Texas’ Stand Your Ground Law:
An Historical Perspective

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Abstract: In the aftermath of the Treyvon Martin shooting in Florida, Stand Your Ground laws have acquired an unsavory reputation. These laws and their close cousin, castle doctrine, have an interesting history, especially with respect to protecting victims of domestic violence. Texas’ Stand Your Ground law differs substantially from that of Florida, with much greater restraints on use of deadly force.

I. The Renaissance Origins of Stand Your Ground Laws

It might not be obvious at first glance, but Stand Your Ground laws (SYG) and castle doctrine have a common root in medieval English law. Both have experienced significant change in the last 150 years, and for reasons that might surprise and even please many opponents of SYG. Their common origin is in a 1532 Parliamentary statute. While this paper is primarily about the development of SYG, understanding castle doctrine is necessary to see how and why SYG developed.

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II.Castle Doctrine

Castle doctrine is no longer a terribly controversial idea. Castle doctrine holds that if a non-resident forces entry into your home (and in some states, vehicle, or business), there is a presumption that this person intends you or others death or great bodily harm. Of course, this is also the standard normally required to justify use of deadly force outside of your home: threat of death or great bodily harm. (“Great bodily injury,” is the phrase used in some state laws.)

Theoretically, a user of deadly force in a castle doctrine state can still be successfully prosecuted if the prosecutor can prove that the killer knew that the intruder had no intention of death or great bodily harm. There are doubtless some cases in castle doctrine states where such prosecutions have gone forward, perhaps even to conviction. In practice, proving that someone knew the intruder had no such intention is hard to do.

Without castle doctrine, you can end up with some pretty strange results. My late stepmother-in-law lived in the Philippines after World War II, and tells me that a neighbor shot an intruder. Because the Philippines had no castle doctrine, the neighbor had the burden of proof that the intruder intended him harm, and wasn’t just taking a short cut through his house.

What provokes state legislatures to enact castle doctrine statutes? California passed the Home Protection Bill of Rights in 1984, what is now Cal. Penal Code sec. 198.5. This is a castle doctrine law that creates a rebuttable presumption in favor of someone who uses deadly force against a stranger who forces entry.2 This passed a Democratically-controlled legislature, and by huge majorities in both houses. Even in 1984, California’s legislature would not be mistaken for NRA puppets, or even neutral on gun ownership. They were, and remain, fiercely hostile to guns.

2 Cal. Penal Code § 198.5 (“Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred. As used in this section, great bodily injury means a significant or substantial physical injury.”)
My recollection of newspaper coverage of the time is that the Los Angeles County District Attorney prosecuted a woman who killed a stranger who forced entry into her home, and according to a phone conversation that I had with the author of the bill April 15, 2012, now retired State Senator H.L. Richardson, this was not the only such case that had come to the attention of the California legislature. The absurdity of these prosecutions provoked swift, nearly unanimous passage.

There are a few exceptions to castle doctrine, especially around the question of whether this intruder is a resident or not. Generally, if the intruder has an equal right to be there, such as a roommate, or if they were invited into the residence, castle doctrine does not apply. You may still be able to use deadly force, but you need evidence of the death or great bodily harm intent; there is no presumption in your favor. Oddly enough, domestic violence has created some exceptions as well, with many state courts over the years recognizing that domestic violence may justify use of deadly force against a person who has an equal right to be there. These exceptions have a rather interesting connection to the “duty to retreat” obligation that SYG laws effectively defeat.

III. Stand Your Ground Laws

Stand your ground laws are still about the use of force, including deadly force. Unlike castle doctrine, SYG laws apply outside your home (or your vehicle, or business, depending on the state). You are authorized to use force, without any duty to retreat:

- If you have a legal right to be where this confrontation starts.
- If you did not provoke the fight (and the definition of this varies from state to state).
- If the aggressor does not clearly break off the confrontation (and again, the definition varies from state to state).

In a much more narrowly defined set of circumstances, you are allowed to use deadly force, again without any duty to retreat. These laws remain controversial. At least 23 states have passed Stand Your Ground statutes (Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania,
IV. Conflating These Terms

I mentioned that castle doctrine and stand your ground laws are closely related—sometimes, so hopelessly intermingled that I have a hard time seeing them as completely separate. Worse, some of these laws are mislabeled. As an example, what is commonly referred to as Florida’s SYG law, which post-Trayvon Martin, is easily the best known SYG law in the country, is primarily a castle doctrine law, with a dash of SYG thrown in there as well.

Texas’s law on use of both force and deadly force is similar to Florida’s law (although not identical). Like Florida, Texas Penal Code § 9.31 creates a presumption in favor of a person using force when defending himself or herself from an intruder in “one’s occupied habitation, vehicle, or place of business or employment.”4 Use of force against trespassers is allowed—but not deadly force unless “the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.”5

While SYG laws, including that of Texas, protect the right to use force outside the home, without any duty to retreat, the right to use deadly force is much more circumscribed. While Texas Penal Code § 9.31 authorizes use of force without any duty to retreat;6 § 9.32 limits use of deadly force quite a bit more than that; deadly force can only be used to prevent “imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.”7

4 Texas Penal Code § 9.31(a)(1)(A) (“unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment …”)
6 Texas Penal Code § 9.32(d).
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This is really not as radical of a law as some have imagined it.

V. Duty to Retreat vs. Stand Your Ground

At one time, there was, at least outside your home, a duty to retreat before using deadly force. You were supposed to retreat until your back was against a wall, a hedge, a ditch, or some other barrier that prevented you from escaping. We’ll discuss the history of this in more detail shortly. As with everything, there was an exception: when an attack was so furious that retreating was not safe. Of course, the definition of what made retreat unsafe was necessarily a judgment call.

By contrast, Stand Your Ground laws have as their core the idea that you are not obligated to retreat from an attacker before using force in self-defense. And this is true even outside your home, and off your property.

The term “Stand Your Ground” comes from Beard v. U.S (1895), in which the U.S. Supreme Court, held that you are not required to retreat before using deadly force. This was expanded on in Brown v. U.S. (1921), a federal jurisdiction case that started in Texas. This is where Justice Holmes used the memorable phrase, “Detached reflection cannot be demanded in the presence of an uplifted knife.” But this still assumed that you were not the aggressor, and that you had a right to be where you were when you were attacked. Clearly, it would not apply if you were trespassing, or breaking the law in some more serious way. So why are there two different models in our law: “duty to retreat” and “stand your ground”?

VI. Historical Development of the Right to Self-Defense

A. Common Law and Self-Defense

The right to self-defense as Americans understand it is a much more recent idea than you might expect. English common law had a very narrow definition of what constituted a legal basis for using deadly force. You could use deadly force against those violating the king’s peace, which was understood to mean against felons. However, at common law, there was no clear provision for you to use deadly force in self-defense,

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8 Beard v. U.S., 158 U.S. 550, 553 (1895) (“where an attack is made with murderous intent, the person attacked is under no duty to fly; he may stand his ground, and if need be, kill his adversary”).
9 Brown v. U.S., 256 U.S. 335, 343 (1921) (“Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.”)
even in defense of your own home.\textsuperscript{10} If you stabbed an intruder who forced entry, you could be convicted of manslaughter, and it appears that before 1290 this happened with some regularity. Even after 1290, while judicial sentiment became more forgiving of such use of deadly force, it was not strictly legal. Prosecutorial discretion and perhaps jury nullification seem to have played a part in reducing prosecutions of such cases after 1290.\textsuperscript{11}

But you could be convicted, and forfeit all your property. You could petition for a royal pardon, and there was a good chance of receiving it, after paying the appropriate legal fees. Good for lawyers; not so good for others.

\textbf{B. Parliamentary Reform}

Parliament fixed this problem in 1532. There were two circumstances where conviction, along with forfeiture of property, no longer applied:

1. The dead guy attempted robbery, murder, or “feloniously do attempt to break any dwelling-house in the night-time” or a night-time burglary.\textsuperscript{12} This is the origin of castle doctrine. It really isn’t very controversial anymore, so we aren’t going to discuss it again—\textit{except} for the \textit{weird} way that it interacts with domestic violence and “duty to retreat.”

2. The second circumstance is death by “chance-medley” which sounds like someone randomly hitting buttons on a jukebox, but isn’t. Chance-medley is what happens when two people get into a minor fight, and one of them, without any intention of doing so, kills the other. This term “chance-

\textsuperscript{10} Albert H. Putney, \textit{4 Torts, Damages, Domestic Relations} 46 n. 50 (1908) (“Certainly in case of homicide the ancient doctrine was that self-defense was not a good plea. The man who was so unfortunate as to have to slay another to save himself was required to surrender and was remitted to jail, where he might hope to receive royal clemency. … Y.B., 12 Edw. II, 381, it was held that self-defense was not a good justification for a battery.”); Joseph H. Beale, Jr., “\textit{Retreat From a Murderous Assault},” 16 \textit{Harvard Law Review} 567-568 (1902-3) (“From the beginning of the jurisdiction of the king’s courts over crime in the reign of Edward I. Homicide could be justified only when done in execution of the king’s writ, or by authority of a custom by which a thief-hand and back-bearing, an outlaw, or perhaps other manifest felons, might be taken by force without a warrant; in short, in cases where the homicide was committed in execution of the law. In all other cases, whether of misadventure or of necessary self-defense, the defendant could set up no justification but must be convicted; to use the words of Pollock and Maitland, he deserved but needed a pardon.”).


\textsuperscript{12} 24 Hen. VIII c. 5(1532).
medley” eventually fell out of use in English because it was misused to refer to accidental, excusable homicides (such as dropping a brick while building a house, and accidentally killing a passer-by)\(^\text{13}\). I suspect that most criminal law practitioners have seen chance-medley deaths produce a criminal case at least once or twice.

C. Castle Doctrine and Deadly Force Against Co-Residents

What if the person forcing entry into your home actually lives in the residence? Maybe you and your roommate had a nasty argument about how to split a utility bill, and he comes back five hours later very drunk, and forgot his house keys. In most states, using deadly force is going to require evidence that he intended you or another resident great bodily injury or death. Mere forced entry by a resident is not enough.

Okay, what if instead of just your roommate, it’s your belligerent husband or boyfriend who is making veiled threats? And because it actually sometimes happens this way, perhaps it is your belligerent wife or girlfriend who is pushing you around, but has not yet drawn a weapon, or started beating you severely – but they sure give you reason to fear it is about to start. For a very long time in American law, you had “a duty to retreat” before using deadly force against a fellow resident.

In some domestic violence cases, the choice of using force or not can be very difficult indeed. I have seen these situations happen to relatives, and at best, you may come back the next day and find everything you own destroyed. Retreating may mean becoming homeless. If you retreat, rather than use deadly force, you may be leaving your children behind, with no confidence that they will not be terribly abused or even killed by the angry, possibly drunk adult who remains. Abstract ideas about the sanctity of human life have had to come to grips with the reality of some pretty ugly family situations.

Even without the pathos of domestic violence, the courts have increasingly recognized that “duty to retreat” often leads to bad results. The Michigan Supreme Court in 2002 recognized that while there is a strong reason to retreat if it is practical, “When the attack upon him is so sudden, fierce and violent, that a

\(^{13}\) 5 Blackstone’s *Commentaries* (St. George Tucker, ed.) 183-4 (1803).
retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all.”\textsuperscript{14} A rather different set of circumstances— but one involving a gang enforcer—caused the Minnesota Supreme Court in 1999 to conclude, “the imposition of a duty to retreat would be improper in defense of dwelling situations, we see no sound reason to impose a duty to retreat when those same circumstances are characterized as self-defense within the home.”\textsuperscript{15}

Now, here’s where the exceptions suddenly get very confusing, and the courts begin to reform that 1532 statute. But those reforms appear not on the defense of self and home part, but the “chance-medley” part.

VII. A Return to Renaissance England

The year is 1500 in a village in Kent. At the town market, John the Merchant is attempting to sell apples. Richard the Foul-Tempered, another villager, comes to John’s stall, looks at some of the apples carefully, and tells John the Merchant, “Your price is too high for wormy and bruised fruit.”

John the Merchant takes offense, and soon voices have been raised, colorful expletives are exchanged, and fingers have been poked in each other’s chest, with increasing aggression. Richard the Foul-Tempered takes a swing at John the Merchant, hitting him in the jaw. John punches Richard in the nose in retaliation.

Richard the Foul-Tempered falls to the ground, and his head hits a rock. Blood starts to drip out of the wound. A few days later, Richard the Foul-Tempered dies. What is John the Merchant’s defense in court? In 1500, John does not have self-defense in either common law or statute available as a defense.

At the common law, deadly force could only be lawfully used “for the prevention of any forcible and atrocious crime.” A bar fight or a dispute between our apple seller and his customer do not fit that

\textsuperscript{14} People \textit{v.} Riddle, 649 NW2d 30, 40 (Mich. 2002).
\textsuperscript{15} State \textit{v.} Carothers, 594 NW2d 897, 903 (Minn. 1999).
description. Battery was only a misdemeanor at common law. Again, the 1532 statute, by including “chance-medley,” prevented a person engaged in immediate self-defense from being convicted of a crime.

VIII. How Does This Lead to Stand Your Ground?

What makes the 1532 law the distant ancestor of SYG is that Stand Your Ground somewhat turns the 1532 law’s provisions on their head. The 1532 law required that the person using deadly force either was not actively fighting, and in some way made it clear to his assailant that he was not interested in fighting. More importantly, and this is what distinguishes it from Stand Your Ground, the person using deadly force “should have retreated as far as he conveniently or safely can… before he turns upon his assailant.” The intent of the law is pretty clear: use deadly force when your back is against a wall. The importance of preventing death took precedence over most everything else.

So how and why did we go from “duty to retreat” to “stand your ground”?

The historian Richard Maxwell Brown wrote a book a few years ago called No Duty to Retreat, in which he argued that the violence of American society, and a general focus on manliness, caused the courts in the late 19th century to judicially abandon the duty to retreat contained in the chance-medley provision.

This 1850s illustration from Harper’s captures well the sort of pointless and stupid brawling that was a big part of the culture in some parts of America in the early 19th century. Here you can see the advantages of roast pig as expedient weapon, while the fellow wearing the fancy military uniform draws his Bowie knife in defense. The caption is, “Pig versus Prigg.”

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16 Lisa M. Storm, Criminal Law by Storm 350 (2015) (“At early common law, battery was a misdemeanor.”)
17 24 Hen. VIII c. 5 (1532).
18 4 William Blackstone’s Commentaries on the Laws of England 185-6 (St. George Tucker, ed. 1803)
There is a bit of debate about whether Brown has this correct, or whether this developed in English law between 1532 and separation from England in 1776. I can find some evidence that supports Brown’s claims that this was a late 19th century and early 20th century development in American law. In support of that claim there is this statement from a contemporary text on evidence in Foster v. Territory of Arizona (Ariz.Terr. 1899) as well as a number of California Supreme Court decisions:

The weight of modern authority, in our judgment, establishes the doctrine, that when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force; and if in the reasonable exercise of his right of self-defense his assailant is killed, he is justifiable. . . .

There are a few Alabama cases from the early 20th century still requiring defendants to have retreated before using deadly force at least outside one’s home, but I can also find evidence that Stand Your Ground is older than that.

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20 13 HARPER’S NEW MONTHLY MAGAZINE 312 (1856).
21 Foster v. Territory of Arizona, 6 Ariz. 240, 243, 244, 56 P. 738, 739 (1899).
As an example of no duty to retreat before the end of the 19th century, California Penal Code sec. 195 as far back as 1872 defined excusable homicide in terms that echo the 1532 statute in some respects—but not in others. “When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.”

California Supreme Court decisions as far back as People v. Hecker, (Cal. 1895) have recognized a right to stand your ground. And it appears this is the case in a majority of states, even before passage of SYG laws—there was no duty to retreat under the excusable homicide statute. (Contrary to what might at first be assumed, “dangerous weapon” in the legal sense of that phrase does not necessarily include firearms, but can include pottery.)

Even more interesting, from the standpoint of whether this is an American development, English law today does not consistently require retreating before using force. As recently as in Rex v. Bird (1985), English courts ruled that a woman who took out an attacker’s eye using a glass was not obligated to retreat before using that level of force. And the woman had actually provoked the attack, by pouring a drink over her victim.

IX. Domestic Violence and Stand Your Ground

Often, domestic violence situations have driven this abandonment of the duty to retreat before using deadly force. Many state supreme courts have long recognized that there is no duty to retreat before using deadly force -- even when the attacker is not a stranger, or is even a cohabitant of the dwelling.

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23 People v. Hecker, 109 Cal. 451 (1895) (“And, as where the attack is sudden and the danger imminent, he may increase his peril by retreat, so situated he may stand his ground, that becoming his ‘wall,’ and slay his aggressor even if it be proved that he might more easily have gained his safety by flight.”)
State v. Livesay (Idaho 1951): A woman had the police arrest her drunken and violent husband on a Saturday night in a small town in Idaho. The next morning, sobered up, but not apparently in any better of a mood, he was released by the police. When he entered the dwelling, making threats, Mrs. Livesay fired a warning shot into the wall. This was apparently a bit too subtle of a hint to Mr. Livesay, at which point he shoved her against a wall and Mrs. Livesay either by accident (her claim) or on purpose (the prosecutor’s claim) shot and killed him. The jury instructions were that she had a duty to retreat, even out of her home, before using deadly force against a cohabitant. Unsurprisingly, the jury convicted her. On appeal, the Idaho Supreme Court ruled that the “duty to retreat” instruction was incorrect; there was no duty to retreat from her own home.26

Other states have long recognized a duty to retreat outside one’s home, but no duty to retreat from one’s home.27 In State v. Carothers (Minn. 1999), even though the defendant shot and killed a person who had not forced entry, the Minnesota Supreme Court ruled that there was no “duty to retreat before using deadly force to prevent the commission of a felony in his dwelling….”28

Race may also be a factor. After the East St. Louis race riots of 1917, the noted civil rights activist Ida B. Wells-Barnett urged “Negroes everywhere to stand their ground and sell their lives as dearly as possible when attacked.”29

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26 State v. Livesay, 233 P. 2d 432, 436 (Idaho 1951) (“as where the attack is sudden and the danger imminent, he (defendant) may increase his danger by retreat, so situated, he may stand his ground, that becoming his ‘wall’, and slay his aggressor, even if it be proved that he might more easily have gained safety by flight.”)

27 Weiand v. State, 732 So.2d 1044 (Fla. 1999) (duty to retreat not applicable in one’s own residence, even when the attacker is her spouse); Hedges v. State, 172 So.2d 824 (Fla. 1965) (woman not obligated to retreat in her own home from an abusive husband); State v. Glowacki, 630 NW2d 392 (Minn. 2001) (no duty to retreat even from a fellow resident). As where the attack is sudden and the danger imminent, he (defendant) may increase his danger by retreat, so situated, he may stand his ground, that becoming his ‘wall’, and slay his aggressor, even if it be proved that he might more easily have gained safety by flight.”

28 State v. Carothers, 594 NW 2d 897 (Minn. 1999)

X. Texas’ SYG Law

Before 1974, Texas did not require one to retreat before using deadly force even outside your home. Case law going back to at least 1905 is clear.\(^{30}\) Effective January 1, 1974, the Texas legislature amended the use of force law requiring one to retreat unless “a reasonable person in defendant's situation would not have retreated.”\(^{31}\) Why? In the twentieth century, legislatures and courts became increasingly uncomfortable with abandoning this duty to retreat, probably because of a belief that our criminal justice system was the best way of handling differences. As the California Court of Appeals explained in 2001, “The principle motivating this evolution was the conviction that ‘[a]ny civilized system of law recognizes the supreme value of human life, and excuses or justifies its taking only in cases of apparent absolute necessity.’”\(^{32}\)

What does “a reasonable person in defendant's situation” mean? That’s for a jury to decide, leaving considerable room for second-guessing someone else’s perhaps life or death decision. Of course, that’s rather the point of Justice Holmes’ “Detached reflection cannot be demanded in the presence of an uplifted knife.” Sometimes making a good decision in the heat of the moment is…difficult.

It is no great surprise that the 2007 revision of 9.31 returned to what is, in Texas, part of its historical tradition: “no duty to retreat.” The Texas Penal Code section that provides for Stand Your Ground is pretty carefully drafted, at least compared to Florida’s statute, which gets all the attention.

The broad outline is the same: castle doctrine applies to not only your home, but also “vehicle, or place of business or employment.”\(^{33}\) You are allowed to fight back outside those places, but Texas law is a bit more limited on when you may use deadly force. There is a list of crimes that the attacker was either

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\(^{30}\) Cooper v. State, 49 Tex.Cri. 28, 33 (Tex.Crim.App. 1905) “Suffice it to say that a party who has the right of self-defense from the standpoint of apparent danger, or any other danger that threatens his life or serious bodily injury to his person, is not bound to retreat, and he can stand his ground, even though an assault has not been made upon him. Under our law if anybody is required to retreat it is not the man acting in self-defense, it is the attacking party: it is the man bringing on the difficulty that is responsible….”

\(^{31}\) Sternlight v. State, 540 SW 2d 704, 706 (Tex.Ct.Crim.App. 1976) (“Retreat was not necessary to the right of self-defense in this state prior to the new penal code which became effective January 1, 1974. In fact, the statute provided it was not necessary to retreat.”)


\(^{33}\) Texas Penal Code § 9.31(a)(1)(A).
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attempting or committing to justify deadly force in public.34 The user of force must not have provoked the confrontation35 (and there have been some examples from Florida that are a good reason for such a requirement).

The user of force may not have been engaged in criminal activity at the time of the incident, with the exception of Class C misdemeanor traffic violations36 (and again, there have been some misuses of SYG from Florida that make such a restriction entirely sensible). Importantly, you must not have been unlawfully carrying or transporting a weapon if you are attempting a discussion of differences with the other party when matters turn violent.37

Another carefully thought out and worded limitation is that verbal provocation alone is insufficient reason to use force, deadly or otherwise. Nasty remarks without some credible threat of force is not enough.38 Attempts to break off the confrontation, if clearly articulated, must be honored.39

While a lawful search or arrest by a peace officer is, unsurprisingly, not justification for use of force, subsection c does allow use of force to resist arrest if, before any defensive action, the peace officer “uses or attempts to use greater force than necessary to make the arrest or search.”40

A. Texas Case Law: The Devil’s in the Details

There is no shortage of case law concerning the 2007 9.31 statute, and as is the situation with nearly all case law, there are a lot of really interesting wrinkles that come up. Morales v. State (Tex.Ct.Crim.App.

34 Texas Penal Code § 9.32(a)(1)(A)-(B) ("to protect the actor against the other's use or attempted use of unlawful deadly force; or ... prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.")
35 Texas Penal Code § 9.32(b)(2) ("did not provoke the person against whom the force was used").
36 Texas Penal Code § 9.32(b)(3) ("was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used").
37 Texas Penal Code § 9.31(b)(1)
38 Texas Penal Code § 9.31(b)(5) ("if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was: (A) carrying a weapon in violation of Section 46.02; or (B) possessing or transporting a weapon in violation of Section 46.05.").
39 Texas Penal Code § 9.31(b)(4)(A) "the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter").
40 Texas Penal Code § 9.31(c) ("The use of force to resist an arrest or search is justified: (1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search").
2011) involved an interesting question: could defendant Morales make a claim under 9.31 because he was defending a third party who was engaged in a riot? Was he required to retreat rather than use deadly force to protect his brother from what appeared to be deadly force? His brother was certainly engaged in a criminal activity, but Morales was not. The Criminal Court of Appeals concluded that Morales was entitled to a jury instruction that did not require him to retreat.\(^{41}\)

Hernandez v. State (Tex.App. 2010) determined that the defendant was carrying a handgun illegally while attempting to discuss his differences with the other party, and therefore could not demand a jury instruction under 9.31 that would have been favorable to him.\(^ {42}\)

Shadden v. State (Tex.App. 2010) held that the 9.31(c) provision about use of force against a peace officer did not apply where the defendant attacked the officers with a stick, and they used a Taser to subdue him. Defendant was also making suicide threats to his wife, had locked himself in his room, and claimed not to know that these were peace officers forcing entry.\(^ {43}\)

Goetschius v. State (Tex.App. 2009): If you want jury instructions about self-defense under 9.31, you need to admit that you engaged in self-defense! Defendant wanted jury instructions about self-defense involving an attack on a 15 year old stepson, but refused to admit to having used force against the 15 year old.\(^ {44}\)

Oliver v. State (Tex.App. 2013): you can make a 9.31 claim, but if there is no evidence that supports your claim that the deceased was violent, and lots of evidence that he was not, the jury can decide as a matter of fact that your claim is false.\(^ {45}\)

Yazdi v. State (Tex.App. 2016): Defendant shot a drunk driver in the back who was apparently unarmed, on the other side of a metal fence, and had made no direct threat to defendant or others. The Code of the West: “don’t shoot someone in the back.”\(^ {46}\)

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XI. Why ARE SYG Laws Needed?

You are probably wondering, if courts in other states have long recognized no duty to retreat, even outside the home, what is driving the passage of such statutes? (Texas obviously did so to undo the 1974 change to 9.31.)

In an ideal world, they wouldn’t be necessary. But prosecutors have enormous discretion in deciding whether to pursue criminal charges or not, and in a legitimate case of self-defense, they clearly should not charge. Even if there is some ambiguity in the matter, the benefit of the doubt should be for the person who was minding his own business, and was attacked.

But prosecutors sometimes abuse their discretion. Sometimes, they are currying favor with voters, or at least some voters. As we saw with the Duke lacrosse team rape case, in racially charged incidents, prosecutors are not above violating the law in order to get votes. Durham County DA Mike Nifong was eventually disbarred for dishonesty, fraud, deceit, and misrepresentation, and served jail time for his crimes. It has been suggested that his actions pursuing criminal charges that he knew were false were driven by the need to win black votes in the Democratic primary.

Sometimes prosecutors have such a fierce opposition to gun ownership that they will pursue criminal charges simply because the victim used a gun. Or, a prosecutor may want to be seen as “tough on crime,” even though the real crime was the one that required the original victim to draw a gun.

According to the author of Florida’s SYG law, the event that provoked it was: A man shot an intruder who had forced entry into his motorhome. This was in the aftermath of one of those hurricanes that washes over Florida frequently, and had destroyed his home. The shooter was living in his motorhome in the
meantime. The prosecutor apparently spent many months trying to decide whether to prosecute this guy for using deadly force against the intruder.49

Remember: even if you are successful in defending yourself in court, the costs will likely bankrupt you—rather like getting a royal pardon in medieval England. And once the criminal trial is over, the next-of-kin of the criminal you killed will sue you for anything that hasn’t already been taken. When I lived in Irvine, California, many years ago, a burglar breaking into a gas station was shot and killed by the manager, who had stayed there to find out who was breaking in and stealing stuff. The manager was not charged, because he had reason to believe that the burglar was drawing a weapon. The burglar’s widow admitted that her husband had a serious cocaine addiction problem, and that she regarded what the manager had done as reasonable. A week later, presumably after an attorney had contacted her, she filed a very large lawsuit against the manager for her husband’s death. Some people think it’s rather like winning the lottery when a criminal relative gets killed.

XII. Effects of SYG

A paper currently being circulated for review measures changes in homicide rates for states that adopted SYG laws, compared to states that did not. It found a 7.1% increase in firearms homicide rates in SYG states compared to non-SYG states. The paper did not examine murder and non-negligent manslaughter rates, which is what the FBI’s Uniform Crime Reports program counts. Instead, it examined civilian firearms homicides: intentional killings of one person by another, which includes killings determined by

the criminal justice system to be justifiable or excusable.\textsuperscript{50} And even then, it only examined changes in CDC’s firearms homicide rates, making no attempt to see what happened to non-firearms homicide rates.\textsuperscript{51}

This seems like a rather significant deficiency: it means that a victim who is threatened with a knife, a club, or strangulation, who uses a gun in self-defense, might well replace a non-firearm death with a firearm death. That firearm homicide might well be determined justifiable by the police or courts, but to McClellan and Tekin, this is still a bad thing. Since firearm deaths generally exceed non-firearm deaths 2:1, there might well be a genuine increase in murders in the SYG states, but perhaps not such an impressive increase. Perhaps not even a statistically significant increase.

Even more curiously, considering how many people have insisted on seeing SYG laws as some conspiracy for whites to kill blacks, McClellan and Tekin’s study found that the only statistically significant increase in firearms homicides involved white male deaths. There was no statistically significant increase for females or for blacks.

Other analyses of the effects of Florida’s SYG come to rather curious conclusions for those who insist on seeing this law as discriminatory:

“African Americans benefit from Florida’s “Stand Your Ground” self-defense law at a rate far out of proportion to their presence in the state’s population, despite an assertion by Attorney General Eric Holder that repealing “Stand Your Ground” would help African Americans.

Black Floridians have made about a third of the state’s total “Stand Your Ground” claims in homicide cases, a rate nearly double the black percentage of Florida’s population. The majority of those claims have been successful, a success rate that exceeds that for Florida whites….

But approximately one third of Florida “Stand Your Ground” claims in fatal cases have been made by black defendants, and they have used the defense successfully 55 percent of the time, at the same rate as the population at large.


and at a higher rate than white defendants, according to a Daily Caller analysis of a database maintained by the Tampa Bay Times. Additionally, the majority of victims in Florida “Stand Your Ground” cases have been white.

African Americans used “Stand Your Ground” defenses at nearly twice the rate of their presence in the Florida population, which was listed at 16.6 percent in 2012.52

The April 7, 2012 Washington Post reported that after Florida adopted SYG, civilian justifiable homicides tripled. Before SYG, there were 12 civilian justifiable homicides a year; after, 36 per year. But the same article mentioned that police justifiable homicides also tripled after SYG. It seems unlikely to me that SYG could have caused both categories to triple.53 I think it is more likely that something else happened: an increase in aggressive criminals? The biggest question of all that I think needs to be asked is, “Did justifiable homicide actually increase? Or just the way that they are reported?”

The FBI’s Uniform Crime Reports program collects justifiable homicide data from the states. They are quite careful to exclude excusable homicides, which includes some accidental killings and the chance-medley deaths.

They only include justifiable homicides in their reporting based on initial reports of the death. That means a killing that is first reported by police as murder or manslaughter, or even excusable homicide, is not reported as justifiable homicide even if it is later reclassified as such.

What happens if further investigation by the police, or the prosecutor, concludes that it was justifiable? What if the grand jury refuses to indict (as often happens), or at trial the case is found to be justifiable? That change from a crime to justifiable homicide will not be reported to the FBI.

My guess, since the Florida Department of Law Enforcement is the UCR reporter, is that Florida’s justifiable homicide data is subject to this same problem. How often does this happen, you may be wondering—and did SYG change this problem of undercounting of justifiable homicides?

So, did SYG actually cause the justifiable homicide rate to triple in Florida? Did SYG laws in McClellan and Tekin’s paper actually cause a 7.1% increase in murders, or is this increase mostly (perhaps entirely) justifiable homicides? Did Florida’s SYG law cause many cases that would have been reported as a crime before to instead be initially reported as justifiable? I don’t know, but it is at least plausible.

XIII. SYG Laws Move the Balance Point of the Criminal Justice System

There are prosecutors who argue that SYG laws make it too hard to prosecute criminals. The claim is that criminals use the presumptions built into the SYG law to get away, literally, with murder.

I do not doubt that this happens. Remember that a lot of murders involves criminals killing other criminals. Not only do people arrested for murder usually have very long rap sheets, their victims also have disproportionately long rap sheets.

On the plus side, it makes it harder for prosecutors to use the enormous powers of their position to abuse those engaged in lawful self-defense. This is a question of balancing the interests of justice: at what point does a law give too much benefit of the doubt to a person engaged in self-defense? In states that have very little violent crime, such as where I live in Idaho, an SYG law is probably unnecessary, and could even be harmful, for the reasons that critics give. But in states with severe violent crime problems, where people have good reason to fear being attacked on the street, SYG laws may make good sense.

54 Op cit., note 46.
55 PETER HERMANN, Baltimore murder victims, suspects share ties to criminal justice system, Baltimore Sun, January 2, 2012, http://articles.baltimoresun.com/2012-01-02/news/bs-md-ci-homicide-analysis-20120102_1_baltimore-murder-victims-stanley-brunson-violent-crime, last accessed March 29, 2016 (“More than 90 percent of the 71 people arrested on murder charges and 80 percent of the 196 people who were slain last year had criminal records, according to Baltimore police statistics released Monday. More than half the suspects had previous gun arrests, and four in 10 were on parole or probation.”)
TEXAS’ STAND YOUR GROUND LAW: AN HISTORICAL PERSPECTIVE

Let me explain that my personal feelings about SYG laws are a bit mixed. The abstract idea of an SYG law is fine. But the world is full of stupid, teenaged, punks. They get mouthy, aggressive, relying on intimidation when they aren’t being actually violent. For some of them, a few days in jail and a fine might be enough to make them stop being punks. At least, we can hope.

They won’t get that chance if they attack someone on the street, and are killed in self-defense. There is no clear answer about whether SYG makes sense. This is a judgment call, and one where people can honestly differ, depending on how important they think human life is. We do need to remember that there is for every choice, a cost, and a benefit. SYG likely makes us safer from criminal attack, but perhaps at the cost of relatively minor criminals dying before they grow up enough to learn to make better decisions.