

The Inalienable Right to Stand Your Ground

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 cannot be repealed, or superseded, or suspended by any human institution.”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

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

I. Introduction

In 1776, Thomas Jefferson stated what American political and legal thinkers took to be “self-evident”: that “all men . . . are endowed . . . with certain unalienable Rights.”³ Among those rights were the right to “Life, Liberty and the pursuit of Happiness.”⁴ English and American common law historically allowed an individual to use reciprocal force to fend off an imminent attack.⁵ It was not until the Victorian Era and then, most forcefully, the Progressive Era, that the right to self-defense was limited by the so-called Duty to Retreat.⁶ Around the same time, the

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³ THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776).

⁴ *Id.*

⁵ Discussed, *infra*, at § III.

⁶ *Id.*

United States Supreme Court, in *South v. Maryland*, held that the police owe citizens no duty of protection.⁷

In March of 2010, the Department of Justice's Bureau of Statistics released its Criminal Victimization in the United States, 2008 Statistical Tables. With updated statistical tables from May of 2011, the report reflects that for violent crimes, the police only respond within 5 minutes about 28% of the time; within 6-10 minutes around 30% of the time; and within 11 minutes to 1 hour only one-third of the time.⁸ Of course, these numbers only include those incidents where the police *actually responded*. In relation to those violent crimes responded to, police made an arrest less than 12% of the time.⁹ Even then, an arrest does not necessarily result in charging or a conviction.

This Article seeks to open a dialogue about an individual's inalienable Right to Self-Defense and the interplay between that Right and Stand Your Ground doctrines. In Section II, this Article will present an overview of what, precisely, a Stand Your Ground statute *actually* encompasses and permits, as many misconceptions have arisen as to the effect of a Stand Your Ground law. Due to the position many political groups have taken, as well as inaccurate news reporting by the media, there is a mistaken belief that Stand Your Ground laws allow a shooter to become "judge, jury, and executioner."¹⁰

⁷ 59 U.S. 396, 403 (1856). See also, *Warren v. D.C.*, 444 A.2d 1, 4 (D.C. Ct. App 1981) holding that even where police negligence resulted in three women being repeatedly raped, "courts have without exception concluded that when a municipality or other governmental entity undertakes to furnish police services, it assumes a duty only to the public at large and not to individual members of the community."

⁸ Available at, <http://www.bjs.gov/content/pub/pdf/cvus08.pdf>, pg 115.

⁹ *Id.* at 116.

¹⁰ Michael Zalewski, *Stand Your Ground Makes One Person Judge, Jury, and Executioner*, in *U.S. News*, Debate Club, March 28, 2012. <http://www.usnews.com/debate-club/are-stand-your-ground-laws-a-good-idea/stand-your-ground-makes-one-person-judge-jury-and-executioner> [Hereinafter, "Zalewski, *Stand Your Ground*"]. See also, Dahlia Lithwick, *Sympathy for the Shooter: How America Has Become a 'Stand Your Ground' Nation*, in *Slate*, Feb. 25, 2014, available at http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/stand_your_ground_nation_from_trayvon

In Section III, the Article will seek to explain that, contrary to the contention that there is a “fundamental duty to avoid conflict,”¹¹ the right to defend oneself – self-preservation – is a Natural Right, not granted to the individual by the state. In that vein, the state cannot abrogate the right of an individual to *defend* himself, which the Duty to Retreat requires. Since the legal interpretation dovetails from the Natural Rights analysis, Section III will then explain when and why the Duty to Retreat entered American jurisprudence. The Duty, rather than being a “fundamental principle of the law,”¹² was actually a misreading or misunderstanding of the common law, all too readily expounded upon by the Progressives in the early 20th Century.

In our conclusion, we ask whether a state Stand Your Ground statute is even required to extinguish the Duty to Retreat, given the inalienable right of the individual to defend himself.

Correspondingly, the question must be asked as to whether a state is even *authorized* to abrogate the right to self-defense and require an individual to retreat. For if the right to self-preservation is a fundamental, deeply rooted, and inalienable right, the state’s ability to infringe upon it is “off the table.”¹³

II. What Is a Stand Your Ground Statute?

Generally, a Stand Your Ground statute eliminates the duty to retreat.¹⁴ Despite the fact that certain media outlets, politicians, and political activist groups have predicted a new “Wild West”

[martin to jordan davis how our understanding.html](#). Lithwick wrote that “[h]istorically, United States self-defense laws have followed British common law by imposing a duty to retreat, requiring those in a dangerous situation to try to withdraw (if they could do so safely) before resorting to killing.”

¹¹ *Id.*

¹² *Id.*

¹³ *See, District of Columbia v. Heller*, 554 U.S. 570, 636 (“[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table”). Of course, *Heller* referred to the Second Amendment, clearly enumerated in the Bill of Rights, but as Section III of this Article will demonstrate, the right to self-defense, *sans* Duty to Retreat, is a Natural Right which cannot be abrogated. *See also, Peruta v. County of San Diego*, No. 10-56971, slip op. at 69 (9th Cir. 2013).

¹⁴ To date, twenty-three states have enacted Stand Your Ground statutes. Other states’ common law provides one the ability to “stand his ground,” but those are not included in the list of twenty-three. Currently, those states with Stand Your Ground statutes are: Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky,

atmosphere in states that have Stand Your Ground statutes, the actual statutes are written quite narrowly. For example, the much-maligned Florida Stand Your Ground statute¹⁵ expressly forbids the use of deadly force in the normal course of self-defense.¹⁶ The law defines the limited circumstances in which “a person is justified in the use of deadly force and does not have a duty to retreat.”¹⁷ Those limited circumstances are then statutorily defined: “When he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a *forcible* felony.”¹⁸

Likewise, Pennsylvania’s Stand Your Ground statute¹⁹ eliminates the duty to retreat where the actor is not engaged in criminal conduct, is not in possession of an illegal firearm, is legally allowed to be where he is attacked, *and* the actor believes the use of force is necessary to protect himself or another against death, serious bodily injury, kidnapping, or rape, and the attacker uses a deadly weapon.²⁰

Without reciting here the statutory provisions of each of the twenty-three so-called “Stand Your Ground” states, a Stand Your Ground statute merely eliminates the duty to retreat where one is confronted, through no fault of his own, with a potentially deadly situation. Stand Your Ground does not – and we would not argue that it should – justify the use of deadly force where it is clear that much more limited force was appropriate. Stand Your Ground does not, in other

Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia. *See*, States That Have Stand Your Ground Laws, <http://criminal.findlaw.com/criminal-law-basics/states-that-have-stand-your-ground-laws.html>.

¹⁵ F.S.A. § 776.012

¹⁶ “A person is justified in using force, *except deadly force*, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself against the other’s imminent use of unlawful force.” *Id.* (Emphasis added).

¹⁷ *Id.*

¹⁸ F.S.A. § 776.012(1). (Emphasis added).

¹⁹ 18 Pa.C.S.A. §§ 505(b)(2.3), 506(a). Notably, the Stand Your Ground provision is found under the subsection heading: “Limitations on justifying necessity for use of force.”

²⁰ *Id.*

words, authorize one to bring a gun to a fistfight, so to speak.²¹ Rather, it merely codifies the standard that was in use throughout English and American common law until the Progressive Era of the early 20th Century.

III. Self-Defense as a Natural Right

The idea of a Natural Law, independent of any civil code, existing apart from the physical realm, but applying to the world nonetheless, can be traced back to Sophocles' *Antigone*.²² Natural law defines how a particular species of being is *supposed* to act. For humans, this translates very closely to a universal moral code.²³

“[T]he first precept of [natural] law is that good is to be done and pursued, and evil is to be avoided. All the other precepts of the law of nature are based on this . . .”²⁴ Because all humans are created equally in the state of nature, the *law* of nature applies equally amongst them. In the western Judeo-Christian tradition, this is because God made man in His image, making an affront on another an affront on God.²⁵ Regardless of the origin of the equality, Natural Law does not distinguish among station, rank, title, or nobility, which makes it quite amenable and equitable to even the modern reader.

²¹ However, in certain circumstances, dependent on disparity of force, it may be authorized – *E.g.* if a petite woman were attacked by a muscular man, she may be authorized to use lethal force, absent the man utilizing a weapon, as the disparity of force is such that without a weapon, the man could cause her serious bodily injury or death. Another such example would be where there are multiple assailants, without weapons, where the victim could use lethal force due to the disparity of the situation.

²² *See*, JACQUES MARITAIN, *MAN AND THE STATE*, *reprinted in*, SAINT THOMAS AQUINAS, *ON POLITICS AND ETHICS*, 204-05 (Paul E. Sigmund, ed., Norton & Co. 1988) (1950). Sophocles said, “Nor did I deem/Your ordinance of so much binding force./As that a mortal man could overbear/The unchangeable unwritten code of Heaven;/This is not of today and yesterday./But lives forever, having origin/Whence no man knows . . .” *See, id.*

²³ *Id.*, at 206.

²⁴ ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, *reprinted in* ST. THOMAS AQUINAS, *ON POLITICS AND ETHICS*, 49 (Paul E. Sigmund, ed., Norton & Co. 1988) (1270) [HEREINAFTER, AQUINAS, *SUMMA THEOLOGIAE*].

²⁵ JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT*, *reprinted in*, JOHN LOCKE, *ON POLITICS AND EDUCATION*, 78-79 (Walter Black, Inc. 1947) (1690) [hereinafter, LOCKE, *SECOND TREATISE*].

Rather than being a mere anachronism, suitable to the discussions of tenured philosophy and political science professors, Natural Law is the foundation of what we consider to be our fundamental rights and freedoms in America. Thomas Jefferson restates the essence of Natural Law in his venerated passage from the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness.”²⁶ In his *Report of the Committee of Correspondence to the Boston Town Meeting* in November, 1772, no less than Samuel Adams reported on the “Natural Rights of the Colonists as Men.”²⁷ Not only did individuals retain their Natural Rights, “[a]ll positive and civil laws should conform, as far as possible, to the laws of natural reason and equity.”²⁸

Invariably, commentators of Natural Law cited self-defense as the first law of nature. In his defense of Michael Corbet, who had been impressed by one Lieutenant Panton, John Adams stated that “[s]elf-preservation is the first Law of Nature . . . [It is] not only our unalienable Right but our clearest Duty, by the Law of Nature.”²⁹ His cousin Samuel agreed that “the *duty* of self-

²⁶ THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776). Pauline Maier notes that by “happiness,” Jefferson most likely intended – and was most likely understood by his contemporaries – as meaning safety and security. *See*, PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE, 134 (Vintage Books, 1997).

²⁷ Samuel Adams, *The Rights of the Colonists*. Old South Leaflets, no. 173 (Boston: Directors of the Old South Work, 1906), available at <http://history.hanover.edu/texts/adamss.html>. [Hereinafter, Samuel Adams, *Rights of the Colonists*].

²⁸ *Id.*

²⁹ JOHN ADAMS, NOTES OF THE ARGUMENT IN DEFENCE, AND STATEMENT OF AUTHORITIES IN THE CAUSE, OF MICHAEL CORBET AND OTHERS, CHARGED WITH THE MURDER OF LIEUTENANT PANTON, 1769, *reprinted in*, THE WORKS OF JOHN ADAMS, 528 (Charles Francis Adams, ed., Little, Brown, 1850) (1769) [hereinafter ADAMS, NOTES]. Adams also states that “[I]f impresses are always illegal, and Lieutenant Panton acted as an impress officer, Michael Corbet and his associates had a right to resist him, and, if they could not otherwise preserve their liberty, to take away his life.” *Id.*, at 528. The temptation is great to conclude that this proves a *natural* duty to retreat. However, the nature of the rights being deprived are not equal. Where one attempts to deprive another of *liberty*, one can certainly resist, but can only resort to homicide when there are no other means. But this does not imply that to resist *homicide*, one must attempt to get away before resorting to taking away the transgressor’s life. Rather, when Lt. Panton approached Corbet and fired a shot at him, “Corbet and his associates had a right, *and it was their duty*, to defend themselves.”

preservation [is] commonly called the first law of nature.”³⁰ And James Wilson, signer of the Declaration of Independence, Continental Congressman, delegate to the Constitutional Convention of 1787,³¹ law professor, and one of the original six justices of the United States Supreme Court appointed by George Washington, knew that “the great natural law of self-preservation . . . cannot be repealed, or superseded, or suspended by any human institution.”³² Indeed, men “cannot, by any compact, deprive or divest their posterity” of the “certain inherent natural rights.”³³

This correlates directly with Natural Law, for according to Locke, while one can dispose of his possessions and property as he pleases, he has a duty *not* to destroy himself.³⁴ According to the Founding generation and its view on the Natural Right of self-preservation, the duty extended so far as to *require* one to fight back.³⁵ This is certainly not indicative of a long-standing duty to *retreat*; if anything, it tends to show that so-called Stand Your Ground laws are superfluous, at best. One wonders what the Adams cousins would think about those laws that criminalize what they – or the rest of the Founding generation, for that matter – considered to be inalienable, permanent rights, unable to be repealed or limited by the government.

³⁰ Samuel Adams, *Rights of the Colonists*.

³¹ The Convention of 1787 was not, technically, a constitutional convention, as it was merely intended to rework the Articles of Confederation. However, because this is how it has come to be known, we refer to it as such here.

³² JAMES WILSON, *THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D.* vol. 3, 84 (Bird Wilson, ed., Lorenzo Press, 1804).

³³ VIRGINIA DECLARATION OF RIGHTS, § 1 (1776), drafted by George Mason.

³⁴ LOCKE, *SECOND TREATISE*, at 77. “[T]hough man in that state [of nature] have uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself.” Likewise, James Wilson, one of the original justices of the Supreme Court of the United States, signer of the Declaration, and delegate to the Convention of 1787, said that because man did not create himself, he could not take his own life: “[I]t was not by his own voluntary act that the man made his appearance upon the theatre of life; he cannot, therefore, plead. . . by his own voluntary act to make his exit.” JAMES WILSON, *THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D.* vol. 1, 157 (Bird Wilson, ed., Lorenzo Press, 1804).

³⁵ See, Samuel Adams, *Rights of the Colonists* (“the *duty* of self-preservation . . .”) (emphasis added); ADAMS, *NOTES*, 528 (“[Self-preservation is] not only our unalienable Right but *our clearest Duty*, by the Law of Nature.”) (emphasis added).

Therefore, the question becomes: how does the Founding generation’s understanding and codification of our Natural Rights influence and affect our post-modern society and Stand Your Ground laws? Even in 1690, John Locke understood that the idea of an amorphous, unwritten law that dictated a universal course of conduct to all individuals, regardless of where they stood on the social ladder, could be controversial, misunderstood, and rather inconvenient to the powers that be.³⁶ In his *Second Treatise on Civil Government*, Locke admitted that “I doubt not but this will seem a very strange doctrine to some men; but before they condemn it, I desire them to resolve me by what right any prince or state can put to death or punish [anyone] who commits a crime in their country?”³⁷ Whereas in the state of nature a man can punish his transgressors freely and, as Rep. Michael Zalewski fears would happen with Stand Your Ground laws, act as judge, jury, and executioner, this is not so in civil society.³⁸ For in civil society, the acts of transgression against an individual are adjudicated in courts of law.³⁹ Referring once more to Locke: “I easily grant that civil government is the proper remedy for the inconveniences of the state of Nature, which must certainly be great where men may be judges in their own case . . .”⁴⁰

Thus, as Jefferson correctly penned in the Declaration of Independence, “to secure these Rights, Governments are instituted among men, deriving their just Powers from the Consent of the Governed.”⁴¹ While avoiding a reprisal of high school civics, it is relevant to note that the “Rights” Jefferson was referring to were the Natural Rights of humanity – in the words of his

³⁶ Aquinas, several centuries before, said the same: “[W]e must conclude that as far as its general principles are concerned the natural law is the same for all, both as a standard of right and as known (by all).” AQUINAS, *SUMMA THEOLOGIAE*, at 49-50.

³⁷ LOCKE, *SECOND TREATISE*, at 79.

³⁸ *See*, LOCKE, *SECOND TREATISE*, at 78; *see also*, Zalewski, *Stand Your Ground Makes One Person Judge, Jury, and Executioner*, *supra*, n. 5.

³⁹ LOCKE, *SECOND TREATISE*, at 81.

⁴⁰ *Id.*

⁴¹ THE DECLARATION OF INDEPENDENCE, para 2 (U.S. 1776).

generation, the rights to “Life, Liberty, and the pursuit of Happiness.”⁴² And, in order to preserve any one of those Natural Rights, one must be vested with the ability to *defend* those rights. In Locke’s state of nature, each individual was responsible for his own defense – thus, civil governments were formed. But even in a civil society, in order to effectively preserve those Natural Rights, it was necessary to ensure that those whose rights were to be protected were in charge of electing those who sought to protect them. The requirement that the government be derived from the consent of the people, then, logically follows.

Thus, the states began adopting language protecting the individual’s right to self-preservation. For example, Pennsylvania’s constitution, in the very first section of the very first Article, states that “[a]ll men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty.”⁴³ Massachusetts’ Constitution declared that “[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties . . . [and] seeking and obtaining their safety and happiness.”⁴⁴ Pennsylvania’s Chapter 1, § 13 then provided the “right of the citizens to bear arms in defense of themselves and the State.”⁴⁵ Vermont, as well, protected the “right to bear arms for the defense of themselves and the State.”⁴⁶ Reaffirming this in 1876, the Vermont

⁴² *Id.* See also, PAULINE MAIER, AMERICAN SCRIPTURE, at 126- 27, 134.

⁴³ Pennsylvania Constitution, Art. I, § 1 (1776).

⁴⁴ Massachusetts Constitution, Article I (1780).

⁴⁵ Pennsylvania Constitution, Art. I, § 13 (1776). In 1790, the right to bear arms for the defense of oneself was shifted to Article 9, § 21. During the transition, it incorporated the words: “. . . shall not be questioned.” See, Pennsylvania Constitution, Art. IX, § 21 (1790). Then, in 1874, the right to bear arms for self-defense, among other things, was moved to Article 1, § 21, where it can be found in the Pennsylvania constitution, today. See, Pennsylvania Constitution, Art. I, § 21 (1874). For the evolutionary text of the Pennsylvania Constitution, see <http://www.duq.edu/academics/schools/law/pa-constitution/texts-of-the-constitution>.

⁴⁶ Vermont Constitution, Ch. 1, para. 15 (1777). The fact that states were explicitly recognizing their citizens’ right to bear arms in defense of themselves *in addition* to the state, also indicates that the use of deadly force was considered an inalienable right to the extent that it was used to defend oneself. While certainly not dispositive, the

Supreme Court held that an individual “had the right to go prepared to defend himself against any assault” that might be made upon him and “if he only intended to use the pistol in such an emergency in defending his own life, or against the infliction of great bodily harm, the carrying it for such a purpose would be lawful.”⁴⁷

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

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

Justifiable Homicide was “the one uniform principle that runs through our own, and all other law: that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting.”⁴⁸ Blackstone cautions, however, that not *all* force may be met with deadly force: “But we must not carry this doctrine to the same visionary length that Mr. Locke does: who holds, ‘that all manner of force without right upon a

fact that the ability to immediately and fully defend oneself was a Natural, unalienable right, tends to point to the fact that one was justified in using deadly force to defend oneself when necessary.

⁴⁷ 55 A. 610 (Vt. 1903)

⁴⁸ 4 WILLIAM BLACKSTONE, COMMENTARIES, * 181.

man's person, puts him in a state of war with the aggressor; and, of consequence, that being in such a state of war, he may lawfully kill him . . .”⁴⁹

As to whether the victim of an attack is required to retreat, Blackstone is not vague: “In cases of justifiable homicide, a man *is not obliged to retreat* . . .” and, in fact, may even pursue the initial assailant until the danger has passed.⁵⁰ “[T]he slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, *with commendation* rather than blame.”⁵¹

On the other hand, an “Excusable Homicide” occurs when “a man must protect himself from an assault or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him.”⁵² Blackstone explains that where “the slayer has not begun the fight, or (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence.” In this case, the person claiming self-defense “should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant.”⁵³

The clear distinction here is this: for a homicide to be justifiable, Blackstone would require the “slayer” to bear no fault.⁵⁴ Where there is no fault, there is no duty to retreat, and the subsequent killing of the initial assailant, regardless of the assailant's possession of a weapon, is justified and “commendable.” The duty to retreat arises where there *is* some fault – that is,

⁴⁹ *Id.* This is because, for non-deadly affronts to the person, we live in a civilized society with redress to the magistrate.

⁵⁰ *Id.*, n. 8 (emphasis added). “. . . [H]e may pursue his adversary until he has secured himself from all danger, and if he kill him in doing so, it is still justifiable self-defence.” *Id.*

⁵¹ *Id.*, at *182. (Emphasis added)

⁵² *Id.*, at *184. Blackstone describes two species of “Excusable Homicide.” The first is akin to manslaughter and its varying degrees, and will not be discussed here.

⁵³ *Id.*, at *184-85.

⁵⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES, * 182. “In these instances of *justifiable* homicide, it may be observed that the slayer is in no kind of fault whatsoever.”

where one *is* involved in a “brawl or quarrel.” In those instances, Blackstone, like Locke, insists on turning to the civil magistrate to sort things out and remedy any violations of rights, so long as the attack is not so “sudden and violent” where “waiting for the assistance of the law” would result in death or serious injury.⁵⁵ And therein lies the difference: where one is in fear of imminent death or serious harm, he may use deadly force to repel it and defend himself. But where there may be fault with the individual claiming defense, he is obligated to escape, if he can do so safely.

Courts throughout the early United States also found a right to immediately repel deadly force with deadly force; or, in today’s modern, more controversial parlance, a right to “stand your ground.” Indeed, John Adams agreed that “[r]esistance to *sudden violence*, for the preservation not only of my person, my limbs and life, but of my property, is an indisputable right of nature which I have never surrendered to the public by the compact of society, and which, perhaps I could not surrender if I would. *Nor is there anything in the common law of England inconsistent of that right.*”⁵⁶ Joel Prentiss Bishop, whose treatise on criminal law may be found throughout criminal jurisprudence, is worth quoting at length on the topic of self-defense and the duty to retreat:

The rule is commonly stated in the American cases thus: if the individual assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself, unless he kills the assailant, the killing is justifiable. And this proposition, it has been held, cannot be qualified by adding to it the words, ‘which [bodily harm] might probably endanger his life;’ for persons attacked may destroy the life of an assailant, though no danger, near or remote, threatens their own lives, but only their safety in a less degree.

⁵⁵ *Id.*, at *184. “[I]nstead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases when certain and immediate suffering would be the consequence of waiting for the assistance of the law.”

⁵⁶ John Adams, Boston Gazette, Sept. 5, 1763, *reprinted in* 3 J. ADAMS, WORKS 438 (1851) (1763) (all emphasis added).

. . . . **Retreating to the Wall.** – If there is a mere fight, or an assault not murderously intended, and it progresses to a conflict for blood, neither party can innocently avail himself of the right of perfect defence by killing the other, until he has endeavored to extricate himself by ‘retreating to the wall,’ as the old phrase is.⁵⁷

In 1784, the Philadelphia Court of Oyer and Terminer concluded that not even “elevation, rank, or immunity of character, can abrogate the right of self defence.”⁵⁸ In 1790, the Supreme Court of New Jersey held that “In order to excuse a homicide on the ground of self defence, it must clearly appear that it was a necessary act, in order to avoid destruction, or some severe calamity.”⁵⁹ Likewise, New York courts found that there was no general duty to retreat, although circumstances certainly could create that duty: “When one *who is without fault*, is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or do him great bodily harm, and there is reasonable ground for believing the danger imminent, I think he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger.”⁶⁰

Even as late as the 1890’s, courts were recognizing the distinction between self-defense in a sudden attack and self-defense in a “brawl or quarrel.” Rhode Island’s Supreme Court, in 1889, found that “[g]enerally, a person wrongfully assailed cannot justify the killing of his assailant in mere self-defense if he can safely avoid it by retreating.”⁶¹ However, “[r]etreat is not always obligatory, even to avoid killing; for, if attack be made with deadly weapons, or with murderous or felonious intent, the assailed may stand his ground, and, if need be, kill his assailant. . . . and

⁵⁷ 1 BISHOP § 865, 3d Ed., at 518-21.

⁵⁸ *Respublica v. De Longchamps*, 1 U.S. 111, 113 (O.T.Phila. 1784).

⁵⁹ *State v. Wells*, 1 N.J.L. 424, 424 (N.J. 1790). Rather than being evidence of a duty to retreat, this language is consistent with the idea that, where one’s life is threatened by a sudden attack, he may act to protect himself to the extent he is required. This is hallmark of a self-defense argument.

⁶⁰ *Shorter v. People*, 2 N.Y. 193, 193 (1849).

⁶¹ *State v. Sherman*, 18 A. 1040, 1041 (R.I. 1889).

we know of no case which holds that retreat is obligatory, simply to avoid a conflict.”⁶² The Indiana, Ohio and Minnesota Supreme Courts agreed.⁶³

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

[w]here an attack is made with murderous intent, there being sufficient overt act, the person attacked is under no duty to fly. He may stand his ground, and, if need be, kill his adversary. And it is the same where the attack is with a deadly weapon, for in this case a person attacked may well assume that the other intends murder, whether he does in fact or not.⁶⁴

As early as the mid-19th Century, some courts began to lose sight of the “uniform principle” and focus only on the duty to retreat. For example, the District of Columbia required a man to retreat when danger becomes apparent, but *not* when he feels his life is in danger.⁶⁵

Pennsylvania’s Supreme Court held in 1868 that “[t]o excuse homicide by a plea of self defence,

⁶² *Id.* In so finding, the Rhode Island Supreme Court cited numerous legal treatises and quoted Bishop’s Criminal Law, § 850, which said: “The assailed person is not permitted to stand and kill his adversary, if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of the case, give back blow for blow.” *Id.*

⁶³ See, *Runyan v. State*, 57 Ind. 80, (1877); *Erwin v. State*, 29 Ohio St. 186, 186 (1876) (“Where a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted *without retreating, although it be in his power to do so without increasing his danger*, may kill his assailant if necessary to save his own life or prevent enormous bodily harm”); *Gallagher v. State*, 3 Minn. 270, 273 (1859)(“[T]he party thus assaulted may strike, or use a sufficient degree of force to prevent the indented blow, without retreating at all”). The court in *Gallagher* was concerned that a jury instruction that so much as implied that *any* duty to retreat existed, when proportional force is used to defend oneself. 3 Minn., at 273.

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

⁶⁵ *United States v. Herbert*, 2 Hay. & Haz. 210 (D.C. 1856). The Court in *Herbert* said that the “moment a man is bound to retreat is that in which the danger becomes apparent.” But if the jury believed that the defendant had “good ground to believe tha this life was in dagner or that he was about to receive some grievous personal harm, and that at the time this danger was apparent and when he fired the pistol he could not safely retreat, *it is not material that he might have escaped at the commencement of the affray.*” While certainly implying *some* duty to retreat, the duty is minimal, at best, and does not require a search for a reasonable escape prior to pulling the trigger in self-defense.

it must appear that the slayer had no other possible or at least probable means of escaping, and that his act was one of necessity.”⁶⁶

It was the early 20th Century, however, that saw the greatest abrogation of the right to defend oneself without analyzing all avenues of retreat. In 1916, the New Jersey Supreme Court found that “[a]lthough the obligation to retreat, when this can be done safely, is not expressly declared . . . it is, we think, necessarily implied in the declaration that a homicide is not justifiable or excusable, unless the necessity for taking life is apparent as the *only means* by which the slayer can avoid his own destruction or some great bodily injury.”⁶⁷ Pennsylvania abrogated the ability of an individual to “stand his ground” in 1917: “We affirmed that point [that the defendant was entitled to self-defense when in fear for his life], if there were no other way by resisting or escaping. Killing is the last resort, and, if there were any other way, it was the duty of the defendant to take that way.”⁶⁸ In 1929, the Massachusetts Supreme Court took this implied duty to retreat even further, finding that “[t]he right of self-defense does not accrue to a person ‘until he has availed himself of all proper means in his power to decline the combat.’”⁶⁹

Notably, the Supreme Court of the United States shifted very minimally during this period. After finding no duty to retreat in *Beard*, Justice Oliver Wendell Holmes, writing for the Court, found that the failure of the defendant to retreat could not be dispositive of either guilt or innocence. Rather, it was one factor to consider out of many in determining whether the killing

⁶⁶ *Commonwealth v. Drum*, 58 Pa. 9, 10 (1868).

⁶⁷ *State v. Di Maria*, 97 A. 248, 249 (N.J. 1916).

⁶⁸ *Commonwealth v. Lapriesta*, 101 A. 637, 637 (Pa. 1917). It is interesting to note that as late as 1912, the Pennsylvania Supreme Court still recognized Blackstone’s distinction between pure self-defense and the claim of self-defense “when two men enter into a fight, and one of them secures a knife and kills his adversary . . .” *Commonwealth v. Watson*, 82 A. 255, 256 (Pa. 1912).

⁶⁹ *Commonwealth v. Trippi*, 167 N.E. 354, 356 (Mass. 1929).

was actually justifiable in self-defense.⁷⁰ “Detached reflection cannot be demanded in the presence of an uplifted knife,” wrote Justice Holmes. “Therefore, in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.”⁷¹

IV. Conclusion

Contrary to political and moral opponents of Stand Your Ground laws, the right of one to “stand his ground” is the true historic right, rooted in the natural, inalienable right of self-preservation. British commentators have recognized this since at least the 17th Century and American courts have repeatedly upheld the rights of citizens to defend themselves when confronted with deadly peril. This is because, despite the social contract and the resort to the civil magistrate for the arbitration of our differences, the proverbial state of nature occasionally rears its head and reminds us that we can all be equally vulnerable, despite our civil protections. In these instances, the common law has always recognized the inalienable right of the individual to stand his ground and defend his life when the civil government cannot - or will not - timely intervene.

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

⁷⁰ *Brown v. United States*, 256 U.S. 335, 343 (1921).

⁷¹ *Id.* This view on the duty to retreat has remained throughout the 20th Century to the present. See, *Martin v. Ohio*, 480 U.S. 228, 233 (1987) (affirming conviction over self-defense argument when state law apparently required *some* duty to retreat as one of the several elements of the crime); see also, *Moran v. Ohio*, 469 U.S. 948, 949 n. 1 (1984).

individual to “retreat to the wall,” unless absolutely necessary,⁷² rather than immediately defend himself.

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

⁷² The definition of “absolutely necessary” is to be determined, of course, by individuals who were not present at the scene and are able to view the situation with the calm and collected vantage point of hindsight.