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“Stand Your Ground” Laws: International Human Rights Law Implications

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I. INTRODUCTION¹

“Between me and the other world there is ever an unasked question [H]ow does it feel to be a problem?” – W.E.B. Du Bois²

Since the February 2012 killing of Trayvon Martin and other recent high-profile criminal cases, “Stand Your Ground” (“SYG”) laws in the United States have come under intense scrutiny. Florida is ground zero for the controversy. SYG laws expand the “Castle Doctrine”—a common law doctrine by which deadly force may be used in self-defense or to prevent a forcible felony when one is in the safety of one’s home³—to include public places outside the home.⁴ Thus, SYG laws remove the classic common law duty to retreat in public spaces, while extending immunity from prosecution or civil suit for the use of deadly force in self-defense beyond the home.⁵ Florida’s SYG law is especially broad in this respect.⁶

Commentators and advocates have decried several aspects of SYG laws. For one, they argue, SYG laws, and the broad immunity they afford the user of deadly force in self-defense, engender a “shoot first” mindset that results in more homicides,⁷ while muddling proper investi-

1. Several sections of this article have been adapted from three documents submitted by the authors (along with other groups) to the United Nations Human Rights Committee (UNHRC) and the Inter-American Commission on Human Rights (IACHR): *Written Statement on Stand Your Ground Laws, Submitted by Dream Defenders, Community Justice Project of Florida Legal Services, Inc. and the National Association for the Advancement of Colored People* (Sept. 2013), available at http://dreamdefenders.org/wp-content/uploads/2013/08/SYG_Shadow_Report_ICCPR.pdf [hereinafter *Dream Defenders et al. UN Shadow Report*]; *Written Statement on Domestic Violence, Gun Violence, and “Stand Your Ground” Laws, Submitted by The Advocates for Human Rights, University of Miami School of Law Human Rights Clinic, Legal Momentum, and Women Enabled* (Sept. 2013), available at <http://www.law.miami.edu/human-rights-clinic/pdf/2013/ICCPR-Shadow-Report-Domestic-Violence.pdf> [hereinafter *Miami Law et al. UN Shadow Report*]; and a briefing paper submitted to the IACHR for a thematic hearing on Stand Your Ground laws on March 25, 2014. The video of the thematic hearing is available at <https://www.youtube.com/watch?v=X0EV8Rbpg2s&feature=youtu.be>, and a copy of the briefing paper is available from the authors upon request.

2. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 1 (1903), available at <http://www.bartleby.com/114/1.html>.

3. See *Weiland v. State*, 732 So. 2d 1044, 1049 (Fla. 1999) (discussing common law doctrine on self-defense, including the “Castle doctrine”).

4. See, e.g., FLA. STAT. § 776.013(3) (2005).

5. See e.g., LAW CENTER TO PREVENT GUN VIOLENCE, “*Stand Your Ground*” Policy Summary, (July 18, 2013) [hereinafter “*Stand Your Ground*” Policy Summary], <http://smartgunlaws.org/stand-your-ground-policy-summary/>.

6. See FLA. STAT. § 776.032 (2005); FLA. STAT. § 776.012 (2005); see e.g., “*Stand Your Ground*” Policy Summary, *supra* note 5.

7. “Stand Your Ground” laws have been given the nickname “shoot first” laws, since an aggressor has no duty to peacefully retreat before using deadly force. See, e.g., Elizabeth Chuck, *Florida Had First Stand Your Ground Law, Other States Followed in ‘Rapid Succession,’* NBC

gations and accountability for those killings.⁸ Accordingly, SYG laws have serious implications for the fundamental right to life and violate standards of necessity and proportionality.⁹ Indeed, national studies have shown that the number of homicides has increased in those states that have implemented some form of SYG laws.¹⁰

Moreover, critics of SYG laws contend that they are applied in an inconsistent and discriminatory manner and have a particularly harsh impact on racial minorities, youth, and female survivors of intimate partner violence. Data indicates that SYG laws introduce bias against black victims and in favor of white defendants.¹¹ These laws have been shown to have a particularly pernicious effect on minority youth, who are more likely to fall victim to an aggressor’s gun in SYG jurisdictions.¹² Conversely, individuals who might legitimately benefit from a SYG defense, such as survivors of domestic violence who act in self-defense, could be denied access to these protections of the law—especially when they are women of color.

The uproar over SYG laws has driven advocates to take a closer look at the human rights implications of these laws. What role does such legislation play in condoning or promoting violence by private actors? What is the role of the government in a state with a SYG law to protect the rights of individuals who reside within its territory? Which human rights principles and instruments address the harmful consequences of SYG laws? Does the focus on dignity, accountability, root causes, and

NEWS (Jul. 18, 2013, 10:03 AM), <http://www.nbcnews.com/news/other/florida-had-first-stand-your-ground-law-other-states-followed-f6C10672364>.

8. See Dahlia Lithwick, “Stand Your Ground” Nation, SLATE (Feb. 25, 2014, 11:46 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/stand_your_ground_nation_from_trayvon_martin_to_jordan_davis_how_our_understanding.single.html; Ashley Lopez, *Dunn Case Puts Stand Your Ground on Trial Again*, FLA. CENTER FOR INVESTIGATIVE REPORTING (Feb. 21, 2014), <http://fcir.org/2014/02/21/dunn-case-puts-stand-your-ground-on-trial-again-zimmerman-gun-murder-florida/>.

9. See Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1 (1999) (arguing that Castle Doctrine laws, which are far less expansive than SYG laws, are difficult to reconcile with principles of necessity and proportionality).

10. See Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine*, 48 J. HUM. RESOURCES 4 (2013), available at http://econweb.tamu.edu/mhoekstra/castle_doctrine.pdf.

11. Sarah Childress, *Is There Racial Bias in “Stand Your Ground” Laws?*, FRONTLINE PBS (July 31, 2012, 12:40 PM), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/is-there-racial-bias-in-stand-your-ground-laws>.

12. See “Stand Your Ground” Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the S. Comm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary, 113th Cong. (2013) (testimony of Dream Defenders). A copy of the testimony is on file with the authors and available upon request.

disparate effect offered by a human rights framework add value to the familiar critiques of SYG laws from academics and activists?

This article argues that SYG laws in the United States are overbroad because they grant a license to use deadly force and amplify existing racial, age, and gender biases. As a result, SYG laws are incompatible with several fundamental protections under international human rights law, including the rights to life, equal protection/non-discrimination, due process and access to the courts, family unity, and the best interests of the child.¹³ The recent concern about SYG laws expressed by the United Nations Human Rights Committee and the Inter-American Commission on Human Rights, discussed *infra* in Part III, underscores the relevance of the international human rights law framework to this discussion.

Part II of this article will provide an overview of SYG laws, the consequences of SYG laws, and notable cases in which SYG laws played a part in the outcome of a prosecution. Part III will discuss the structural inequities in the United States criminal justice system that have allowed SYG laws to be applied in a manner that reflects racial, age, and gender biases. Part IV will consider the human rights law implications of SYG laws. Finally, Part V will briefly address the challenges that federalism poses in addressing the human rights issues raised by SYG laws.

II. BACKGROUND

A. *An Overview of State “Stand Your Ground” Laws: Florida and Beyond*¹⁴

In 2005, Florida modified its law on the justified use of force by adopting the first National Rifle Association (“NRA”)-supported shoot first law, later termed a “SYG” law.¹⁵ But even before the modification in Florida law, Utah had already adopted one version of a “shoot first” law in 1994, permitting the use of deadly force in self-defense in public with no duty to retreat.¹⁶ Since 2005, twenty-one additional states have adopted similar statutes, so that today, twenty-three states have different versions of SYG laws that generally permit the use of deadly force in

13. See *infra* Part III (discussing the implications of SYG laws on these principles of international human rights law).

14. This section is adapted from the *Dream Defenders et al UN Shadow Report*, *supra* note 1, and Testimony of Niaz Kasravi, *Impact of “Stand Your Ground” on Minority Communities in the U.S.*, Inter-Am. Comm’n H.R., (Mar. 25, 2014), available at: http://www.indybay.org/uploads/2014/03/27/testimony_stand_your_ground.pdf.

15. See “*Stand Your Ground*” Policy Summary, *supra* note 5; see also Chuck, *supra* note 7.

16. See “*Stand Your Ground*” Policy Summary, *supra* note 5; see also Chuck, *supra* note 7.

self-defense in public places without the common law duty to retreat.¹⁷ In four additional states, a SYG provision only applies to defensive force exerted by an individual from within his or her vehicle.¹⁸

In addition to the twenty-seven SYG states described above, seven other states have not explicitly passed SYG laws but do, "through a combination of statutes, judicial decisions, and/or jury instructions," permit the use of deadly force in self-defense in public with no duty to retreat.¹⁹ However, several aspects of these states' self-defense frameworks differ from Florida-style SYG laws. First, they permit a defendant to invoke self-defense protections only at the criminal trial stage.²⁰ In contrast, as described in more detail below, Florida-style SYG laws permit an individual claiming to have used force in self-defense to escape liability in a pretrial hearing.²¹ Second, these other states' regimes do not contain the same broad immunity provisions that exist in Florida law, such as the provision requiring law enforcement to have probable cause to believe that an individual's use of deadly force was not justified in order to arrest him or her for using that force in self-defense.²²

Florida's SYG law modified Chapter 776 of the Florida Statutes to eliminate the duty to retreat,²³ codify the "Castle doctrine" (which was already part of Florida's law through jurisprudence),²⁴ expand the justifiable use of force beyond the home to "any other place where [a person] has a right to be,"²⁵ and extend immunity from prosecution or civil suit for the use of deadly force in self-defense beyond the home.²⁶

17. These twenty-three states are: Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin. See "Stand Your Ground" Policy Summary, *supra* note 5.

18. These four states are: Missouri, North Dakota, Ohio, and Wisconsin. *Id.*

19. These seven states are: California, Idaho, Illinois, New Mexico, Oregon, Virginia, and Washington. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. FLA. STAT. § 776.012 (2013) ("[A] person is justified in the use of deadly force and does not have a duty to retreat if: (1) 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; or (2) Under those circumstances permitted pursuant to s. 776.013.").

24. See FLA. STAT. § 776.013, *see also* *Weiand v. State*, 732 So. 2d 1044, 1049 (Fla. 1999).

25. FLA. STAT. § 776.013(3) ("A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.").

26. See FLA. STAT. § 776.032 (2013).

Florida's SYG law has implications at multiple levels: arrest, prosecution, pre-trial, and trial. Because section 776.032 of the Florida Statute defines "criminal prosecution" broadly to include "arresting, detaining in custody, and charging or prosecuting the defendant,"²⁷ many argue that this provision grants law enforcement the broad discretion to arrest based on an officer's individual immunity determination.²⁸ As a result of the broad power vested in law enforcement, a case in which the force used was deemed justified at the arresting stage may never come before a prosecutor or a judge.

Even if the defendant is arrested and prosecuted, he or she can nonetheless file a "stand your ground" motion, which affords the defendant a pre-trial hearing before a judge on whether force has been used in self-defense.²⁹ If the judge does not find that the force used was in self-defense, the prosecution goes forward. But, as Professor Tamara Lawson has noted, "[i]f the defendant is successful in proving his self-defense claim at the pre-trial hearing, the criminal case is dismissed, and the defendant is deemed immune from criminal prosecution for the killing. The immunity is granted on the judge's order alone, with the case never being heard by a jury."³⁰

Beyond the pre-trial setting, SYG can still play a role in whether the defendant is acquitted at trial. This is because the language of the SYG law modified the entire statute on self-defense, and thus the language in section 776.013(3) of the Florida Statute is still included in the jury instructions. This was the case, for example, in the Trayvon Martin and Jordan Davis cases, discussed *infra* in Section D.

B. *The Consequences of SYG Laws*

At the national level, a study by Texas A&M University professors revealed that homicides have gone up by seven to nine percent in states that have passed some form of SYG laws, compared to states without SYG-type laws over the same time period.³¹ The study found no evidence of any deterrent effect to homicides of SYG-type laws over the same time period.³² The study examined twenty-one states with SYG-

27. FLA. STAT. § 776.032(1).

28. *Id.*; see also Phyllis Raybin Emert, N.J. STATE BAR ASS'N, *Standing Your Ground or License to Shoot First and Ask Questions Later?* 12 RESPECT 3, (Spring 2013), https://www.njsbf.org/images/content/1/1/11510/respect_spring_2013.pdf.

29. See Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 288 (2012).

30. *Id.*

31. See Cheng & Hoekstra, *supra* note 10, at 27.

32. *Id.*

type laws, taking into account each state's population, pre-existing crime trends, and other factors, and concluded that SYG-type laws translated into an additional 600 homicides per year across these states cumulatively.³³

Florida's SYG law places no restrictions on the use of deadly force. This fact, combined with the "concealed carry" laws in Florida that allow individuals to carry concealed weapons with a permit,³⁴ creates a dangerous dynamic. Of the 237 Florida cases analyzed in a *Tampa Bay Times* database of SYG cases, unarmed victims were attacked in 62.5% of all Florida cases where defendants claimed a SYG defense.³⁵ Furthermore, in 70 out of 237 cases (29.5%) the defendant pursued the victim.³⁶ These data show that SYG laws can unnecessarily escalate conflicts because there is no duty to retreat when possible to avoid a confrontation. According to the *Tampa Bay Times* database, of the 237 Florida SYG cases presented as of August 2013, the defendant could have retreated to avoid the conflict in 135 cases (57.4%).³⁷

Evidence also indicates that SYG may have contributed to the proliferation of gun ownership since its passage. The number of concealed weapons permits in Florida has ballooned to over 1.2 million—more than double the number when the SYG law was passed in 2005.³⁸

C. SYG Laws as a Subject of National and International Critique

Since 2012, a variety of stakeholders at the local, state, national, and international levels have leveled an intense critique of SYG laws. Youth of color are among those most affected by the passage of SYG laws and have been especially active and vocal. Perhaps the most promi-

33. *Id.* at 3–4.

34. See FLA. STAT. § 790.06 (2013); *Concealed Weapon License*, FLA. DEP'T AGRIC. & CONSUMER SERVS., <http://www.freshfromflorida.com/Divisions-Offices/Licensing/Concealed-Weapon-License> (last visited May 4, 2014).

35. See *Explore Our 'Stand Your Ground' Data*, TAMPA BAY TIMES, <http://tampabay.com/stand-your-ground-law/data> (last visited May 4, 2014) [hereinafter *Tampa Bay Times Database*]. The data is based on the 256 cases to date that the authors of the article analyzed for this statistic, where the victim was unarmed in 160 of those cases, and the facts are unclear or disputed in 21 of those cases.

36. *Id.* In 48 out of the 237 cases analyzed for this statistic, it is unclear or disputed whether the defendant pursued the victim.

37. *Id.* Cases are constantly added to the database, so the number of cases in the database at the time of publication has increased.

38. See *Commissioner's Spotlight: Concealed Carry Weapon Permits*, FLA. DEP'T AGRIC. & CONSUMER SERVICES (July 23, 2012), <http://www.freshfromflorida.com/Divisions-Offices/Marketing-and-Development/Education/For-the-Community/Video-and-Audio/Audio/Commissioner-Messages-and-PSAs/Commissioner-s-Spotlight-Concealed-Weapon-Permits> (Commissioner Putnam states that "[o]ver the last ten years, we've seen a significant increase in applications for concealed weapon permits. Applications have grown by 584 percent"); see also *Dream Defenders et al.*, *UN Shadow Report*, *supra* note 1.

ment example of youth mobilization is the Dream Defenders, a Florida-based organization that has focused, in the aftermath of the Trayvon Martin killing, on the impact of SYG laws on youth of color.³⁹ The Dream Defenders' 31-day sit-in in the Florida State Capitol building⁴⁰ in the wake of the verdict acquitting George Zimmerman of all charges related to the death of Trayvon Martin, discussed *infra*, led the Florida Legislature to hold a hearing to reevaluate Florida's SYG law.⁴¹ Similarly, in the face of a bill that introduced SYG language into Ohio's self-defense law, Ohio youth were at the forefront of a vocal opposition that recognized the negative impact that SYG laws have on communities of color and youth in particular.⁴²

Despite being a state-level creation, SYG laws have been subject to a national critique as well. On October 29, 2013, the Senate Judiciary Committee held a Congressional hearing on "'Stand Your Ground' Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force."⁴³ The purpose of the hearing was to reconsider and evaluate the impact of SYG laws.⁴⁴ Many witnesses expressed their concerns and called for reconsideration of SYG laws because of their tendency to promote violence and their discriminatory application to racial minorities.⁴⁵ According to United States Representative Marcia Fudge from Ohio, SYG laws foster a "'Wild West' environment in our communities where individuals play the role of judge, jury, and execu-

39. See Section D, *infra* (describing Trayvon Martin case); see also "Stand Your Ground" Policy Summary, *supra* note 5; see also *Dream Defenders et al., UN Shadow Report*, *supra* note 1.

40. Kathleen McGrory, *Dream Defenders End Sit-In Protest at Capitol in Tallahassee*, MIAMI HERALD (Aug. 15, 2013), <http://www.miamiherald.com/2013/08/15/3564934/dream-defenders-end-sit-in-protest.html>.

41. *Id.* Ultimately, the Florida Legislature has been largely opposed to substantial reform of the law that would include a duty to retreat and impose burdens of proof on a defendant seeking to use this defense. See Margie Menzel, "Stand Your Ground" Returns to the Capitol With Hearing, WJCT NEWS (Nov. 5, 2013, 2:55 PM), <http://news.wjct.org/post/stand-your-ground-returns-capitol-hearing>.

42. Isabelle Nastasia & StudentNation, *Ohio Students Fight Back Against 'Stand Your Ground' Laws*, NATION (Oct. 4, 2013, 4:13 PM), <http://www.thenation.com/blog/176507/ohio-students-fight-back-against-stand-your-ground-laws>.

43. "'Stand Your Ground' Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the S. Comm. on the Constitution, Civil Rights and Human Rights of the S. Comm on the Judiciary, 113th Cong. (2013) (video), available at <http://www.judiciary.senate.gov/meetings/stand-your-ground-laws-civil-rights-and-public-safety-implications-of-the-expanded-use-of-deadly-force> (last visited May 4, 2014) [hereinafter *Hearing Video*].

44. "'Stand Your Ground' Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the S. Comm. on the Constitution, Civil Rights and Human Rights of the S. Comm on the Judiciary, 113th Cong. (2013) (testimony of Sen. Dick Durbin, Chairman, Judiciary S. Comm. on the Constitution, Civil Rights and Human Rights) available at <http://www.judiciary.senate.gov/imo/media/doc/10-29-13DurbinStatement.pdf>.

45. See *Hearing Video*, *supra* note 43.

tioner."⁴⁶ Ronald Sullivan, a Harvard Law Professor, testified that academic research suggests that SYG laws have little, if any, impact on homicide reduction.⁴⁷ In addition, Professor Sullivan noted that the American criminal justice system, and SYG laws in particular, negatively and disproportionately affect African-Americans and other racial and ethnic minorities.⁴⁸ Furthermore, witnesses in the hearing testified that SYG laws create a safe harbor for criminals and hinder law enforcement's efforts to fight crime.⁴⁹ There has, however, been little follow up on this hearing.

In response to the serious concerns raised at the national level concerning SYG laws, the American Bar Association ("ABA") created the National Task Force on Stand Your Ground Laws ("SYG Task Force") to "serve[] as an independent leader on the legal critique and analysis of the impact of state Stand Your Ground laws."⁵⁰ In 2013, the SYG Task Force conducted five regional public hearings in San Francisco, Miami, Chicago, Philadelphia, and Dallas.⁵¹ Each hearing incorporated testimony from community leaders, regional stakeholders, legal experts, and policymakers who offered distinct perspectives on the impact of SYG laws at both the local and state levels, with a specific focus on the impact of the laws on the criminal justice system, individual liberties, and racial minorities.⁵² The issues on which the Task Force received testimony included:

46. "Stand Your Ground" Laws: *Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the S. Comm. On the Constitution, Civil Rights and Human Rights of the S. Comm on the Judiciary, 113th Cong. (2013)* (testimony of Rep. Fudge, Member, S. Comm. on the Judiciary), available at http://fudge.house.gov/uploads/Stand_Your_Ground_Testimony_10.29.13.pdf.

47. "Stand Your Ground" Laws: *Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the S. Comm. On the Constitution, Civil Rights and Human Rights of the S. Comm on the Judiciary, 113th Cong. (2013)* (testimony of Ronald Sullivan, Jr.) available at <http://www.judiciary.senate.gov/imo/media/doc/10-29-13SullivanTestimony.pdf> [hereinafter *Sullivan Testimony*].

48. *Id.* at 10 ("It is beyond dispute that Blacks and other racial and ethnic minorities are disproportionately, negatively impacted by our criminal justice system. . . . This disparity is even more pronounced when comparing dispositions in Stand Your Ground states versus non-Stand-Your-Ground states.")

49. "Stand Your Ground" Laws: *Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the S. Comm. On the Constitution, Civil Rights and Human Rights of the S. Comm on the Judiciary, 113th Cong. (2013)* (testimony of David LaBahn), available at http://www.durbin.senate.gov/public/index.cfm/files/serve?File_id=3b104707-e672-4919-b5bc-785e3adf0215.

50. *National Task Force on Stand Your Ground Laws: Southeast Regional Hearing*, AM. BAR ASS'N 5 (Oct. 17, 2013), available at http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_justice/miami_syg_program_book.authcheckdam.pdf [hereinafter *ABA Task Force*].

51. *Id.* at 57.

52. *Id.* at 6.

1. The utility of SYG laws from legal and policy perspectives;
2. The impact of SYG laws on public safety;
3. The impact of SYG laws on traditionally marginalized communities and racial and ethnic minorities; and
4. The impact of SYG laws on the criminal justice system, with a particular focus on law enforcement and the prosecutorial function.⁵³

An overwhelming number of the speakers at the ABA hearings concluded that SYG laws have actually led to a significant increase in justifiable homicides, and have not had a counter effect of deterring violent crime.⁵⁴ Moreover, numerous speakers underscored how SYG laws disproportionately affect racial minorities in a detrimental way.⁵⁵ The task force repeatedly heard the recommendation that SYG laws be either repealed or amended to (1) include the duty to retreat, and (2) eliminate the blanket immunity that a defendant receives from prosecution, while still taking into consideration the impact that such a move could have on vulnerable populations, such as survivors of domestic violence, who could potentially benefit from the protections of SYG laws if charged with the use of deadly force in the course of defending themselves.⁵⁶

In May of 2013, the United States Commission on Civil Rights (“USCCR”) launched an investigation into the question of whether SYG laws have a racial bias. According to Commissioner Michael Yaki, the commission will initiate a “full-blown field investigation,” rather than simply seeking briefings and testimony.⁵⁷

More recently, at the international level, the United Nations Human Rights Committee (“UNHRC,” or “Committee”) and the Inter-American Commission on Human Rights (“IACHR,” or “Commission”) have expressed concern about the human rights implications of SYG laws. In March of 2014, the UNHRC reviewed the United States’ compliance with its obligations under the International Covenant on Civil and Politi-

53. *Id.* at 5–6.

54. ABA Task Force Hearing Transcripts (on file with authors); *see also id.* at 55 (“In all states where Stand Your Ground laws have passed, there was a near doubling of justifiable homicides from 2005 to 2011. . . [t]here is no evidence that the laws have a deterrent effect.”).

55. *See ABA Task Force Hearing Transcripts, supra* note 54; *see also ABA Task Force, supra* note 50 at 59 (for example, “the National District Attorneys Association posits that one such negative consequence of this legislation is its ‘disproportionately negative effect on minorities, persons from lower socio-economic status, and young adults/juveniles’”).

56. *See ABA Task Force Hearing Transcripts, supra* note 54.

57. Amanda Terkel, ‘Stand Your Ground’ Laws to Be Scrutinized for Racial Bias by Civil Rights Commission, HUFFINGTON POST (May 31, 2013, 6:01 PM), http://www.huffingtonpost.com/2013/05/31/stand-your-ground-racial-bias_n_3365893.html; *see also* Ryan J. Reilly, Civil Rights Commission to Examine ‘Stand Your Ground’ Laws for Racial Bias, TPM MUCKRAKER (June 8, 2012, 5:45 PM), <http://talkingpointsmemo.com/muckraker/civil-rights-commission-to-examine-stand-your-ground-laws-for-racial-bias> (examining the USCCR decision to make a special investigation into the possible racial bias of SYG laws).

cal Rights ("ICCPR") as part of the periodic review process.⁵⁸ In the oral questions presented to the United States government delegation in Geneva, Committee member Walter Kälin called SYG laws "incompatible" with the right to life under Article 6 of the ICCPR.⁵⁹ SYG laws played a prominent role in the UNHRC's subsequently published Concluding Observations:⁶⁰

Gun Violence

10. While acknowledging the measures taken to reduce gun violence, the Committee remains concerned about the *continuing high numbers of gun-related deaths and injuries and the disparate impact of gun violence on minorities, women and children*. While commending the U.S. Commission on Civil Rights' investigation of the discriminatory effect of "Stand Your Ground Laws," *the Committee is concerned about the proliferation of such laws that are used to circumvent the limits of legitimate self-defence in violation of the State party's duty to protect life* (arts. 2, 6, and 26).

The State Party should take all necessary measures to abide by its obligation to effectively protect the right to life. In particular, it should: (a) continue its efforts to effectively curb gun violence, including through the continued pursuit of legislation requiring background checks for all private firearm transfers in order to prevent possession of arms by persons recognized as prohibited individuals under federal law and strict enforcement of the Domestic Violence Offender Gun Ban legislation of 1996 (the "Lautenberg Amendment"); and (b) *review Stand Your Ground Laws to remove far-reaching immunity and ensure strict adherence to the principles of necessity and proportionality when using deadly force in self-defence.*⁶¹

The UNHRC members expressed concern about the immunity pro-

58. All States Parties to the United Nations human rights treaties are periodically reviewed by the corresponding treaty monitoring bodies concerning State compliance with treaty obligations. YOGESH TYAGI, *THE UN HUMAN RIGHTS COMMITTEE: PRACTICE AND PROCEDURE* (Cambridge 2011).

59. U.N. HUM. RTS. COMM., *Review of the United States*, March 14-15, 2014, available at <http://law.miami.edu/hrc/Geneva/SYG> [hereinafter *2014 Review of the United States Video*]; Nicole Flatow, *UN Officials Question U.S. on Wrongful Death Sentences, Stand Your Ground*, THINKPROGRESS (Mar. 14, 2014, 3:23 PM), <http://www.thinkprogress.org/justice/2014/03/14/3407931/un-officials-question-us-on-wrongful-death-sentences-stand-your-ground/>.

60. All States Parties to the ICCPR are periodically reviewed by the United Nations Human Rights Committee (UNHRC), the corresponding treaty monitoring body, concerning State compliance with treaty obligations. During the review, States undertake a reporting procedure which "consists of three successive stages: submission of reports by States parties, examination of State reports by the [UNHRC], and commentary on those reports by the Committee." TYAGI, *supra* note 58, at 153, 156.

61. Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/4, Corr. 1, para. 10 (Mar. 26, 2014), [hereinafter *Concluding Observations*] (emphasis added).

visions of SYG laws, and notably exhorted the United States to make state and federal law consistent with international standards on necessity and proportionality concerning the use of deadly force in self-defense. The UNHRC had not directly addressed gun violence or SYG laws in its prior periodic reviews of the United States; the last periodic review was in 2006, just after SYG laws had begun to enter the scene.⁶²

Additionally, the Concluding Observations place special emphasis and urgency on the issue of gun violence and SYG laws: this issue is flagged as one of the four baskets of issues—which also include accountability for post-9/11 human rights violations, detainees at Guantanamo Bay, and NSA surveillance—on which the United States must “provide, within one year, relevant information on its implementation of the Committee’s recommendations. . . .”⁶³ Placing the issue of gun violence and SYG laws, which involves private acts of violence, alongside these other high-profile, internationally-recognized human rights violations involving direct State action, sends a clear message about the Committee’s prioritization of the gun issue as well as its deconstruction of the public/private action distinction.⁶⁴

On the heels of the UNHRC review, the IACHR, on March 25, 2014, convened a thematic hearing on the impact of SYG laws on minorities and women in the United States.⁶⁵ The Petitioners’ delegation included Sybrina Fulton, mother of slain teenager Trayvon Martin; Ron Davis, father of slain teenager Jordan Davis; and representatives of Dream Defenders, the Free Marissa Now Mobilization Campaign, the Community Justice Project of Florida Legal Services, the University of Miami School of Law Human Rights Clinic, and the National Associa-

62. In its 1995 concluding observations, the UNHRC wrote: “The Committee . . . regrets the easy availability of firearms to the public and the fact that federal and state legislation is not stringent enough in that connection to secure the protection and enjoyment of the right to life and security of the individual guaranteed under the Covenant.” Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/79/Add.50, A/50/40, para. 282 (1995).

63. *Concluding Observations*, *supra* note 61, at para 27. As to all of the other issues addressed in the 2014 Concluding Observations, the UNHRC has a softer ask: “The Committee requests the State Party, in its next periodic report, due to be submitted on 28 March 2019, to provide specific, up-to-date information on all its recommendations and on the Covenant as a whole.” *Id.* at para 28.

64. For more information on the public/private action distinction in international human rights law, see Dinah L. Shelton, *Private Violence, Public Wrongs, and the Responsibilities of States*, 13 *FORDHAM INT’L L.J.* 1 (1990); Caroline Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 *COLUM. HUM. RTS. L. REV.* 19 (2008).

65. For a video of the hearing, see *USA Leyes de Defensa*, YouTube (Mar. 25, 2014), <https://www.youtube.com/watch?v=X0EV8Rbpg2s&feature=youtu.be> [hereinafter *March 25, 2014 SYG Hearing*]; for audio of the hearing, see *Impact of “Stand Your Ground” Laws on Minorities in the United States*, ORG. AM. STATES (Mar. 25, 2014), <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=18>.

tion for the Advancement of Colored People (NAACP).⁶⁶ The Governmental delegation included the Deputy United States Permanent Representative to the Organization of American States (OAS), and representatives of the State Department Office of the Legal Advisor and the United States Mission to the OAS.⁶⁷

The IACHR Petitioners, which included the authors of this article, put forward an argument that mirrors the argument contained herein. However, the most moving part of the hearing came in the form of the testimonies of Fulton and Davis, described below in Section D, as they described the devastating loss of their sons to gun violence.⁶⁸

The governmental delegation then made relatively short and non-provocative remarks—an uncharacteristic move for the United States government, which is usually more combative about jurisdictional and substantive law matters in hearings before the IACHR. The governmental delegation began by invoking federalism and noting that SYG laws are the province of the states, not the federal government.⁶⁹ However, the delegation noted Attorney General Eric Holder's 2013 statement condemning SYG laws, as well as the ongoing investigation by the USCCR.⁷⁰ In Florida, the government representative noted, the Department of Justice, Civil Rights Division and the FBI continue to "evaluate the evidence."⁷¹ The delegation asserted that "there are [] no statistics on disparities in the application of SYG laws," but expressed appreciation of the Petitioners' statements about unintended consequences of these laws.⁷² The governmental delegation concluded by thanking the IACHR for convening the hearing, telling the Petitioners that the United States government values their testimony, and then ceding the government's remaining time to the Petitioners' delegation.⁷³

66. See *March 25, 2014 SYG Hearing*, *supra* note 65.

67. *Id.*

68. *Id.*

69. *Id.*

70. See *Eric Holder Strongly Criticizes Stand Your Ground Laws, Opens up About Trayvon Martin Case*, HUFFINGTON POST, (July 16, 2013, 4:45 PM), http://www.huffingtonpost.com/2013/07/16/eric-holder-stand-your-ground-laws_n_3606778.html (linking to a video of the remarks and including a transcript of his speech); Manuel Roig-Franzia & Sari Horwitz, *Attorney General Eric Holder Denounces 'Stand Your Ground' Laws*, WASH. POST, (July 16, 2013), http://www.washingtonpost.com/politics/naacp-urges-eric-holder-do-the-right-thing/2013/07/16/530425da-ee49-11e2-9008-61e94a7ea20d_story.html ("Attorney General Eric H. Holder Jr. strongly condemned 'stand your ground' laws, saying the measures 'senselessly expand the concept of self-defense' and may encourage 'violent situations to escalate.'").

71. *March 25, 2014 SYG Hearing*, *supra* note 65 (containing a statement from Lawrence Gumbiner, Deputy U.S. Permanent Representative to the Organization of American States (OAS)).

72. *Id.*

73. For a thorough description of the IACHR hearing, see Deena R. Hurwitz, *Part I: IACHR Expresses Concern Over Apparent Prima Facie Discrimination in Stand Your Ground Laws*,

The panel of IACHR Commissioners expressed concern about the claims raised by Petitioners, and appeared “genuinely moved by the presence and testimony of the parents of the two slain teens.”⁷⁴ Commissioner Felipe Gonzalez (Chile), who also serves as the Commission’s Rapporteur (or independent country expert) for the United States, inquired about the role of the federal government in addressing SYG laws, and asked for clarification on the application of SYG laws in domestic violence cases.⁷⁵

The IACHR First Vice-Chair, Commissioner Rose-Marie Belle Antoine (Saint Lucia and Trinidad and Tobago), who also serves as the Commission’s Rapporteur on the rights of persons of African descent, noted that expansions of the Castle Doctrine in recent years “could have significant implications for public safety and the justice system’s ability to hold people accountable for violent acts.”⁷⁶ Commissioner Antoine pushed back on the government’s assertions of a paucity of research relating to issues of race discrimination and SYG laws, stating that “the Petitioners have provided some important statistics [and] significant research . . . demonstrating structural patterns, which is very helpful for us.”⁷⁷ Finally, she expressed concern about the precarious situation of black women such as Marissa Alexander, discussed *infra* Section D, who are domestic violence survivors trying to assert a SYG defense:

On the issue of gender . . . there are clear disparities related to women, and particularly Afro-American women in relation to the application of SYG laws when it comes to domestic violence. For me, it appears to be very inconsistent the way the laws are applied. . . . So, even on that ground alone, it raises issues of inequality.⁷⁸

HUM. RTS. HOME BLOG (Apr. 2, 2014), http://lawprofessors.typepad.com/human_rights/2014/04/iachr-expresses-concern-over-apparent-prima-facie-discrimination-in-stand-your-ground-laws.html. See also Deena R. Hurwitz, *Part II: IACHR Expresses Concern Over Apparent Prima Facie Discrimination in Stand Your Ground Laws: “Stand Your Ground Are Not Only Bad Law, They’re Biased Law,”* HUM. RTS. HOME BLOG (Apr. 3, 2014), http://lawprofessors.typepad.com/human_rights/2014/04/part-ii-iachr-expresses-concern-over-apparent-prima-facie-discrimination-in-stand-your-ground-laws-s.html.

74. *Id.*

75. See also Hurwitz, *supra* note 73.

76. See *March 25, 2014 SYG Hearing*, *supra* note 65; see also Steven Jansen & M. Elaine Nugent-Borakove, *Expansions to the Castle Doctrine, Implications for Policy and Practice*, NAT’L DISTRICT ATTORNEYS ASS’N, available at <http://www.ndaa.org/pdf/Castle%20Doctrine.pdf>.

77. See *March 25, 2014 SYG Hearing*, *supra* note 65.

78. *Id.*

D. Case Examples

1. THE TRAYVON MARTIN CASE: "STAND YOUR GROUND" CAPTURES THE NATION

As mentioned above, the killing of Trayvon Martin marked a flashpoint for a national focus on the public safety and discriminatory implications of SYG laws. Martin, a black high school student from Miami, had traveled to Sanford, Florida to visit his father, who lived in a gated community there.⁷⁹ On February 26, 2012, while walking in the community toward his father's house after leaving a store, Martin was pursued by George Zimmerman, a 28 year-old white Hispanic neighborhood watch coordinator.⁸⁰ Believing Martin to be suspicious, Zimmerman called the police before leaving his vehicle to follow Martin.⁸¹ An altercation ensued.⁸² Though Martin was unarmed, Zimmerman discharged a gun he had concealed in his waistband, killing the teenager.⁸³ The police arrived two minutes later, took Zimmerman in for questioning, but ultimately released him the same day without charging him with a crime.⁸⁴ The police justified Zimmerman's release on the grounds that he was standing his ground in self-defense.⁸⁵ It was not until nearly six weeks later, amidst public outcry around the failure to charge Zimmerman for murder, that he was taken into custody and charged by Angela Corey, a special prosecutor named by the Governor of Florida.⁸⁶ After a long trial, in July 2013, Zimmerman was found "not guilty" for the murder of Martin, sparking major debate about the biased application of SYG laws and a call to revise the laws.⁸⁷

The Zimmerman/Martin case has come to symbolize advocates' concerns that SYG laws have shifted attitudes amongst law enforcement, jurors, and the general public about self-defense, such that the killing of another human being can be quickly justified, without rigorous inquiry

79. *Trayvon Martin Shooting Fast Facts*, CNN (Feb. 22, 2014, 1:48 PM), <http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html>.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.*; Graham Winch, *Documents, Trayvon Martin Police Report*, HLN (Mar. 22, 2012), <http://www.hlnv.com/article/2012/03/21/police-report-martin-death-details-scene-shooting> (stating that police did not arrest Zimmerman in the weeks after the attack because there was "no evidence disputing Zimmerman's self-defense claim").

86. *See Trayvon Martin Shooting Fast Facts*, *supra* note 79; *see also Dream Defenders et al., UN Shadow Report*, *supra* note 1. Note that the Stand Your Ground defense was not invoked by a pre-trial motion in the Martin case.

87. *See Trayvon Martin Shooting Fast Facts*, *supra* note 79; *see also Dream Defenders et al., UN Shadow Report*, *supra* note 1. The trial started on June 20 and ended on July 13, 2013, spanning almost three weeks.

or investigation, on self-defense grounds. While the killing of Trayvon Martin gained national attention, there are hundreds of similar cases where the SYG defense has been invoked. Because the Martin killing occurred in Florida, extensive data has been gathered on specific cases implicating the SYG law throughout the state.⁸⁸ Cases like that of Marissa Alexander and Jordan Davis, discussed *infra*, which might have otherwise been ignored by the media, garnered new attention in the aftermath of the Zimmerman verdict.⁸⁹

2. THE JORDAN DAVIS CASE: “STAND YOUR GROUND”’S IMPACT ON RACIAL MINORITIES EXPOSED

On February 3, 2014, the trial of Michael Dunn began in Jacksonville, Florida, for the killing of 17 year-old Jordan Davis in November 2012.⁹⁰ After nearly four days of deliberation, the jury reached a verdict on February 14, 2014.⁹¹ The jury found Dunn guilty of three counts of attempted second-degree murder and one count of discharging a firearm into a vehicle.⁹² However, the jury was unable to come to a verdict regarding the first-degree murder charge for the death of Jordan Davis, resulting in a mistrial on that count.⁹³

As part of his defense, Dunn claimed that he saw Jordan Davis point a shotgun at him through the car window.⁹⁴ However, no gun was found in any investigation, and none of the three witnesses ever saw the alleged gun.⁹⁵ Furthermore, Dunn’s own fiancée undermined this very claim when, on the stand, she said that Dunn never mentioned that a weapon of any kind had been pointed at him.⁹⁶

Particularly notable in this case were the racist remarks that came from the defendant himself—evidence that the prosecution failed to present at trial. While he was incarcerated pending trial, Dunn wrote a letter

88. *Tampa Bay Times Database*, *supra* note 35.

89. *Dream Defenders et al. UN Shadow Report*, *supra* note 1.

90. Lizette Alvarez, *Jury Reaches Partial Verdict in Florida Killing over Loud Music*, N.Y. TIMES, Feb. 15, 2014, http://www.nytimes.com/2014/02/16/us/florida-killing-over-loud-music.html?_r=0.

91. *Id.*

92. *Id.* (“Three other teenagers, the subjects of the attempted murder charges, were in the car [with Jordan Davis] but were not struck.”).

93. *Id.* (“Judge Russell L. Healey of Duval County declared a mistrial on the count of first-degree murder, which applied only in the death of Mr. Davis. The jury also failed to reach agreement on lesser charges that are automatically included in jury instructions. Those were second- and third-degree murder and manslaughter.”).

94. *Id.*

95. *Id.*

96. *Id.*; see also *The Loud Music Trial and Renewed Debate over Stand-Your-Ground Laws*, Diane Rehm Show (NPR Feb. 18, 2014), available at <http://thedianerehmshow.org/shows/2014-02-18/loud-music-trial-and-renewed-debate-over-stand-your-ground-laws/transcript>.

that was subsequently released by the State Attorney, excerpts of which include:

It’s spooky how racist everyone is up here and how biased towards blacks the courts are. This jail is full of blacks and they all act like thugs. . . . This may sound a bit radical but if more people would arm themselves and kill these **** idiots when they’re threatening you, eventually they may take the hint and change their behavior.⁹⁷

The racist overtones and undertones of the Davis case are undeniable. Dunn’s words highlighted the sentiments of a man who truly felt justified in taking the life of a black teenager. As described in Part II, civil rights advocates pointed to the Dunn/Davis case and the mistrial on the murder count as yet another example of discriminatory attitudes held by jurors and the general public and structural biases within the criminal justice system. SYG laws were assailed for playing a role in sanctioning and crystallizing the right of people to act on subjective fears based on racist stereotypes.⁹⁸

As in the Zimmerman case, Dunn did not explicitly invoke the SYG defense through a motion, but SYG language was nevertheless included as part of the jury instructions since it became part of the law on self-defense in the state of Florida through Section 776.013(3) of the Florida Statutes.⁹⁹ Therefore, even though Dunn’s defense counsel did not explicitly file a SYG motion, Florida’s SYG law played a part in the case for two reasons: first, the attorney cited Florida’s self-defense law and SYG explicitly in closing arguments,¹⁰⁰ and second, the language of section 776.013(3) was included in the jury instructions, allowing the jury to take into consideration Florida’s self-defense law that authorizes the use of deadly force without imposing a duty to retreat in circumstances where “a person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be.”¹⁰¹

An additional similarity between the Davis case and the cases of George Zimmerman and Marissa Alexander (described below) is that

97. Tom McKay, *The Revolting Way Michael Dunn Describes His Trial—and Black People*, POLICYMIC (Feb. 19, 2014), <http://www.policymic.com/articles/82695/the-revolting-way-michael-dunn-describes-his-trial-and-black-people>.

98. See generally D. Marvin Jones, “*He’s a Black Male. . . Something Is Wrong with Him!*” *The Role of Race in the Stand Your Ground Debate*, 68 U. MIAMI L. REV. 1025 (2014).

99. Zachary L. Weaver, *Florida’s “Stand Your Ground” Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 400–01 (2008); see also Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J. L. PUB. POL’Y 504 (2007).

100. *The Killing of Jordan Davis: Michael Dunn Faces 60 Years After Split Verdict in ‘Thug Music’ Trial*, DEMOCRACY NOW! (Feb. 17, 2014), http://www.democracynow.org/2014/2/17/the_killing_of_jordan_davis_michael.

101. FLA. STAT. § 776.013(3) (2013).

the prosecution teams were all led by Special Prosecutor Angela Corey.¹⁰² Corey, who has sent more people to death row than any prosecutor in Florida,¹⁰³ failed to secure the murder conviction of George Zimmerman or Michael Dunn, despite overwhelming evidence that their actions took the lives of unarmed teenage boys who did not pose an imminent risk to the defendants' lives. For this reason, advocates have called into question Corey's competence or willingness to prosecute cases involving the killing of young black youth.¹⁰⁴

3. THE MARISSA ALEXANDER CASE: "STAND YOUR GROUND" LAWS IN THE CONTEXT OF DOMESTIC VIOLENCE AND RACE¹⁰⁵

While the George Zimmerman and Michael Dunn trials brought the issue of SYG laws and the killings of black youth to the forefront of the American consciousness, what has received less public attention is the application of SYG laws to domestic violence cases—particularly in cases involving women belonging to vulnerable groups, such as racial or ethnic minorities and immigrant women. The Marissa Alexander case has become the emblematic SYG domestic violence case in the United States.

In May 2011, an African-American woman, Marissa Alexander, unsuccessfully tried to defend herself at trial using Florida's SYG law.¹⁰⁶ Alexander was arrested on August 1, 2010, after shooting upward into a wall during an altercation with her abusive husband, Rico Gray, against whom she had a court-issued injunction for protection.¹⁰⁷

102. Radley Balko, *Florida's Killingest Prosecutor*, WASH. POST (Mar. 13, 2014, 1:04 PM), <http://www.washingtonpost.com/news/the-watch/wp/2014/03/13/floridas-killingest-prosecutor/>.

103. *Id.*

104. Jesse L. Jackson, Sr., *Jesse Jackson: In Florida, Injustice Still Reigns Supreme*, WASH. INFORMER (Feb. 16, 2014, 11:50 PM), <http://washingtoninformer.com/news/2014/feb/16/jesse-jackson-florida-injustice-reigns-supreme/>.

105. This section was adapted, in part, from *Free Marissa Now! Talking Points*, FREE MARISSA NOW! COALITION (Aug. 6, 2013), <http://tiny.cc/fmmtalkingpoints> [hereinafter *FMN Talking Points*], and *Miami Law et al., UN Shadow Report*, *supra* note 1 at 22–23.

106. Mitch Stacy, *Marissa Alexander Gets 20 Years for Firing Warning Shot (VIDEO)*, HUFFINGTON POST (May 19, 2012, 1:07 PM), http://www.huffingtonpost.com/2012/05/19/marissa-alexander-gets-20_n_1530035.html.

107. *Id.* Certain facts of the Alexander case are contested between the prosecution and defense. For example, Alexander claims she fired a warning shot to repel an abusive husband but prosecutors claim she fired the gun to threaten Gray and could have harmed his two children, who were present in the home. *See, e.g.,* Joy-Ann Reid, *Angela Corey Lashes out at Critics of Marissa Alexander Prosecution*, THE GRIO (May 15, 2012), <http://thegrio.com/2012/05/15/angela-corey-lashes-out-at-critics-of-marissa-alexander-prosecution/#s:angela-corey-4x3-jpg>. The authors follow the defense version of the facts in this article because we believe it is far more credible and consistent with the realities of life for domestic violence survivors who need to defend themselves against their abusers.

One shot was fired, and no one was injured.¹⁰⁸ Despite the fact that Gray assaulted Alexander and threatened to kill her before she fired the gun, Alexander was denied SYG immunity and was charged with three counts of aggravated assault with a deadly weapon without intent to kill.¹⁰⁹ While the Florida statute allows an individual to defend him or herself if he or she believes it is necessary to prevent death or great bodily injury, the trial court, in a ruling that advocates criticized as a misreading of the law, required that an individual must first suffer serious bodily injury in order to defend him or herself.¹¹⁰ Because Alexander could not demonstrate that she suffered serious bodily injury at the time that she fired the shot, she was unable to claim self-defense.¹¹¹ After twelve minutes of deliberation, a jury of six people convicted Alexander of three counts of aggravated assault with a deadly weapon with no intent to harm.¹¹² Her sentence was set at twenty years due to Florida's mandatory minimum sentencing law.¹¹³

Alexander successfully appealed the verdict, and her new trial is scheduled for July 28, 2014.¹¹⁴ The Office of State Attorney Angela Corey has announced it is seeking three consecutive 20-year sentences for Alexander instead of concurrent sentences, essentially a life sentence.¹¹⁵ Alexander's legal team filed a renewed motion for a SYG immunity hearing, arguing that the evidence presented at her 2011 hearing was "at best grossly incomplete" and that the court failed to evaluate her case under the "correct legal standard."¹¹⁶

In the wake of the Alexander case, a group called the Free Marissa

108. Stacy, *supra* note 106.

109. *Id.*

110. *Id.*

111. Stephanie Brown, *Marissa Alexander Seeks "Stand Your Ground" Immunity, Sentencing Changes*, WOKV NEWSTALK (Mar. 14, 2014, 4:46 PM), <http://www.wokv.com/news/news/local/marissa-alexander-seeks-stand-your-ground-immunity/nfDCT/>.

112. *Id.*

113. *Id.*; see also *OLR Research Report: Florida's "10-20-Life" Law*, CONN. GEN. ASSEMBLY (Jan. 23, 2013), available at <http://www.cga.ct.gov/2013/rpt/2013-R-0067.htm> ("Florida's '10-20-Life' law is a law that requires courts to impose a minimum sentence of 10 years, 20 years, or 25 years to life for certain felony convictions involving the use or attempted use of a firearm or destructive device.").

114. Kevin Meerschaert, *Jury Selection, Retrial Dates Set for Marissa Alexander*, WJCT News (Apr. 2, 2014, 12:11 PM), <http://news.wjct.org/post/jury-selection-retrial-dates-set-marissa-alexander>.

115. Larry Hannan, *Marissa Alexander's Sentence Could Triple in 'Warning-Shot' Case*, FLA. TIMES UNION (March 1, 2014, 7:23 PM), <http://jacksonville.com/news/crime/2014-03-01/story/marissa-alexander-sentence-could-triple-warning-shot-case#ixzz30n7s3zGc>.

116. Defendant Marissa Alexander's Motion for a Supplemental Evidentiary Hearing on "Stand Your Ground" Immunity Pursuant to Sections 776.032(1) and 776.012(1), Florida Statutes, at 1-2, *State v. Alexander*, No. 16-2010-CF-008579-AXXX-MA (Fla. 4th Cir. Ct. Mar. 14, 2014), available at http://media.cmgdigital.com/shared/news/documents/2014/03/14/Stand_Your_Ground.pdf.

Now Mobilization Campaign emerged with the primary goal of mobilizing grassroots support to call on the State of Florida to drop all charges against Alexander and reunite her with her family. The Campaign contends that the contradictory application of the SYG law by the prosecutor in the Alexander case, as opposed to the Zimmerman and Dunn cases, reflects a deep social problem: race and gender are often determinants of “who is granted the right to defend their lives and who is constructed as an object of fear” in the United States criminal justice system.¹¹⁷ The next section explores this theme in greater detail.

III. STRUCTURAL INJUSTICE: AN UNJUST SYSTEM PRODUCE UNJUST RESULTS

As legal scholar Professor Michelle Alexander explains, “[i]t is the prosecutor, far more than any other criminal justice official, who holds the keys to the jailhouse door.”¹¹⁸ How did Angela Corey, the Florida Special Prosecutor, fail to secure a conviction against either Zimmerman or Dunn, yet initially succeed in portraying Marissa Alexander as the aggressor? The Dunn, Zimmerman, and Alexander cases, all of which invoke the “Stand Your Ground” principle but with very different outcomes, are indicative of the biases inherent in the criminal justice system that are exacerbated in the uneven application of SYG laws based on the race, age, and gender of the defendant and victim. These cases shed a glaring light on those individuals whom our system views as a threat, and those whom it views as deserving of protection.

The Free Marissa Now Mobilization Campaign put the question this way in its advocacy materials:

Who is permitted to stand their ground without fear of punishment and who isn't? President Obama addressed this very issue when he asked, if Trayvon Martin was of age and armed, could he have stood his ground on that sidewalk? Would Trayvon Martin have been considered justified in shooting George Zimmerman because he felt threatened?¹¹⁹

In the following sections, we review sites of structural discrimination and bias in the criminal justice system that exacerbate the legal and public safety conundrums posed by SYG laws.

117. *FMN Talking Points*, *supra* note 105, at 4; see also Mary Anne Franks, *Real Men Advance, Real Women Retreat: How Stand Your Ground & Battered Women's Syndrome Safeguard Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099 (2014).

118. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 86 (2010).

119. *FMN Talking Points*, *supra* note 105, at 4 (referencing *Remarks by the President on Trayvon Martin*, THE WHITE HOUSE, OFF. PRESS SECRETARY (July 19, 2013, 1:33 PM), <http://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>).

A. *Disproportionate Targeting of People of Color in the Criminal Justice System*

As many scholars have documented, longstanding structural injustice and systematic practices of exclusion founded on white supremacy in the United States—ranging from slavery to Jim Crow laws and now mass incarceration through tools like the War on Drugs—have given rise to entrenched racial discrimination and stereotyping of black individuals as inherently inferior and dangerous.¹²⁰ Contrary to the notion that racism disappeared with the defeat of Jim Crow laws and the Civil Rights Movement, scholars such as Michelle Alexander argue that the racial caste system created by overt forms of racism has been allowed to continue through a criminal justice system in the United States designed to perpetuate the status of black men as second class citizens.¹²¹

For example, the War on Drugs has become a strong contributing factor to the rise of the prison industrial complex, and the justification for the arrest, interrogation, search, and detention of hundreds of thousands of black people.¹²² In recent times, this has spread to include mass detention of immigrant populations, and particularly the Latino population, which represents 34.5% of all inmates, according to the Federal Bureau of Prisons.¹²³ According to a study by the American Civil Liberties Union (ACLU), one in fifteen blacks and one in thirty-one Latinos are incarcerated, while only one in 104 whites are incarcerated.¹²⁴

The continuing existence of a racial caste system, supported by the United States criminal justice system, is what makes SYG laws so threatening to people of color in the United States. Deeply ingrained racial biases against black males make it such that these laws, as applied, essentially sanction the use of deadly force in the name of self-defense, even if the fear is irrational and based on subjective stereotypes.¹²⁵ It is within this context that Michael Dunn and George Zimmerman, along with countless other white men, were able to claim that they felt threatened by unarmed black teenagers and had to resort to deadly force

120. See generally ALEXANDER, *supra* note 118.

121. *Id.* at 43.

122. See, e.g., *id.* at 97–103.

123. *Inmate Statistics*, FED. BUREAU OF PRISONS, <http://www.bop.gov/about/statistics/> (last updated Mar. 29, 2014); see e.g., Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 232 (2013); Aubrey Pringle, *The Winners in Immigration Control: Private Prisons*, ATLANTIC (Aug. 28, 2013, 11:08 AM), <http://www.theatlantic.com/national/archive/2013/08/the-winners-in-immigration-control-private-prisons/279128/>.

124. See [Infographic] *Combating Mass Incarceration—The Facts*, ACLU (Jun. 17, 2011), <https://www.aclu.org/combating-mass-incarceration-facts-0>.

125. For an in-depth discussion of this type of rationalized racism, see Jones, *supra* note 98.

to protect themselves. And, these same biases allowed their claims to not only be heard, but also be accepted, by a jury of their peers.

As noted above, the incarceration of people of color did not happen by chance, but rather, it is the result of legislative and policy decisions, not least important of which is the War on Drugs. Between 1980 and 2000, the American prison population ballooned from 300,000 prisoners to almost 2 million prisoners.¹²⁶ By the end of 2005, nearly 7 million Americans were under the supervision of the criminal justice system—either in prison, jail, on probation, or on parole.¹²⁷ The United States' high rate of incarceration is propelled by the disproportionate imprisonment of minorities.¹²⁸ In fact, the percentage of the black population currently incarcerated in America exceeds the percentage of the black population incarcerated in South Africa during the apartheid regime.¹²⁹ These statistics are staggering; yet, they are not surprising when one considers the targeted way in which the War on Drugs has been waged.

According to the NAACP, African Americans are sent to prison for drug offenses ten-times more frequently than whites.¹³⁰ And while African Americans only represent 12% of the total American population who use drugs, they make up 38% of the drug related arrests and 59% of the state prison population for drug offenses.¹³¹ Similarly, in 2002, blacks accounted for 46% of drug arrests in the seventy-five largest cities in America, although they only made up 15.6% of the population.¹³²

However, drug related offenses are not the only place where racial bias appears in the criminal justice system. For example, in *McCleskey v. Kemp*, a black man was sentenced to death for the murder of a white

126. There are currently over 2.2 million incarcerated Americans in jails and prisons. Lauren E. Glaze & Erinn J. Herberman, BUREAU OF JUSTICE STATISTICS, *Correctional Populations in the United States, 2012*, U.S. DEP'T OF JUSTICE (Dec. 2013), available at <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.

127. ALEXANDER, *supra* note 118, at 59.

128. Christopher Hartney, *U.S. Rates of Incarceration: A Global Perspective*, NAT'L COUNCIL ON CRIME AND DELINQUENCY 3 (Nov. 2006), available at http://www.nccdglobal.org/sites/default/files/publication_pdf/factsheet-us-incarceration.pdf ("US rates are in large part driven by disproportionate minority incarceration.").

129. ALEXANDER, *supra* note 118, at 6; see also Marc Mauer, *Addressing Racial Disparities in Incarceration*, PRISON J. (2011), <http://sentencingproject.org/doc/publications/Prison%20Journal%20-%20racial%20disparity.pdf> (stating that if current trends continue, one out of every three African American males will go to prison in their lifetime, compared to one out of every seventeen white males. The study also suggests that one out of every eighteen African American females will go to prison in their lifetime, compared to one out of every 111 white females).

130. *Criminal Justice Fact Sheet*, NAACP, www.naacp.org/pages/criminal-justice-fact-sheet (last visited May 5, 2014).

131. *Id.*

132. Jaime Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 274 (2009).

police officer.¹³³ In his defense, his counsel presented a sociological study—the “Baldus Study”—which analyzed 2,000 murder cases in Georgia.¹³⁴ The results of the study indicated that a defendant charged with the murder of a white victim was eleven times more likely to be found guilty than when charged with the murder of a black victim.¹³⁵

B. *The Criminal Justice System at the Intersection of Race and Gender*

Deep-seated gender bias further complicates the status of women of color in American society who exist at the intersection of at least two marginalized groups with respect to race and gender. As Professor Beth Richie has articulated, “Black women are subjected to a tangled web of concentrated structural disadvantages that are profoundly intense and forceful in their ability to stigmatize and create subordinate social status [Sexism] is complicated by institutional racism and the particular way that white patriarchy imparts racial hierarchy on Black bodies.”¹³⁶

Statistics demonstrate that “[b]lack women and other marginalized people are especially likely to be criminalized, prosecuted, and incarcerated while trying to navigate and survive the violence in their lives.”¹³⁷ Violence perpetrated against women and girls can put them at risk for incarceration because their survival strategies, e.g., prostitution, are routinely criminalized.¹³⁸ Eighty-five to ninety percent of women in prison have a history of violent victimization prior to their incarceration, including domestic violence and sexual violence.¹³⁹

In the context of domestic violence cases, the structural disadvantages for women of color are glaringly evident.¹⁴⁰ Black and Latina bat-

133. *McCleskey v. Kemp*, 481 U.S. 279, 283 (1987).

134. *Id.* at 286.

135. *Id.*

136. BETH RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* 110, 128 (2012).

137. *FMN Talking Points*, *supra* note 105, at 1 (citing to Mary E. Gilfus, *Women's Experiences of Abuse as a Risk Factor for Incarceration* VAW NET http://www.vawnet.org/Assoc_Files_VAWnet/AR_Incarceration.pdf); see Eric Lipton, *With Criminal Case Closed, Justice Department Will Restart Hate Crime Inquiry*, N.Y. TIMES, July 14, 2013, <http://www.nytimes.com/2013/07/15/us/justice-department-to-restart-hate-crime-investigation-in-trayvon-martins-death.html> (stating that the U.S. Commission on Civil Rights is investigating racial bias in the application of “Stand Your Ground” Laws); see also Childress, *supra* note 11.

138. Mary E. Gilfus, *Women's Experiences of Abuse as a Risk Factor for Incarceration*, NAT'L ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN 1 (Dec. 2002), http://www.vawnet.org/Assoc_Files_VAWnet/AR_Incarceration.pdf.

139. *Prison Rape Elimination Act of 2003 (PREA)*, ACLU (Apr. 29, 2011), <https://www.aclu.org/prisoners-rights-womens-rights/prison-rape-elimination-act-2003-prea>.

140. URBAN JUSTICE CENTER, *Local Implementation: New York, New York, Race Realities in New York City, Response to the Periodic Report of the United States to the United Nations*

tered women often confront a difficult choice when trying to escape their abusers. As has been highlighted, “[t]o be protected from their abusers, [battered women] are encouraged to call the cops, but for women of color this means relying on the same police department they believe holds their communities in contempt.”¹⁴¹ That is to say, given the history of police brutality and discrimination against people of color, and the general fear and mistrust of the police by minorities and immigrants, many victims are hesitant to invite police intervention into their own lives.

Data support this notion. In a study of African-American sexual assault survivors, only 17% reported the assault to the police.¹⁴² African-American women may fear that police intervention could result in the police blaming them instead of helping them; calling child services to remove their children; or citing them for other crimes. Minority women are arrested more frequently than white women when the police arrive at the scene of a domestic violence incident.¹⁴³ For African-American women, this higher likelihood of arrest may be on account of stereotypes of them as overly aggressive.¹⁴⁴ Domestic violence survivors “may also be hesitant to invite law enforcement to enter their intimate partners’ lives, for fear that their partners, who are the primary breadwinners of the family, might be mistreated by the authorities” or arrested and no longer be able to provide financially.¹⁴⁵ As a result, advocates argue, “many of the women most in need of government aid are made more vulnerable by these very interventions.”¹⁴⁶

As Professor Leigh Goodmark has explained, a result of the racial bias inherent in the United States criminal justice system is that it sometimes forces minority women to choose between seeking help from a system that stereotypes and criminalizes them, and defending them-

Committee on the Elimination of Racial Discrimination, U.S. HUM. RTS. NETWORK (2008), http://www.ushrnetwork.org/sites/ushrnetwork.org/files/26_new_york.pdf.

141. E. Assata Wright, *Not a Black and White Issue: For Battered and Abused Latinas and Black Women, Dialing 911 May Be Risky Business*, ON THE ISSUES MAG., Jan. 31, 1998, http://www.ontheissuesmagazine.com/1998winter/w98_Wright.php.

142. COMM’N ON DOMESTIC & SEXUAL VIOLENCE, *Domestic Violence Statistics*, AM. BAR ASS’N, http://www.americanbar.org/groups/domestic_violence/resources/statistics.html#african_american (last visited May 5, 2014).

143. This paragraph has been adapted from Caroline Bettinger-López et al., *Domestic Violence in the United States: A Preliminary Report prepared for Rashida Manjoo, U.N. Special Rapporteur on Violence Against Women*, ¶ 16, Apr. 18, 2011, available at http://reproductive-rights.org/sites/crr.civicaactions.net/files/newsletter/DV%20in%20the%20US_Br%20Paper%20to%20SR%20on%20VAW.pdf.

144. *Id.*

145. See *Miami Law et al. UN Shadow Report*, *supra* note 1; Wright, *supra* note 141.

146. DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE (Natalie J. Sokoloff & Christina Pratt, eds., Rutgers Univ. Press 2005).

selves from violence.¹⁴⁷ In other words, lack of confidence in the system's ability to protect them may lead women of color who are domestic violence victims to resort to fighting back and defending themselves.¹⁴⁸ But what happens when the system criminalizes women of color who stand their ground against their abusers? Marissa Alexander's case, discussed *supra* and *infra*, illustrates the perverse result.

Alexander's case not only demonstrates the racial and gender biases inherent in the United States criminal justice system, but also highlights how bad policies like mandatory minimum sentencing can impact vulnerable populations, such as women victims of domestic violence.¹⁴⁹ Alexander's case is not unique; numerous other women of color have been negatively impacted by mandatory minimum sentencing.¹⁵⁰ For example, Kemba Smith, another African-American domestic violence victim, received a nearly twenty-five year sentence after being coerced to participate in her abuser's drug activities, and was only released by a presidential pardon by President Bill Clinton in 2000.¹⁵¹ In a recent shift in government position, Attorney General Eric Holder called mandatory minimum sentencing "draconian" and the cause of "shameful" racial disparities in US prisons.¹⁵² Holder also announced that the Department of Justice plans to stop pursuing federal mandatory minimums for non-violent drug crimes,¹⁵³ an important policy change to begin to address some of the structural inequities discussed in this Article, and reverse the impact these policies have on domestic violence victims in particular.

As the Free Marissa Now Mobilization Campaign has emphasized, the judicial system should support victims of domestic violence—not exacerbate the abuse they experience. "Transformative community-based responses to violence" are particularly important, the campaign

147. Leigh Goodmark, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (NYU Press 2012); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 *YALE J. L. & FEMINISM* 75, 101 (2008).

148. *Id.*

149. See Lauren Danice Shuman, *Pulling The Trigger: Shooting down Mandatory Minimum Sentencing for Victims Who Kill Their Abuser*, 56 *HOW. L.J.* 983, 990–92 (2013).

150. *Id.*

151. *Kemba Smith*, SENTENCING PROJECT: RES. AND ADVOC. FOR REFORM, http://www.sentencingproject.org/detail/feature.cfm?feature_id=1 (last visited May 5, 2014); Nekima Levy-Pounds, *Beaten by the System and down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 *U. ST. THOMAS L.J.* 462, 469 (2006).

152. Dan Merica & Evan Perez, *Eric Holder Seeks to Cut Mandatory Minimum Drug Sentences*, CNN (Aug. 12, 2013), <http://www.cnn.com/2013/08/12/politics/holder-mandatory-minimums/index.html>.

153. *Id.* ("They now 'will be charged with offenses for which the accompanying sentences are better suited to their individual conduct, rather than excessive prison terms more appropriate for violent criminals or drug kingpins.'").

emphasizes, “especially when engaging the criminal legal system may further endanger survivors of domestic violence, as it has in the Alexander case.”¹⁵⁴

Whereas some criminal defendants, like Zimmerman and Dunn, benefit from the protections of SYG laws (or the confusion they have introduced into the criminal process through jury instructions), others, in particular minority women, do not. Discrimination on the bases of gender and race is embedded in the United States criminal justice system and Marissa Alexander’s case serves as an example of such discrimination. As the Free Marissa Now Mobilization Campaign has stated, “[s]ociety tends to see women who experience domestic violence through certain racial and gendered lenses that stereotype and punish them for making choices that others judge as wrong.”¹⁵⁵ Laws that create an environment where survivors have to “defend themselves to police, prosecutors, and judges because they don’t fit into some preconceived notion of what genuine victims do and don’t do”¹⁵⁶ are dangerous to the stability of our communities. SYG laws must be reevaluated to ensure that their application does not perpetuate racial and gender stereotypes, discrimination, and injustice.

C. *Data on Stand Your Ground Laws Highlight Structural Bias in the Criminal Justice System*

The Trayvon Martin killing in February 2012, described above, occasioned closer scrutiny of SYG laws throughout the United States, revealing uneven application of those laws due to racial bias that infects the United States criminal justice system.¹⁵⁷ 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.¹⁵⁸

Chart 1 illustrates the national disparity in courts’ determinations of whether a homicide is justifiable based on the race of the defendant and

154. *FMN Talking Points*, *supra* note 105, at 1.

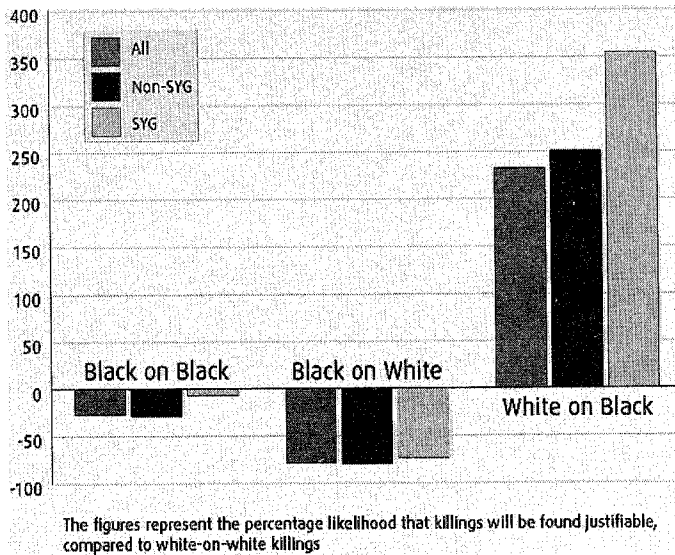
155. *Id.* at 2.

156. *Id.*

157. See, e.g., Kris Hundley et al., *Florida ‘Stand Your Ground’ Law Yields Some Shocking Outcomes Depending on How Law Is Applied*, TAMPA BAY TIMES (JUN. 1, 2012, 11:25 AM), <http://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133>.

158. *Tampa Bay Times Database*, *supra* note 35. Though the numbers are few as of the writing of this article, the data from the *Tampa Bay Times* shows three out of the seven resolved fatal cases of white accused/black victim were found justified and three such cases are still pending. *Id.* By contrast, only one of seven resolved fatal cases of black accused/white victim was found justified, and four such cases are still pending. *Id.*

the victim. The chart reflects that white-on-black homicides are 250% more likely to be found justified than white-on-white homicides in non-SYG states.¹⁵⁹ This disparity increases to 354% in SYG states.¹⁶⁰

CHART 1¹⁶¹

Moreover, the Urban Institute's Justice Policy Center conducted a study using the FBI's Supplementary Homicide Report for 2005-2009 and determined that though less than 2% of homicides are eventually ruled to have been committed in self-defense, that number contains a significant split between SYG and non-SYG states.¹⁶² The data also revealed that such laws introduce bias against black victims and in favor of white defendants. In cases where the defendant was black and the victim was white, there was little difference between SYG states and other states (1.4% versus 1.1%).¹⁶³ However, when the defendant was white and the victim was black, 16.85% of the homicides were ruled justified in SYG states and only 9.51% in non-SYG states.¹⁶⁴ The study

159. Childress, *supra* note 11.

160. *Id.*

161. *Id.*

162. John K. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data*, URBAN INST. (July 2013), <http://www.urban.org/UploadedPDF/412873-stand-your-ground.pdf>; see also Patrik Jonsson, *Racial Bias and 'Stand Your Ground' Laws: What the Data Show*, CHRISTIAN SCI. MONITOR (Aug. 6, 2013), <http://www.csmonitor.com/USA/Justice/2013/0806/Racial-bias-and-stand-your-ground-laws-what-the-data-show>.

163. Roman, *supra* note 162, at 7.

164. *Id.*

also showed that the odds that a white-on-black homicide is ruled justified is almost ten times greater than the odds a black-on-white shooting is ruled justified.¹⁶⁵ Chart 2 below illustrates this disparity.¹⁶⁶

CHART 2

	Total	Non-Stand Your Ground states	Stand Your Ground states
White on white	2.21	1.68	3.51***
White on black	11.41	9.51	16.85***
Black on white	1.20	1.13	1.40
Black on black	2.43	2.15	3.16***
Total	2.57	2.15	3.67***

Source: 2005–10 FBI Uniform Crime Statistics Supplementary Homicide Reports.

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

As discussed *supra*, the most recent deadlock in the Jordan Davis murder trial further exposed the confusion that SYG laws have introduced into the criminal process.¹⁶⁷ SYG laws' grant of immunity for the use of deadly force if in "reasonable fear" of death or great bodily harm has made it easier for people to act on the irrational belief that black men are by nature dangerous.¹⁶⁸

In a recent analysis of FBI homicide data prepared by the Urban Institute comparing SYG and non-SYG states and examining the use of SYG laws in cases involving women defendants, 13.5% of cases where a white woman killed a black man were found justified, whereas in contrast, only 2.9% of cases where a black women killed a white man were found justified.¹⁶⁹ Again, this highlights the disproportionate role that race plays in "justifiable" homicides, and how that is overlaid in cases involving women defendants. Chart 3 illustrates this disparity.¹⁷⁰

These data clearly demonstrate that until American society moves away from a general indifference to the disadvantaged social position of people of color and foregoes the "mistaken belief that racial animus is necessary for the creation and maintenance of racialized systems of social control,"¹⁷¹ an inherently unjust racist criminal justice system will continue to exist and reproduce unjust results.

165. *Id.*

166. *Id.*

167. *See, e.g., Diane Rehm Show, supra* note 96.

168. *See, e.g., Corinne McConaughy, Why We Can't See Jordan Davis and Why it Matters, WASH POST* (Feb. 17, 2014, 7:37 PM), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/02/17/why-we-cant-see-jordan-davis-and-why-it-matters/>.

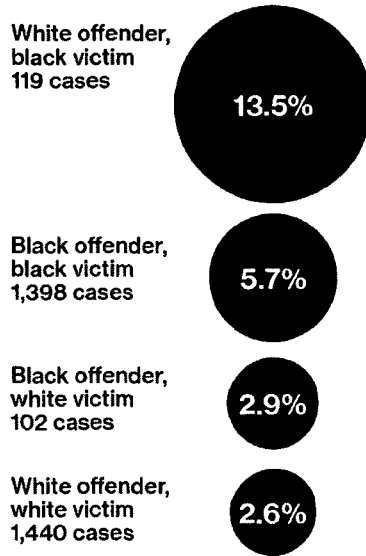
169. Irin Carmon, *Can Women Stand Their Ground? Depends on the Target*, MSNBC (Mar. 20, 2014 3:05 PM), <http://www.msnbc.com/msnbc/can-women-stand-their-ground> (citing unpublished Urban Institute study).

170. *Id.*

171. ALEXANDER, *supra* note 118, at 178.

CHART 3

When a female killer is found justified



Of 3,059 homicide cases that were ruled justified, 2005 to 2010.
Source: Urban Institute



IV. RIGHTS VIOLATED BY STAND YOUR GROUND LAWS¹⁷²

Having reviewed the law, history, policy, and social science dynamics of SYG laws, we will now examine the international human rights implications of SYG laws and the obligations of the State to protect those who may be harmed in the application of these laws.¹⁷³

172. The analysis in this section has been adapted and modestly modified from Briefing Paper for Thematic Hearing, Stand Your Ground Laws and Their Impact on Minority Communities in the United States, Inter-Am. Comm’n H.R. (March 25, 2014) and, with permission, from Petitioners’ Brief on the Final Observations Regarding the Merits of the Case, *Gonzales v. United States*, Case 12.626, Inter-Am. Comm’n H.R. (2008). Copies of both documents are on file with the authors and available on request.

173. This article focuses on an international human rights analysis of SYG laws, and does not review the many critiques of SYG laws under domestic law, which tend to focus on the broad discretion given by Florida’s SYG law to police, prosecutors, and judges, and a legal framework that justifies the failure to arrest, failure to prosecute, and dismissal of a case. For critiques based in domestic law and policy, see Philip J. Cook, *Why Stand Your Ground Laws Are Dangerous*, SCHOLARS STRATEGY NETWORK (Aug. 2013), http://www.scholarsstrategynetwork.org/sites/default/files/ssn_basic_facts_cook_on_stand_your_ground_laws.pdf; Tamara Rice Lave, *Shoot to*

The Universal Declaration of Human Rights (UDHR), adopted unanimously by the General Assembly of the United Nations in 1948, was founded on the principle that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”¹⁷⁴ The amalgam of international human rights treaties grew out of this basic principle of dignity, to ensure respect of the human rights of all without distinction. It is thus a helpful framework through which to analyze the harmfulness of SYG laws to the rights to life, equal protection/non-discrimination, due process and access to the courts, and the rights to family unity and the best interests of the child.¹⁷⁵

A. *The Right to Life*

The importance of the right to life is reflected by its incorporation in every major international human rights instrument.¹⁷⁶ Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹⁷⁷ The Committee’s General Comment 6 describes the right to life as a “supreme right,” and explicitly states that “[t]he protection against arbitrary deprivation of life . . . is of paramount importance,” and imposes an obligation on State parties to “take measures . . . to prevent and punish deprivation of life by criminal acts.”¹⁷⁸

The Inter-American system, like the United Nations, considers the right to life to be the most fundamental right. The American Declaration on the Rights and Duties of Man, a foundational document in the Inter-American human rights system, provides that “[e]very human being has

Kill: A Critical Look at Stand Your Ground Laws, 67 U. MIAMI L. REV. 827 (2013); Franks, *supra* note 117.

174. Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/810, art. 8 (Dec. 10, 1948).

175. Note that the right to freedom of movement may also be implicated by SYG laws—an issue the authors intend to explore in greater detail in future scholarship.

176. Universal Declaration of Human Rights, *supra* note 174, at art. 3; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], art. 6; African Banjul Charter on Human and Peoples’ Rights, art. 4, Jun. 27, 1981, 21 I.L.M. 58 (1982); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, (entered into force July 18, 1978), art. 4; Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, art. I, O.A.S. Doc. OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948) [hereinafter *American Declaration*], art. I; European Convention for the Protection of Human Rights and Fundamental Freedoms, (entered into force Sept. 3, 1953), art. 2.

177. ICCPR, *supra* note 176, at art. 6(1).

178. HUM. RTS. COMM., General Comment No. 6, U.N. Doc. HR1/GEN/1/Rev.1 (1994) ¶ 1.

the right to life, liberty and the security of his person."¹⁷⁹ The Inter-American Commission on Human Rights (IACHR), one of the two organs of the Inter-American system responsible for protecting human rights in the Western Hemisphere, has defined the right to life to include "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."¹⁸⁰ The Commission has found the right to life to be "the supreme right of the human being, respect for which the enjoyment of all other rights depends."¹⁸¹ Furthermore, the Inter-American Commission and Court of Human Rights have underscored that States must protect the right to life from violation by both State and private actors.¹⁸²

SYG laws violate the right to life because they effectively permit, condone, and even encourage the use of deadly force without imposing a duty to retreat when safely possible. As discussed in Section I.B., SYG laws correlate with an *increase* in the number of homicides as compared to states without SYG laws. These homicides are strongly linked to the provision of immunity without proper investigation of the use of force.¹⁸³ This stands in direct contravention of fundamental right to life obligations contained in every major human rights treaty and instrument.

The failure to impose a duty to retreat when safely possible effectively permits private actors to commit violence on the basis of subjective fears (or use SYG to justify their acts of violence under a claim of self-defense), even when another avenue to defuse the conflict, short of force or deadly force, may exist. This leads to the needless loss of life when an individual chooses to unnecessarily use deadly force. Further-

179. *American Declaration*, *supra* note 176, at art. I.

180. *Haitian Centre for Human Rights v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 170 (1997), available at <http://www.cidh.oas.org/annualrep/96eng/USA10675.htm>.

181. *Gary T. Graham (Shaka Sankofa) v. United States*, Case 11.193, Inter-Am. Comm'n H.R., Report No. 97/03, OEA/Ser.L./V/II.114, doc.70 rev. ¶ 26 (2003), available at <http://www.cidh.oas.org/annualrep/2003eng/USA.11193>.

182. *Velásquez Rodríguez v. Honduras*, Merits Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (Jul. 29, 1988), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf; see also *Osman v. United Kingdom*, 1999-VIII Eur. Ct. H.R. 115 (1998); *Z and Others v. United Kingdom*, Eur. Ct. H.R.(2001); *Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶¶ 124-25 (Jul. 4, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf; *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 120 (Jan. 31, 2006), available at http://www.corteidh.or.cr/doccc/casos/articulos/seriec_140_ing.pdf; *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134 ¶232 (Sep. 15, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_esp.pdf; *Humberto Sánchez v. Honduras*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 102, (Nov. 26, 2003), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_102_ing.pdf.

183. See *Cheng & Hoekstra*, *supra* note 10, at 27.

more, the provision of immunity from prosecution for even those who may act impulsively creates an environment in which individuals, particularly youth of color, fear for their personal security.¹⁸⁴ This can have implications on an individual's quality of life and freedom of movement, which may be restricted as spaces are racialized and claimed by privilege, as when George Zimmerman targeted Trayvon Martin for walking in a predominantly white neighborhood.¹⁸⁵

Conversely, in Alexander's case, the judicial system did not apply SYG to support the right to self-defense for a survivor of domestic violence whose life was threatened in her own home.¹⁸⁶ The judge's ruling asserted that Alexander's action to go to another part of her home (her garage) to retrieve her legally owned and licensed firearm to defend herself demonstrated that she did not feel "genuine fear," and therefore SYG did not apply in her case.¹⁸⁷ Alexander, who had a history of being beaten by Gray, and who asserts she was strangled and threatened before she fired her warning shot, was not perceived as experiencing fear because she "stood her ground" in her own home.¹⁸⁸ As noted previously in the discussion of the Marissa Alexander case¹⁸⁹ and in analyses of recent statistics that highlight the disparity in the frequency with which black versus white women are found justified in the use of lethal force,¹⁹⁰ the right to life appears all-too-often to be selectively granted, depending on a defendant's race and gender.

B. *The Right to Equality and Non-Discrimination*

The right to be free from discrimination on the basis of race, sex, and other grounds is contained in nearly every significant international human rights treaty and instrument.¹⁹¹ Article 26 of the International

184. See e.g., *Sullivan Testimony*, *supra* note 47.

185. See *Trayvon Martin Shooting Fast Facts*, *supra* note 79.

186. See Stacy, *supra* note 106.

187. *Id.*

188. *Id.*

189. See *supra* Part I.D.iii.

190. See *supra* Part II.C.

191. See American Convention on Human Rights, *supra* note 176, at arts. 1(1), 2, 19, and 24; American Declaration, *supra* note 176, at art. II; Universal Declaration of Human Rights, *supra* note 174, at arts. 1, 2, and 7; ICCPR, *supra* note 176, at arts. 2-3, 24, and 26; International Covenant on Economic, Social and Cultural Rights, art. 2-3, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 8 (entered into force on Jan. 3, 1976); Convention on the Elimination of All Forms of Discrimination against Women, arts. 2-3, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará", arts. 4, 6, *opened for signature* June 6, 1994, 33 I.L.M. 1534 (entered into force Mar. 5, 1995); and European Convention on Human Rights, art. 14; Charter of the Organization of American States art. 3(L), *opened for signature* Apr. 30, 1948, 2 U.S.T. 2394 (entered into force Dec. 13, 1951) ("the

Covenant on Civil and Political Rights (“ICCPR”) states that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”¹⁹² Similarly, the American Declaration provides that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed . . . or any other factor.”¹⁹³ More specifically, Article 2 of the Convention on the Elimination of all Forms of Racial Discrimination (“CERD”) declares that “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. . . .”¹⁹⁴

Any measure adopted by a State that intentionally disadvantages an individual or group on grounds of race, sex, or other enumerated grounds, or that has a negative disparate impact on such a group, constitutes impermissible discrimination under international human rights law.¹⁹⁵ Importantly, the Inter-American Commission has found, “the right to equality before the law means not that the substantive protections of the law will be the same for everyone, but that the application of the law should be equal for all persons without prejudice or discrimination.”¹⁹⁶ Similarly, the Human Rights Committee has noted that “the term ‘discrimination’ as used in the [ICCPR] should be understood to imply any distinction, exclusion, restriction or preference . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”¹⁹⁷

Furthermore, human rights bodies have considered the unique character of “intersectional” discrimination—including discrimination against women of color—and the ways in which such discrimination differs from discrimination on compartmentalized enumerated grounds.¹⁹⁸ In 2011, the Inter-American Commission on Human Rights

American States proclaim the fundamental rights of the individual without distinction as to . . . sex”).

192. ICCPR, *supra* note 176, at art. 26.

193. *American Declaration*, *supra* note 176, at art. II.

194. International Convention on the Elimination of All Form of Racial Discrimination, G.A. Res. 2106 (XX), Annex 20, art 2, U.N. Doc. A/6014 (1966), entered into force Jan. 4, 1969.

195. *Yean & Bosico Children v. Dominican Republic*, Judgment, Inter-Am Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_20ing.pdf.

196. *Andrews v. United States*, Case 11.139, Inter-Am. Comm’n H.R., Report No. 57/96, OEA/Ser.L/V/II.98, doc. 6 rev., ¶ 173 (1997).

197. U.N. Secretary-General, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment 18, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

198. The CERD Committee, for example, has “recognize[ed] that some forms of racial

noted, in a case involving domestic and gun violence, that “certain groups of women face discrimination on the basis of more than one factor during their lifetime, based on their young age, race and ethnic origin, among others, which increases their exposure to acts of violence.”¹⁹⁹

In the CERD Committee’s 2008 Concluding Observations concerning the United States’ compliance with the treaty,²⁰⁰ the Committee reiterated its concern “that the definition of racial discrimination used in the federal and state legislation and in court practice is not always in line with that contained in . . . the Convention, which requires States parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.”²⁰¹ Furthermore, since 1993, the CERD Committee has explicitly recognized the importance of ensuring that law enforcement officials, particularly those with the powers of detention or arrest, “receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, colour or national or ethnic origin.”²⁰²

As described above, the data that has been collected regarding SYG laws indicates that these laws have a significant negative disparate impact on people of color, especially black youth and women of color. According to an analysis done by the *Tampa Bay Times* of nearly 200 SYG cases, “people who killed a black person walked free 73% of the time, while those who killed a white person went free 59% of the time.”²⁰³ In addition, as discussed above, in a more recent study done by the Urban Institute, white women who kill black men were found justi-

discrimination have a unique and specific impact on women.” Committee on the Elimination of Racial Discrimination, General Recommendation 25, Gender Related Dimensions of Racial Discrimination (2000) ¶ 3. Additionally, the Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 194, at art. 9, directs “States Parties [to] take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons.”

199. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 ¶ 113 (2011) [hereinafter *Lenahan*].

200. “Concluding Observations: United States of America,” UN Doc. CERD/C/USA/CO/6, Mar. 5, 2008.

201. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶10, U.N. Doc. CERD/C/USA/CO/6 (Feb. 18-Mar. 7, 2008).

202. Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, General Recommendation 13, ¶ 2, U.N. Doc. A/48/18 (Sept. 15, 1993).

203. Susan Taylor et al., *Race Plays Complex Role in Florida’s ‘Stand Your Ground’ Law*, TAMPA BAY TIMES (June 2, 2012 1:00 PM), <http://www.tampabay.com/news/courts/criminal/race-plays-complex-role-in-floridas-stand-your-ground-law/1233152>.

fied in 13.5% of cases, whereas only 2.6% of white women who kill white men, and 5.7% of black women who kill black men, were found justified.²⁰⁴ Upon analyzing this data, John Roman, senior fellow at the Urban Institute, noted: "In any situation where a black male is perceived as being the aggressor, you are much more likely to have the homicide considered justifiable. If they're involved in a homicide, the finding is likely going to go against them."²⁰⁵ Under International law, in contrast racially disparate outcomes of a facially neutral law that are the product of private action (i.e. when white men feel encouraged to attack black male youths because they believe the law is more lenient) violate human rights.²⁰⁶

One law enforcement officer recently commented during a public hearing on SYG laws that there is no evidence to suggest that law enforcement agencies and officers in Florida have been provided the necessary training to ensure that their application of SYG laws is not discriminatory.²⁰⁷ Regardless, even if law enforcement officials were adequately trained to ensure a non-discriminatory application of SYG laws, this might still be insufficient to cure the inherent biases that SYG laws allow into the criminal process through the broad discretion granted to prosecutors and judges.²⁰⁸ Thus there are significant concerns that SYG laws cannot comport with international standards of equality and non-discrimination and are in clear violation of these rights.

C. *The Right to Due Process and Access to the Courts*

Victims of human rights violations have the right to an effective remedy and reparations under every major human rights instrument.²⁰⁹ The CERD Committee's General Recommendation XXXI, on the prevention of racial discrimination in the functioning of the criminal justice system, emphasizes that:

States parties are obliged to guarantee the right of every person

204. See Carmon, *supra* note 169.

205. *Id.*

206. See, e.g., Yean & Bosico Children, *supra* note 195.

207. Testimony of Cmdr. Ervens Ford, American Bar Association National Task Force on Stand Your Ground Laws Southeast Regional Hearing (Oct. 17, 2013), on file with authors.

208. See, e.g., Lawson, *supra* note 29 (providing an analysis of the problems with prosecutorial discretion in SYG cases).

209. *American Declaration*, *supra* note 176, at art. XVIII; Universal Declaration of Human Rights, *supra* note 174, at art. 8; ICCPR, *supra* note 176, at art. 2(3); International Convention on the Elimination of All Forms of Racial Discrimination art. 6, *open for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); U.N. Human Rights Committee, *Gen. Cmt. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, para. 15, 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (states have obligations to provide victims access to "effective remedies to vindicate those rights").

within their jurisdiction to an effective remedy against the perpetrators of acts of racial discrimination, without discrimination of any kind, whether such acts are committed by private individuals or State officials, as well as the right to seek just and adequate reparation for the damage suffered.²¹⁰

This broad reaching General Recommendation outlines the steps that States must take in order to safeguard against racial discrimination in the criminal justice system.²¹¹ These include: (1) providing access to the law and justice; (2) reporting of incidents to the authorities competent for receiving complaints; (3) initiation of judicial proceedings; and (4) functioning of the system of justice.²¹²

Additionally, international human rights law broadly recognizes that all individuals have the right to a fair legal process.²¹³ Both the Inter-American Commission and Court have repeatedly determined that a tribunal should be available to all persons who allege violations of their fundamental rights and that the tribunal in question be one capable of granting a remedy that effectively and adequately addresses the infringement of the right alleged.²¹⁴ Importantly, the right to a remedy requires that a State do more than simply ensure that the door of the courthouse is open to aggrieved individuals. Rather, it must also ensure that available remedies are “effective” in affording the individual whose rights have been violated adequate redress for the harm suffered.²¹⁵

Accordingly, these core provisions of international law should be understood to include not only the right to a thorough judicial consideration of the merits of a case that alleges the violation of fundamental human rights, but also the right to receive an adequate and prompt investigation of a complaint by the police.

210. U.N. Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, 66th Session/67th Session, at 102, sec. II, para. 6, U.N. Doc. A/60/18 (2005).

211. *Id.* at sec. II.

212. *Id.*

213. See, e.g., *American Declaration*, *supra* note 176, at arts. XVIII, XXIV; *American Convention on Human Rights*, *supra* note 176, at arts. 8, 25.

214. See, e.g., *Velásquez Rodríguez v. Honduras*, Case, Inter-Am. Ct. H.R., OAS/ser. L./V./III.19, doc. 13 ¶ 64 (1988).; see also Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 334 (Oct. 22, 2002).

215. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 66, ¶ 22 (Feb. 1, 2000); *Constitutional Court v. Peru, Merits, Reparations, and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶ 89 (Jan. 31, 2001); *Bronstein v. Peru*, (ser. C) No. 74, Inter-Am. Ct. H.R. ¶¶ 136-137 (Feb. 6, 2001); *Gustavo Carranza v. Argentina*, Case 10.087, Inter-Am. Comm'n H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev. ¶ 72 (1997); *Judicial Guarantees in States of Emergency (Arts. 27(2) 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987). See also, *Velásquez Rodríguez*, Inter-Am. Ct. H.R., OAS/ser. L./V./ III.19, doc. 13 ¶ 64.

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power reaffirms the importance of providing both "[j]udicial and administrative mechanisms" to "enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive, and accessible."²¹⁶ Such procedures should include law enforcement investigations and judicial considerations that "[a]llow[] the views and concerns of victims to be presented and considered,"²¹⁷ "[i]nform[] victims of their role and the scope, timing, and progress of the proceedings and the disposition of their cases,"²¹⁸ "[p]rovid[e] proper assistance to [victims] . . . ,"²¹⁹ "[t]ak[e] measures to . . . ensure [victims'] safety, as well as that of their families,"²²⁰ and "[a]void[] unnecessary delay."²²¹

In the Marissa Alexander case, despite the fact that Alexander is a defendant in a criminal case, she is also a victim of gender violence. As explained above, Alexander has been repeatedly denied her right to an expeditious and fair trial and has been characterized as the perpetrator of violence when in fact, she was defending herself against her notoriously abusive husband. Thus, pursuant to the UN Basic Principles described above, Marissa Alexander is the victim of a failed judicial system.

The right to an effective remedy, as outlined above, is undermined by the blanket immunity provided by SYG laws. As discussed at length in Section I, the grant of immunity risks encouraging defendants to invoke SYG as a means to avoid liability for using deadly force.²²² Florida's SYG law defines "criminal prosecution" for the purposes of immunity to include arrest and detention, which essentially gives law enforcement the discretion to determine whether the force used was in self-defense, even before the matter comes before a prosecutor or a judge.²²³ Even in those cases in which a SYG motion is filed, a hearing on the motion is not sufficient process to ensure that the victims' access to a remedy is not prematurely curtailed.²²⁴

Additionally, laws granting immunity to government actors and their civilian counterparts violate international human rights law because they deny victims the opportunity to litigate before a court and deny

216. United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶ 5, U.N. Doc. A/RES/40/53 (Nov. 29, 1985).

217. *Id.* at ¶ 6(b).

218. *Id.* at ¶ 6(a).

219. *Id.* at ¶ 6(c).

220. *Id.* at ¶ 6(d).

221. *Id.* at ¶ 6(e).

222. *See supra* Part I.A.

223. *Id.*; FLA. STAT. § 776.032(1) (2013).

224. *See Lawson, supra* note 29.

them the right to judicial protection.²²⁵ This is also true of laws that do not explicitly confer immunity, but effectively preclude victims' access to a court.²²⁶ Thus, the State contravenes international human rights law guarantees regarding an adequate and effective remedy, access to the courts, and due process of law when SYG laws are used to claim immunity.

D. *The Right to Family Life and Special Protections for Children*

The right to family life is embodied in a significant number of human rights treaties.²²⁷ For example, Article 23(1) of the ICCPR recognizes that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State" and the Convention on the Rights of the Child establishes that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family [or] home," and that "[t]he child has the right to the protection of the law against such interference or attacks."²²⁸

The Inter-American Commission has found that the right to establish and receive protection for the family "is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances."²²⁹ In addition, the Commission has found that individuals have a right to protection in their private and family lives from harmful acts by both public and private actors.²³⁰

In addition to the protections afforded to the family unit, special protections are guaranteed to children. As stated in the Convention on the Rights of the Child, "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being."²³¹

225. Report on the Situation of Human Rights in El Salvador, Inter-Am. Comm'n H.R., OEA/Ser.L/II.85, doc. 28(1994); *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. ¶ 42 (ser. C) No. 75 (Mar. 14, 2001).

226. *Cantos v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 97, ¶ 54 (Nov. 28 2002) (referring to filing fees as barring access to the courts).

227. ICCPR, *supra* note 176, at art. 23(1); International Covenant on Economic, Social and Cultural Rights, *supra* note 191, at art. 10(1); Convention on the Rights of the Child, art. 16, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (hereinafter "CRC"); Universal Declaration of Human Rights, *supra* note 174, at art. 16(3); European Convention on Human Rights, *supra* note 191, at art. 8(1); *American Declaration*, *supra* note 176, at art. V.

228. See CRC, *supra* note 227, at arts. 6(1), 16(1) & 16(2); *American Declaration*, *supra* note 176, at arts. V-VI.

229. *Ms. X v. Argentina*, Case 10.506, Inter-Am. Comm'n H.R., Report No. 38/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 96 (1996).

230. *Id.* In *Oscar Elías Biscet et. al. v. Cuba*, the Commission found that the State must "take steps to effectively ensure the right to maintain and cultivate family relationships." Case 12.476, Inter-Am. Comm'n H.R., Report No. 67/06, ¶ 237 (2006).

231. CRC, *supra* note 227, at art. 3(2); *American Declaration*, *supra* note 176, at art. VII.

When black teenagers are shot and killed because of a law that promotes violence and rescinds the duty to retreat, children and families are harmed. The parents and families of Trayvon Martin and Jordan Davis have been deprived of their children and relatives, and Martin and Davis themselves were deprived of the special protection to which they were entitled. Ronald Davis lamented the devastating effect of SYG laws on his family at the Thematic-Hearing on SYG laws before the Inter-American Commission: "My son is Jordan Davis and he was not given his human rights. SYG [laws] all over this country [are] trumping human rights. They take into account the fears and biases of other people—what they have in their mind—never mind that your child or loved one was unarmed."²³²

Sybrina Fulton was exceptionally eloquent about the consequences of her son Trayvon's death on her and her family:

[I]t's very difficult as a parent to relate to a law that gives a person with a gun so much authority. . . . But when a seventeen-year-old child, minor, is in a gated community simply walking from the store with no weapon, only a drink and candy, that poses a problem for me as a mother—and should pose a problem for other mothers and fathers as well. Because what it's saying to us is that: we have no clue what to tell our teenagers now. I mean, how many of our teenagers walk home from the store, from the park, from the school, and have to worry now about someone perceiving them to be a criminal. How many parents now are concerned about their minors just making it home . . . from point A to point B. And so, I stand and hopefully I'm the voice of many of those concerned parents that says "[t]his has to stop!" This gun violence has to stop. This method of "let's shoot first and ask questions later" has to stop. Because our teenagers have no clue what to do. They're afraid to walk in their own communities because they're afraid of someone perceiving them as being a criminal or doing something wrong when they're not. So that's just something that we definitely need to think about. . . . Use our families' tragedies as examples to say: there has to be a better way. There has to be a better law. We have to clean this thing up. And I feel it started here in Florida and it should end here in Florida. Because our teenagers are afraid.²³³

When a legal regime, such as that of SYG laws, promotes or condones violence that is disproportionately targeted at youth, and more

232. See Testimony of Ronald Davis, *Impact of "Stand Your Ground" on Minority Communities in the U.S.*, Inter-American Commission on Human Rights (Mar. 25, 2014), available at: http://www.indybay.org/uploads/2014/03/27/testimony_stand_your_ground.pdf.

233. See *March 25, 2014 SYG Hearing*, *supra* note 65; see also Testimony of Sybrina Fulton, *Impact of "Stand Your Ground" on Minority Communities in the U.S.*, Inter-American Commission on Human Rights (Mar. 25, 2014), on file with authors.

specifically black youth, the resulting deaths exemplify a failure to protect children and a destruction of families. The Martin and Davis cases are perhaps the most notable examples of this devastating result.

Traditionally, laws must provide heightened protection to promote the best interest of the child; however, SYG laws do precisely the opposite. They condone and incentivize violence, result in the murder of black youth, and destroy the family unit. Although these crimes were perpetrated by private actors, they are directly related to problematic legislation, and thus, are attributable to the state.

V. CHALLENGES POSED BY FEDERALISM

A full discussion of the potential problems posed by federalism in the United States is outside of the scope of this paper; however, advocates seeking to use the human rights framework to challenge unfair state laws must confront these problems in order to come up with implementable solutions. Federalism has long been used to marginalize human rights discourse in the United States.²³⁴ The federalism problem arises from the tension between the authority of the federal government to bind the United States under its foreign affairs power and the potential infringement an assertion of this power can have on the autonomy of states under the Tenth Amendment to exert authority in all domains outside of the federal government's enumerated powers. This tension has caused the United States to either refrain from signing and ratifying many human rights treaties, or, for those treaties that the United States has signed and ratified, it has put forward a slew of accompanying reservations, understandings and declarations that essentially gut the treaty of its power to hold the United States accountable to the obligations that should come with ratification.²³⁵

It is important to note the relevance of federalism to SYG laws. Advocates challenging SYG laws promulgated by individual states before human rights fora risk coming up against a federal government that may try to abdicate its responsibility to protect rights under treaties like the ICCPR by pointing a finger at the states whose laws the federal government is powerless to change. It is critically important, however, to come up with recommendations that challenge the federalism problem to avoid such a response from the federal government.

234. See Johanna Kalb, *The Persistence Of Dualism in Human Rights Treaty Implementation*, 30 *YALE L. & POL'Y REV.* 71, 84–85 (2011).

235. See generally David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 *UC IRVINE L. REV.* 95, 98 (2013); Risa Kaufman, "By Some Other Means": *Considering the Executive's Role in Subnational Human Rights Compliance*, 33 *CARDOZO L. REV.* 1971 (2012).

The federal government has numerous tools it can employ to rectify some of the issues that arise from SYG laws. For example, the federal government has the power to enact common sense gun control laws that increase the criteria for background checks and ban certain types of arms and ammunition. These measures promote safety generally by lowering the probability that extremely dangerous individuals will be armed or that extremely dangerous weapons will be available for public consumption on the streets. Thus even if SYG laws are allowed to remain in existence, reducing potentially dangerous individuals' access to weapons (and certain types of particularly dangerous weapons like assault rifles and extended ammunition clips) could help reduce the public safety issues SYG pose by effectively granting individuals a license to "shoot first" without imposing a duty to retreat before resorting to deadly force.

Another solution could include conditioning federal funding to local law enforcement and other such programs on the inclusion of certain minimum protections within states' self-defense laws (i.e., the elimination of SYG provisions), as was done in the case of *South Dakota v. Dole*,²³⁶ to bring states' legal drinking ages in conformity with federal policy. Furthermore, the federal government plays a key role in fixing the structural inequities within the criminal justice system, including mandatory minimum sentencing.²³⁷ In addition, it should deal with problems like racial or gender stereotyping, by, for example, having the Department of Justice's Office for Victims of Crime (OVC) or Community Oriented Policing Services (COPS) program offer training to law enforcement about racial and gender sensitivity in policing. Guidelines for prosecutors on the inclusion of expert testimony on racial or gender stereotyping can also be helpful in this regard. The federal government can similarly revise policies like those that undergird the War on Drugs and send thousands of people of color to prison every year. Human rights advocates need to press on these kinds of solutions at the federal level to hold the federal government accountable to its obligations under international human rights treaties and norms.

VI. CONCLUSION

Stand Your Ground laws are dangerous. They give individuals the right to shoot-to-kill based on subjective perceptions of fear, and avoid facing any consequences. Instead of promoting more conciliatory means

236. 483 U.S. 203 (1987). However, as the Supreme Court recently held in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), congressional conditions on federal funding may not take the form of threats to terminate existing federal funding, and states must have a genuine choice about whether to accept the new federal funding.

237. See *supra* Part II for a discussion in the structural inequalities of the criminal justice system.

of addressing conflict, SYG laws perpetuate violence and encourage the use of deadly force without regard to principles of necessity and proportionality, particularly by eliminating the duty to retreat when safely possible. As United Nations Human Rights Committee Member Walter Kälin said, these laws are “incompatible” with fundamental human rights.²³⁸

Recent cases and data have also shown that SYG laws are applied in a biased manner on the basis of race and gender. The unjust results in the Martin, Dunn, and Alexander cases that have captured nationwide attention have provided us with an opportunity to take a deeper look at the inequities built into our criminal justice system. American society must confront the legal and social fiction that we live in a colorblind society and must recognize that racial bias has been systematically built into the American justice system in a way that has had devastating impacts on the black population in the United States.²³⁹ SYG laws expose and exacerbate this dynamic, and so long as they continue to be on the books, the United States will not be able to fulfill its obligations to protect against violations of human rights as fundamental as the rights to life, equal protection/non-discrimination, due process and access to courts (including the right to an effective remedy), family life, and the best interests of the child.

International human rights bodies are the latest entities to shine a light on the inequities and fundamental rights violations spurred by SYG laws. Human rights advocates should capitalize upon this surge of international interest to push for solutions at all levels of government—local, state, and federal—to address the serious human rights implications of these laws, and to bring the United States into compliance with international human rights standards in the SYG and criminal justice arenas.

238. *Review of the United States Video*, *supra* note 59.

239. *See generally* ALEXANDER, *supra* note 118.