point that I was trying to make with  
12 Miss Burke which is, you can -- you can -- and,  
13 you know, people say -- I noticed that Mr. Shapiro  
14 liked it -- liked to say that, "Then Senator  
15 Barack Obama voted to expand the Castle Doctrine  
16 in Illinois." But then again Illinois has very  
17 tough gun laws. But we're talking about, when we  
18 look at some of the states where you have not so  
19 tough gun laws, where you have the Florida models  
20 stand your ground law, and you have the data --  
21 the data that Mr. Roman and others have, and the  
22 Tampa Bay Times have, that's where we have --  
23 that's where we see the disparity. That's sort of  
24 the -- that's sort of the cocktail that I'm  
25 concerned about. That is -- that is, quite



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2 one of our national conferences we've trained on  
3 that. On behalf of APA we've been involved in two  
4 now, racial justice summits of -- especially  
5 within our role of prosecutors within the system,  
6 how can we make sure that we're doing no harm.

7 So I wanted to directly address and say,  
8 that on behalf of prosecutors we recognize  
9 implicit bias exists, it's how can we counteract  
10 it, and make sure that certain other things are  
11 fair. So thank you, sir.

12 COMMISSIONER CASTRO: Thank you. And  
13 thanks to each of you and to all of the panelists  
14 today. This information is going to be very  
15 helpful to us as we prepare our report.

16 I also want to acknowledge and ask all  
17 of our staff that are here and especially the  
18 staff that have been involved in putting this  
19 together over the last several months to please  
20 stand and be acknowledged, we really appreciate  
21 your work.

22 (Applause.)

23 COMMISSIONER CASTRO: This could not  
24 have happened without all of you and we really do  
25 appreciate that.



2                   Lastly, the record for this briefing is  
3 going to remain open for the next 30 days. If  
4 panalists or members of the public would like to  
5 submit materials they can mail them to the: U.S.  
6 Commission on Civil Rights, Office of Federal  
7 Civil Rights Evaluation, 1331 Pennsylvania Avenue  
8 Northwest, Suite 1150, Washington, D.C., 20425 or  
9 via e-mail to publiccomments@usccr.gov.

10                   The exact time is now 3:35 p.m. and this  
11 meeting of the U.S. Civil Rights Commission is now  
12 adjourned.

13                   Thank you.

14                   (Hearing was adjourned at 3:35 p.m.)

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17                   (Meeting was concluded. This is the end of volume III)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF POLK

I, Kathy Wescott, Certified Shorthand Reporter, do hereby certify that I was authorized to and did report in Stenotypy and electronically the foregoing proceedings and evidence in the captioned case and that the foregoing pages constitute a true and correct transcription of my recordings thereof.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 28th day of October, 2014, at Lakeland, Polk County, Florida.

Kathy Wescott, CSR  
Court Reporter