WITHDRAWING A LICENSE TO KILL: WHY AMERICAN LAW SHOULD JETTISON "STAND YOUR GROUND" AND ADOPT THE ENGLISH APPROACH TO RETREAT

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Abstract: The justification of self-defense generally allows the use of a reasonable amount of force when a victim of an attack has a reasonable belief that the use of force is necessary in order to prevent an imminent harm. For centuries, the justification of self-defense included a duty of the victim—or defendant—to retreat before resorting to force. Today in the United States, this duty has been eliminated entirely in many jurisdictions. In England, however, the duty has not been done away with but has, instead, been incorporated into the reasonableness aspect of self-defense, which evaluates whether the amount of force used by the defendant was reasonable and whether the defendant's belief of an imminent harm was reasonable. The English version, therefore, allows the use of force even when retreat is possible but only when it can be shown that it was reasonable not to retreat. U.S. jurisdictions should undo the outright abandonment of the duty to retreat and adopt the English adjustment because it is better suited to both to gun culture in the United States and to the protection of human life.

INTRODUCTION

Americans own more guns than their counterparts in other wealthy nations.[1] In fact, one in four Americans, 35% of American households, own at least one gun.[2] The Supreme Court has held that the Second Amendment to the U.S. Constitution guarantees an individual right to gun ownership—especially when the gun is kept for self-defense.[3] For better or worse, American law operates in an environment that is heavily armed.[4] Nonetheless, American laws have adopted an ever-expanding view of self-defense justifications by diminishing the common-law requirement of retreat and eliminating the requirement

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[1] *See* PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW 2 (2014).

[2] *See id*. at 2–4.

[3] U.S. CONST. amend. II; McDonald v. Chicago, 561 U.S. 742, 749–50 (2010); District of Columbia v. Heller, 554 U.S. 570, 593–94 (2008).

[4] *See* COOK & GOSS, *supra* note 1, at 2–4.

in certain situations.[5] Meanwhile, America's common-law ancestor, England, has expanded the justification by incorporating the duty to retreat into the determination of whether the use of force in self-defense was reasonable.[6]

This Note examines the ways in which the United States and England approach the obligation to retreat in the context of self-defense. It advocates that U.S. jurisdictions should adjust their laws to reflect English law so that the obligation to retreat is included as a factor to consider when assessing whether the defendant's use of force in self-defense was reasonable. Part I of this Note describes the status of the self-defense justification in U.S. and English criminal law. Part II discusses the legal development of self-defense in both systems through an examination of significant cases, the history of self-defense, gun ownership statistics, and homicide rates. Part III evaluates the positive and negative qualities of the different approaches and concludes the English approach is preferable—even with private gun ownership as high as it is in the United States. In particular, including retreat in the assessment of the reasonableness requirement is superior because it puts greater emphasis on human life and safety, which is particularly important in a society that is built on laws and replete with guns.

I. BACKGROUND

The legal systems of the United States and England are intimately related due to their shared cultural heritage and common-law systems—the latter of which is identified as the body of law first developed in England by judicial application of precedent set by prior cases.[7] This English law followed colo-

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[5] *See, e.g.*, FLA. STAT. ANN. § 776.012(2) (West 2014); 18 PA. CONS. STAT. § 505(b)(2.3) (2014); Erwin v. State, 29 Ohio St. 186, 199–200 (1876).

[6] *See* R v. Julien, [1969] 1 W.L.R. 839 (AC) at 843 (Eng.) ("It is not . . . the law that a person threatened must take to his heels and run in [a] dramatic way . . . ; but what is necessary is that he should demonstrate by his actions that he does not want to fight."); R v. Bird, [1985] 2 All E.R. 513 (AC) at 516 (Eng.) ("There were formerly technical rules about the duty to retreat before using force, or at least fatal force. This is now simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable." (quoting JOHN C. SMITH & BRIAN HOGAN, CRIMINAL LAW 327 (5th ed. 1983))).

[7] *See Common Law*, BLACK'S LAW DICTIONARY (10th ed. 2014) [hereinafter *Common Law*, BLACK'S]; DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS 1 n.1 (2d ed. 2004); *Common Law*, ENCYC. BRITANNICA, http://www.britannica.com/EBchecked/topic/128386/common-law [https://perma.cc/7SZG-HQ69] (last visited Mar. 23, 2016); OLIVER LEWIS, HOW IMPORTANT ARE SHARED CULTURE, LANGUAGE, AND VALUES TO THE 'SPECIAL RELATIONSHIP BETWEEN BRITAIN AND THE UNITED STATES?', (Dec. 3, 2007), http://www.e-ir.info/2007/12/03/how-important-are-shared-culture-language-and-values-to-the-%E2%80%98special-relationship%E2%80%99-between-britain-and-the-united-states/ [https://perma.cc/27CG-QHT2] ("Britain and America are widely perceived to share many of the same, largely 'liberal', values. Bilateral relations between the United States and the United Kingdom are arguably conducted along these lines, where shared liberal capitalist ideals are the currency and wider cultural similarities add to the sense of solidarity between the two . . . .").

nists to North America through clauses in their colonial charters that permitted them to establish laws but which also held English law as superior, forbidding any colonial law that conflicted with English law.[8] Upon American independence, the former colonies' newly empowered state legislatures enacted statutes formally adopting the common law of England.[9] This trend continued such that every state except Louisiana adopted similar statutes embracing the common law.[10] Of course, these statutes only adopt the common law to the extent permitted and amended by the U.S. Constitution or state law.[11] Further, through early cases, American judges not only relied on the law of England in their decisions but also adapted it to fit the needs of the new American society.[12] One of the areas of law in which this adaptation was most pronounced was regarding the justification of self-defense.[13]

Justifications and excuses are defenses to criminal charges.[14] Excuses, like insanity or involuntary intoxication, are defenses that demonstrate a criminal defendant is not actually blameworthy for his otherwise criminal acts.[15] Justifications, on the other hand, are defenses that show a lawful reason for the defendant's actions—the absence of which would render them criminal.[16] Justifications include necessity and self-defense.[17] The justification of self-defense generally provides that a reasonable amount of force may be used to repel an attack when the victim has a reasonable belief that the use of force is necessary to prevent the imminent attack.[18]

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[8] *See* COQUILLETTE, *supra* note 7, at 368.

[9] *See, e.g.*, DEL. CONST. of 1776, art. XXV; FLA. STAT. ANN. § 775.01 (West 2014); 1 PA. CONS. STAT. § 1503(a) (2014); S.C. CODE ANN. § 14-1-50 (1976); VA. CODE ANN. § 1-200 (2015).

[10] *Common Law*, BLACK'S, *supra* note 7.

[11] *See, e.g.*, DEL. CONST. of 1776, art. XXV; 1 PA. CONS. STAT. § 1503(c) (West 1972); S.C. CODE ANN. § 14-1-50; VA. CODE ANN. § 1-200.

[12] *See* RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 5–6 (1991); COQUILLETTE, *supra* note 7, at 505.

[13] *See* SANFORD KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 865 (9th ed. 2014).

[14] *See Excuse*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Justification*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[15] *See Excuse*, *supra* note 14; KADISH ET AL., *supra* note 13, at 817; ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 96 (5th ed. 2006).

[16] *See Justification*, *supra* note 14; KADISH ET AL., *supra* note 13, at 817; ASHWORTH, *supra* note 15, at 96–97.

[17] *Necessity*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A justification defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's actions."); *Self-Defense*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[18] *Self-Defense*, *supra* note 17; *see* ASHWORTH, *supra* note 15, at 139.

A. Status of U.S. Law

The common law imported to North America from England restricted the use of deadly force in self-defense to situations in which no retreat was possible.[19] Early in American history, this common-law duty to retreat was found to be ill suited for American life and values—especially along the frontier.[20] In *Erwin v. State*, an oft-cited case decided one hundred years after American independence, the Supreme Court of Ohio considered the common-law requirement of retreat before rejecting it and stating:

> The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.[21]

Quickly after *Erwin*, the duty to retreat was shed in many states as courts adapted the common law to fit what they perceived to be the American way of life.[22] If state courts did not act to diminish the duty to retreat, state legislatures often did.[23] To this day, the status of the duty to retreat varies from state to state and is frequently still subject to revision by the state judiciaries and legislatures.[24]

This process has resulted in a patchwork of law varying from state to state.25 Despite the impact of the *Erwin* decision, some states continue to require retreat in order to assert the justification of self-defense, particularly when a person is attacked outside of their dwelling place.[26] Hawaii, for example, forbids the use of force in self-defense when a person knows that he or she can retreat with complete safety, or by surrendering anything to which the at-

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[19] *See* BROWN, *supra* note 12, at 3–5; KADISH ET AL., *supra* note 13, at 865; FIONA LEVERICK, KILLING IN SELF-DEFENCE 70 (2006).

[20] *See* Erwin v. State, 29 Ohio St. 186, 199–200 (1876); BROWN, *supra* note 12, at 8–10; KADISH ET AL., *supra* note 13, at 865.

[21] *Erwin*, 29 Ohio St. at 199–200; *see* BROWN, *supra* note 12, at 8–10; KADISH ET AL., *supra* note 13, at 865.

[22] *See* Runyan v. State, 57 Ind. 80, 84 (1877); BROWN, *supra* note 12, at 5, 8; KADISH ET AL., *supra* note 13, at 865.

[23] *See* KADISH, *supra* note 13, at 865–66.

[24] *See id.*

[25] *See, e.g.*, HAW. REV. STAT. § 703-304(5)(b); FLA. STAT. ANN. § 776.012(2); 18 PA. CONS. STAT. § 505(b); VT. STAT. ANN. tit. 13 § 2305 (West 2014).

[26] *See* KADISH, *supra* note 13, at 865–67; *see, e.g.*, HAW. REV. STAT. § 703-304(5)(b); VT. STAT. ANN. tit. 13 § 2305; State v. Albano, 102 A. 333, 334 (Vt. 1917). The law of the state of Vermont allows the use of force in self-defense, but case law from 1917 indicates that force may not be used in self-defense when sufficient means are available to avoid it. *See* VT. STAT. ANN. tit. 13 § 2305; *Albano*, 102 A. at 334.

tacker claims a right.27 The justification of self-defense is also not available under Hawaiian law when a person can cooperate with a demand from the attacker that he or she refrain from acting in a manner in which he or she has no obligation to act.28 Hawaiian law, however, does create the exception that a person has no duty to retreat from his or her "dwelling or place of work, unless he [or she] is the initial aggressor or is assailed in his [or her] place of work" by a known co-worker.[29] In contrast to Hawaii, however, several other states do not require retreat from a place that a person has a right to be.[30]

The state of Pennsylvania offers a poignant example of variation and evolution of self-defense law in the United States.[31] Pennsylvania law establishes that the use of force is justifiable in self-defense when the person using force believes that it was "immediately necessary" to protect himself "against the use of unlawful force by [another] person on the present occasion."[32] This provision has remained unchanged since its enactment in 1972 when the official comment asserted that it made "no substantial change in existing law."[33] The restrictions on a defendant's ability to use force in self-defense, however, have changed.[34] The 1972 law stated:

> The use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; *nor is it justifiable if . . . the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take*, except that . . . the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be . . . .[35]

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[27] HAW. REV. STAT. § 703-304(5)(b).

[28] *Id.* § 703-304(5)(b)(i).

[29] *Id.*

[30] *See, e.g.*, FLA. STAT. ANN. § 776.012(2); 18 PA. CONS. STAT. § 505(b)(2.3).

[31] *Compare* 18 PA. STAT. AND CONS. STAT. ANN. § 505(b)(2) (West 1972), *with* 18 PA. CONS. STAT. § 505(b)(2.3).

[32] 18 PA. CONS. STAT. § 505(a).

[33] 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 1972) Official Comment – 1972.

[34] *Compare* 18 PA. STAT. AND CONS. STAT. ANN. § 505 (b)(2), *with* 18 PA. CONS. STAT. § 505 (b)(2.3).

[35] 18 PA. STAT. AND CONS. STAT. ANN. § 505(b)(2)(ii)(A) (emphasis added).

Thus, the 1972 law required retreat by the defendant before the use of force in self-defense was permitted—except when inside a dwelling or place of work.[36]

In 2011, prior to the killing of Florida teen Trayvon Martin and the national focus on so-called "stand your ground" laws, Pennsylvania added two new and significant portions to its law regarding the right to use force in self-defense.[37] The 2011 version of the law, in force today, removed the requirement that a person must surrender a possession or must refrain from lawful action pursuant to the attacker's demand before using force.[38] It also added sections qualifying the duty to retreat and the justified use of force, which had the effect of diminishing the duty to retreat and expanding the justified use of force.[39]

The new law creates a presumption that an actor reasonably believes "deadly force is immediately necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat" when the force is used against a person who

> is in the process of unlawfully and forcefully entering, or has unlawfully and forcefully entered and is present within, a dwelling, residence or occupied vehicle; or the person against whom the force is used is or is attempting to unlawfully and forcefully remove another against that other's will from the dwelling, residence or occupied vehicle.[40]

The subsequent section of the statute creates exceptions that prohibit the use of deadly force in family situations, in the context of criminal activity, where a person has a right to enter, and when peace officers are involved.[41] A later section states that a person who does not fall within these exceptions is presumed to be entering for the purpose of committing an act that will result "in death or serious bodily injury; or kidnapping or sexual intercourse by force or threat."[42]

The most significant portion of the 2011 law extends the justifiable use of force outside of the home by removing the duty to retreat in all situations and

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[36] *See id*.

[37] *See* 18 PA. CONS. STAT. § 505(b)(2.1)–(3); *Pa's 'Stand Your Ground' Law Different from Florida's*, CBS PITTSBURGH (July 18, 2013), http://pittsburgh.cbslocal.com/2013/07/18/pa-s-stand-your-ground-law-different-from-floridas/ [https://perma.cc/EL39-B89S]; Jonathon D. Silver, *Self-Defense Bill Backs Broader Deadly Force Use*, PITTSBURGH POST-GAZETTE (May 29, 2010), http://www.post-gazette.com/news/state/2010/05/29/Self-defense-bill-backs-broader-deadly-force-use/stories/201005290169 [https://perma.cc/3E4G-5DR9].

[38] 18 PA. CONS. STAT. § 505(b)(3).

[39] *See id*. § 505(b)(2.1)–(2.5).

[40] *See id*. § 505(b)(2.1).

[41] *See id*. § 505(b)(2.2).

[42] *Id.* § 505(b)(2.5)(i)–(ii).

implementing the stand your ground doctrine.[43] The new law establishes that when a person who is

> not engaged in a criminal activity, who is not in illegal possession of a firearm and who is attacked in any place [that he has a right to be outside his dwelling or place of work, the person] has no duty to retreat and has the right to stand his ground and use force, including deadly force.[44]

The law limits the use of force to instances when the person believes that it is immediately necessary to use force to protect himself from "death, serious bodily injury, kidnapping or sexual intercourse by force or threat."[45] It further requires that the person against whom force is used have a "firearm or replica of the firearm," or "any other weapon readily or apparently capable of lethal use."[46] Further highlighting the constancy of movement on the issue, in 2013, bills were introduced in the Pennsylvania legislature to repeal or to alter the stand your ground provisions enacted in 2011.[47] An additional bill was introduced in 2015 that, if passed, would retain the stand your ground provision and would expand the justifiable use of force to situations in which the defendant is outnumbered or the assailant possesses the physical capacity to inflict death or other serious injury.48 As of early 2016, however, the 2011 version remains in effect.49

The Pennsylvania incarnation of stand your ground and diminished duty to retreat reflects a variation of the simpler version enacted in Florida.[50] The Florida law states:

> A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or

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[43] *See id*. § 505(b)(2.3).
[44] *Id.*
[45] *Id.* § 505(2.3)(ii).
[46] *Id.* § 505(2.3)(iii). There are also additional provisions for public officials. *See id*. § 505(2.4), (2.6).
[47] *See, e.g.*, H.R. 1812, 197th Gen. Assemb., Reg. Sess. (Pa. 2013).
[48] *See* H.R. 45, 199th Gen. Assemb., Reg. Sess. (Pa. 2015).
[49] *See* 18 PA. CONS. STAT. § 505.
[50] *See id.* § 505(b)(2.3); FLA. STAT. ANN. § 776.012(2).

> threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.[51]

By including the broad "forcible felony" language, this statute allows the use of force in a greater range of situations.[52] Further, the Florida statute does not require that the person against whom force is used have a weapon.[53]

B. Status of English Law

In England, the Criminal Justice and Immigration Act 2008, like U.S. law, states that the common-law justification of self-defense is a defense.[54] Unlike U.S. law, English law has focused its adjustment of the duty to retreat on the requirement that the use of force in self-defense be reasonable.[55] The 2008 Act provided that the degree of force used by a defendant in self-defense is not reasonable when it is disproportionate to the circumstances as the defendant genuinely believed them to be.[56] A provision was added in 2013 to make special guidelines for householder cases (cases where the defendant, not a trespasser, was defending his person in or partially within his dwelling from a person believed to be a trespasser),[57] stating, "In a householder case, the degree of force used by [defendant] is not to be regarded as having been reasonable in the circumstances as [defendant] believed them to be if it was *grossly* disproportionate in those circumstances."[58] At the time of its passage, a memorandum from Home Affairs to the Members of Parliament explained that this section was born from a desire to give greater legal protection to individuals who defend themselves in their homes.[59]

Historically in England, a strict duty to retreat limited the right of self-defense under the theory that the use of force was the exclusive purview of the Crown.[60] Thus, Englishmen were not thought to have a general right to seek their own justice through self-defense but were to avail themselves of the

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[51] FLA. STAT. ANN. § 776.012(2).

[52] *See id*. §§ 776.012(2), 776.08 ("'Forcible felony' means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.").

[53] *See id*. § 776.012(2).

[54] *See* Criminal Justice and Immigration Act 2008, c. 4, § 76(2)(a) (Eng.).

[55] *See id*. § 76(3); R v. Bird, [1985] 2 All E.R. 513 (C.A.) at 516 (Eng.).

[56] *See* Criminal Justice and Immigration Act 2008, c. 4. § 76(6) (Eng.).

[57] Self-Defence and the Prevention of Crime, CROWN PROSECUTION SERV., http://www.cps.gov.uk/legal/s_to_u/self_defence/ [https://perma.cc/Z8GL-EN9Z] (last visited Mar. 24, 2016).

[58] Crimes and Courts Act 2013, c. 22, § 43(2) (Eng.) (*amending* Criminal Justice and Immigration Act 2008, c. 4, § 76 (Eng.)) (emphasis added).

[59] *See* Home Affairs, *Householders and the Criminal Law of Self Defence*, 9–12, HC n. SN/HA/1959 (Jan. 10, 2013) (UK).

[60] *See* BROWN, *supra* note 12, at 4.

courts.[61] The obligation of strict retreat required that the victim of an attack had to retreat until his back was to the wall before he or she could employ force in self-defense.[62] This was the law as recorded by Blackstone, and it remained the law into modernity in England.[63]

In the twentieth century and in the face of arguments that Englishmen should have no duty to retreat before using force in self-defense, English courts reformulated the duty to retreat, changing the obligation from an individual requirement to a factor to be considered when evaluating whether the amount of force used by the defendant in self-defense was reasonable.[64] Under this iteration of retreat, a defendant's use of force in self-defense may be determined to be unreasonable if he failed to retreat when the opportunity of safe retreat presented itself.[65] In this manner, the English duty to retreat has been weakened, but not abandoned entirely, and the present "duty" is not an individual requirement but a factor used to determine the reasonableness of a defendant's actions.[66]

II. DISCUSSION

In his quintessential work on the common law, *Commentaries on the Law of England*, William Blackstone wrote that a self-defense plea required proof that the person who ultimately killed his attacker had "no other probable means of escaping his assailant."[67] He concluded that the law required a self-defense claimant to have retreated as far as safely possibly before employing force against his attacker.[68] Blackstone's famous work reflected the law of England in 1758, and it became highly influential among American lawyers during the nineteenth century.[69]

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[61] *See id.*

[62] *See id.*

[63] *See* LEVERICK, *supra* note 19, at 70–71; WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, 646–47 (William Hardcastle Browne ed., 1897).

[64] *See Bird*, 2 All E.R. at 516 (concluding the ability to retreat is a factor for determining the reasonableness of the use of force); R v. Julien, [1969] 1 W.L.R. 839 (AC) at 842 (Eng.) (explaining that the appellant's brief included, without citing authority, the assertion that "an Englishman is not bound to run away when threatened, but can stand his ground and defend himself where he is").

[65] *See Bird*, 2 All E.R. at 516; LEVERICK, *supra* note 19, at 73–74.

[66] *See Bird*, 2 All E.R. at 516.

[67] BLACKSTONE, *supra* note 63, at 646.

[68] *Id.* at 647.

[69] *See id.* at 1 n.1; *Sir William Blackstone*, ENCYC. BRITANNICA, http://www.britannica.com/EBchecked/topic/68589/Sir-William-Blackstone [https://perma.cc/6HQS-MPD4] (last visited Mar. 24, 2016).

A. Development of U.S. Law

Early American jurists were not strangers to the common-law formula of self-defense, which required retreat before the use of force in self-defense could be justified.[70] Instead, they acknowledged and rejected it over time.[71] Yet, even as Midwestern judges added the final nails to the coffin, the duty to retreat had its supporters in academia and on the bench.[72] These common law traditionalists, however, eventually lost the battle to retain the duty to retreat in the United States.[73] By 2013, thirty-one states had done away with the duty to retreat outside of the home through either judicial or legislative enactment.[74] This development of U.S. law away from the duty to retreat took shape over the first one hundred years of American history and even continues today.[75]

The 1806 Massachusetts case *Commonwealth v. Selfridge* exemplifies the early shift in the American perspective on self-defense.[76] In *Selfridge*, the defendant was an attorney hired by a Democratic Party committeeperson to pursue a suit against the committee's chairman regarding the contested costs of a party dinner organized by the committee.[77] The chairman, Benjamin Austin, was the father of the eventual victim, Charles Austin.[78] After the suit settled, Benjamin Austin and Thomas Selfridge exchanged a series of quarrelsome letters, which provoked Selfridge to publish a newspaper advertisement discrediting Austin and caused Austin to respond promptly in kind.[79] The day that the advertisements appeared in local newspapers, Selfridge was advised that he would be physically attacked in some manner by Austin or his associates.[80] That afternoon, Selfridge left his office and encountered Charles Austin in the street.[81] The younger Austin struck Selfridge in the head with a walking stick, but before he could land the first or second blow, Selfridge fired his pistol and

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[70] *See* Commonwealth v. Selfridge (Mass. 1806), *in* L.B. HORRIGAN & SEYMOUR D. THOMPSON, SELECT AMERICAN CASES ON THE LAW OF SELF DEFENCE 3, 17–18 (1874) [hereinafter *Selfridge*]; BROWN, *supra* note 12, at 5–7.

[71] *See* BROWN, *supra* note 12, at 5–7.

[72] *See id*. at 22–27.

[73] *See* Runyan v. State, 57 Ind. 80, 84 (1877); Erwin v. State, 29 Ohio St. 186, 199–200 (1876); BROWN, *supra* note 12, at 20.

[74] *See* Eugene Volokh, *Duty to Retreat and Stand Your Ground: Counting the States*, VOLOKH CONSPIRACY (July 17, 2013, 10:11 AM), http://www.volokh.com/2013/07/17/duty-to-retreat/ [https://perma.cc/6YQP-7WPY].

[75] *See, e.g.*, *Selfridge*, *supra* note 70, at 3–4, 17–18; KADISH ET AL., *supra* note 13, at 865–66.

[76] *See generally Selfridge*, *supra* note 70, at 1–34 (relating two contemporaneous Massachusetts judges' differing interpretations of self-defense and the retreat requirement).

[77] *See id*. at 4–5.

[78] *See id*. at 4.

[79] *See id*.

[80] *See id.* at 8.

[81] *See id*.

shot Austin.[82] Austin was shot through the lungs, but he continued to beat Selfridge until dying quickly from the gunshot.[83]

The grand jury was charged by Chief Justice Parsons of the Supreme Judicial Court of Massachusetts on the law of self-defense.[84] Just thirty years after American independence in 1776, Chief Justice Parsons had already embraced the abandonment of the duty to retreat.[85] Chief Justice Parsons described the law of self-defense to the jury, stating, "A man may repel force by force in the defence of his person, against any one who manifestly intends or endeavors by violence or surprise, feloniously to kill him."[86] Explicitly reflecting his belief that self-defense did not require retreat, he continued his charge, adding, "And he is not obliged to retreat, but he may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is *justifiable self-defence*."[87] He went on to explain that the law required that the assailant actually make an overt act and that the defendant have an actual and reasonable belief of his assailant's felonious intent.[88] The Chief Justice instructed the jury that if Selfridge reasonably believed a felony was about to be committed against him but that was not in fact the case, Selfridge could be charged with manslaughter, or the killing could be justifiable.[89] The grand jury ultimately indicted Selfridge for manslaughter.[90]

At the trial, Justice Parker, who had apparently not adopted Chief Justice Parsons's view of the duty to retreat, instructed the jury using the common-law version of self-defense requiring retreat.[91] He asserted that this iteration of the law had been consistent from Sir Edward Coke through William Blackstone.[92] He told the jury that a man who is attacked with intent to kill him or cause him great bodily harm "may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own life, . . . such as retreating as far as he can, or disabling his adversary, without killing him if it be in his power."[93] The Justice added that when retreat would increase danger, the person attacked may kill the attacker without retreat.[94] He also noted that the killing can be justified so long as the person attacked reasonably believed that he was

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[82] *See id*.
[83] *See id*.
[84] *See id*. at 1.
[85] *See id*. at 1–2; *Independence Day*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[86] *Selfridge*, *supra* note 70, at 3–4.
[87] *Id.* at 4.
[88] *See id*.
[89] *Id.*
[90] *Id.*
[91] *See id*. at 13, 17.
[92] *See id*. at 17.
[93] *Id.* at 17–18.
[94] *See id*. at 18.

going to be killed or suffer severe bodily harm, even if it is ultimately not the case.[95] The jury returned a verdict of not guilty.[96]

When *Commonwealth v. Selfridge* was recorded in the 1874 text *Select American Cases on the Law of Self-Defence*, the editors appended lengthy notes discussing the duty to retreat as articulated in *Selfridge* and later cases.[97] Referencing English commentators Sir Michael Foster and his American protégés Francis Wharton and Joel Prentiss Bishop, the editors suggested that the law actually implied a duty to resist a felony with force and not to retreat.[98] While the views of these commentators were widely eschewed in England, they were embraced in the United States.[99] The authors, therefore, concluded that Justice Parker's articulation of the law was in error because it required retreat from a felonious attack in any case in which retreat were possible.[100] The editors asserted that an examination of U.S. cases would reveal that no U.S. judge since Justice Parker had instructed that the law required retreat in the case of a felonious attack.[101] Although the editors maintained that the law did not require retreat, they suggested that under the facts in *Selfridge*, the killing of Austin was not justifiable.[102] According to the editors, while a person attacked has no duty to retreat from a felonious assault, a reasonable man could not have concluded Austin's attack on Selfridge to have been felonious, for, in their opinion, no reasonable man could have concluded that the intent of the attack was anything more than "severe chastisement."[103] They concluded that the attack against Selfridge was, therefore, merely a brutal caning as part of a "personal conflict" and not a felonious attack.[104]

Later in the nineteenth century, as the population moved westward and Americans developed an increasingly distinctive culture, the duty to retreat was abandoned with increasing frequency.[105] In 1800, Ohio had just over forty-two thousand residents, but by 1880, the population had grown to more than seventy-one times its 1800 number and included over three million people.[106] The number continued to grow, as nearly one million additional people resided

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[95] *See id*.
[96] *Id.* at 28.
[97] *See* HORRIGAN & THOMPSON, *supra* note 70, at 28–34.
[98] *See* BROWN, *supra* note 12, at 6–8; HORRIGAN & THOMPSON, *supra* note 70, at 30–31.
[99] *See* BROWN, *supra* note 12, at 7.
[100] *See* HORRIGAN & THOMPSON, *supra* note 70, at 31–32.
[101] *See id.* at 32–33.
[102] *See id.* at 33.
[103] *Id.*
[104] *Id.* at 33–34.
[105] *See* BROWN, *supra* note 12, at 8.
[106] *Id*.

in Ohio by 1900 and over eleven million people by 2000.[107] It was in Ohio in 1876, amid this rapid westward expansion, that one of the most influential and oft-cited cases of the American movement away from the duty to retreat arose.[108]

Erwin v. State added what is known as the "true man" doctrine to U.S. jurisprudence on self-defense and the duty to retreat.[109] In *Erwin*, a feud had developed between the defendant and the decedent, the defendant's son-in-law, over possession and use of a shed situated between their homes.[110] The dispute waged on and included incidents in which all of the defendant's tools were removed from the shed and thrown outside.[111] One day, the defendant was resecuring his instruments inside the shed with a chain when a verbal altercation erupted between him and his son-in-law.[112] The son-in-law approached the shed with an ax on his shoulder and—possibly defying his father-in-law's command not to enter the shed—came under its eaves.[113] As his son-in-law approached, Erwin drew a pistol, shot, and killed him.[114]

Erwin was indicted and found guilty of second-degree murder.[115] When charging the jury, the trial judge repeated Justice Parker's articulation of self-defense in *Selfridge* verbatim.[116] Thus, the jurors were told that Erwin was required to "use all means in his power otherwise to save his own life or to prevent the intended harm," including, "retreating as far as he [could]."[117] On appeal, Erwin challenged this instruction because it required retreat.[118] The Supreme Court of Ohio stated that it had not previously ruled on the duty to retreat and initiated an energetic discussion of legal authorities on the matter.[119]

The court identified a passage by Sir Matthew Hale—an English judge considered to be one of history's greatest scholars of the common law, who lived from 1609 to 1676—stating that although the law generally requires re-

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[107] *Id.*; *see* U.S. CENSUS BUREAU, TABLE DP-1 PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 GEOGRAPHIC AREA: OHIO (2000), https://development.ohio.gov/files/research/P2002.pdf [https://perma.cc/NYJ5-VR6A].

[108] *See* BROWN, *supra* note 12, at 8. *See generally Erwin*, 29 Ohio St. 186 (identifying and rejecting the duty to retreat).

[109] *See Erwin*, 29 Ohio St. at 199–200; BROWN, *supra* note 12, at 8.

[110] *See Erwin*, 29 Ohio St. at 192; BROWN, *supra* note 12, at 8–9.

[111] *See Erwin*, 29 Ohio St. at 192.

[112] *See id.* at 193; BROWN, *supra* note 12, at 9.

[113] *See Erwin*, 29 Ohio St. at 193; BROWN, *supra* note 12, at 9.

[114] *See Erwin*, 29 Ohio St. at 193; BROWN, *supra* note 12, at 9.

[115] *Erwin*, 29 Ohio St. at 188–89.

[116] *See id.* at 193; *Selfridge*, *supra* note 70, at 17–18.

[117] *Erwin*, 29 Ohio St. at 193 (emphasis omitted); *see Selfridge*, *supra* note 70, at 17–18.

[118] *Erwin*, 29 Ohio St. at 193–94.

[119] *See id.* at 194–200.

treat, there are a few exceptions.[120] Among these exceptions was that "[i]f a thief assaults a true man either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony."[121] The court moved on to recite some of Foster's writing, which posited that retreat is not required when a person is met with a felonious attack.[122] The court addressed *Selfridge* by asserting that Justice Parker's charge was highly contextual.[123] Justice Parker, claimed the court, was attempting to fashion a rule whereby justifiable homicide—in the face of a felony—did not require retreat, but justifiable homicide—in the face of an attack that could not be reasonably believed to be felonious—did require retreat.[124]

The court acknowledged that "[t]he law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked."[125] Nonetheless, the court went on to conclude that "a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."[126] The ruling essentially abrogated the duty to retreat in Ohio, and the opinion was soon cited with approval by state supreme courts across the country.[127]

One year later, and one state further west, the Indiana Supreme Court further contributed to the American abandonment of the duty to retreat.[128] In *Runyan v. State*, the defendant shot and killed an acquaintance who had struck him during a politically motivated brawl.[129] The defendant, found guilty of murder, appealed and asserted error in the jury instruction, which had required retreat in all cases in which it could be carried out safely.[130] In reversing the conviction, the Indiana Supreme Court summarized that the "ancient doctrine," which required retreat "ha[d] been greatly modified in this country."[131] In fact, the court posited that the undoing of the duty to retreat was now ingrained

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[120] *See Erwin*, 29 Ohio St. at 195 (citing 1 HALE, PLEAS OF THE CROWN, ch. 40); *Sir Matthew Hale*, ENCYC. BRITANNICA, http://www.britannica.com/EBchecked/topic/252299/Sir-Matthew-Hale [https://perma.cc/K8E4-TSX5] (last visited Mar. 24, 2016).

[121] *Erwin*, 29 Ohio St. at 195 (quoting 1 HALE, PLEAS OF THE CROWN, ch. 40) (internal quotation marks omitted).

[122] *See id*. at 195–96.

[123] *See id*. at 198–99.

[124] *See id*.

[125] *Id.* at 199.

[126] *Id.* at 199–200.

[127] *See* BROWN, *supra* note 12, at 8, 10.

[128] *See id. See generally*, Runyan v. State, 57 Ind. 80 (Brown explains that "Lawyers, judges, and legal scholars had barely begun to digest" Ohio's *Erwin* when Indiana considered the duty to retreat in *Runyan*).

[129] *See Runyan*, 57 Ind. at 80–81; BROWN, *supra* note 12, at 12–13.

[130] *See Runyan*, 57 Ind. at 82–83.

[131] *Id.* at 83–85.

within American culture.[132] It stated that "the tendency of the American mind seems to be very strongly against the enforcement of any rule" requiring retreat, whether the motivation for the retreat was to avoid punishment or to avoid the taking of a life.[133]

In light of this case law and similar developments, Professor Eugene Volokh counted that, as of 2013, thirty-one states had eliminated the duty to retreat by either legislation or judicial enactment.[134] Prompted by the shooting death of unarmed teen Trayvon Martin, many Americans have severely criticized these stand your ground laws, citing their disproportionate impact on women and African Americans and rallying for their repeal.[135] Other commentators have posited that this modification to self-defense law was not to the advantage of white American males alone, but that women and black civil rights leaders also have benefitted by the nature in which American self-defense law has developed.[136]

B. Development of English Law

Self-defense is an ancient and well-established principle of the common law in England dating back to at least the 1200s.[137] Its status as an available defense was preserved and codified in the Criminal Justice and Immigration

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[132] *See id*. at 84.

[133] *Id.*; BROWN, *supra* note 12, at 10.

[134] Volokh, *supra* note 74.

[135] Wesley Lowry, *Trayvon Martin Was Shot and Killed Three Years Ago Today*, WASH. POST (Feb. 26, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/02/26/trayvon-martin-was-shot-and-killed-three-years-ago-today/ [https://perma.cc/CAU9-RSXN]; Alice Speri, *Three Years Since Trayvon Martin's Killing, Stand Your Ground Laws Are Alive and Well in America*, VICE NEWS (Feb. 26, 2015), https://news.vice.com/article/three-years-since-trayvon-martins-murder-stand-your-ground-laws-are-alive-and-well-in-america [https://perma.cc/B7VH-GXND].

[136] CHARLES E. COBB JR., THIS NONVIOLENT STUFF'LL GET YOU KILLED 70 (2014) ("Across the country, with and without guns, black people like [W.E.B.] Du Bois were willing to resist white-supremacist power—especially violence—by any means necessary. If we exclude here the more complex Native American resistance to settlors seizing their land, it can easily be argued that today's controversial Stand Your Ground right of self-defense first took root in black communities."); JOHN R. LOTT JR., MORE GUNS LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 153, 165 (2010); Don Gaetz & Matt Gaetz, *Sen. Don Gaetz and Rep. Matt Gaetz Op-Ed: Standing Up for "Stand Your Ground,"* SAINTPETERSBLOG (May 2, 2012), http://saintpetersblog.com/sen-don-gaetz-rep-matt-gaetz-op-ed-standing-up-for-stand-your-ground/ [https://perma.cc/5FKJ-S3W8] (arguing that "stand your ground" laws protect women and stating, "[c]alls to repeal 'Stand Your Ground' are anti-woman"). Of course many people believe that looser gun laws, such as "stand your ground," disproportionately benefit white males. *See, e.g.*, Dante Atkins, *Stand Your Ground: Women and Blacks Need Not Apply*, DAILY KOS (Oct. 19, 2014, 4:30 PM), http://www.dailykos.com/story/2014/10/19/1336842/-Stand-Your-Ground-Women-and-blacks-need-not-apply# [https://perma.cc/3NA7-P3E5].

[137] LEVERICK, *supra* note 19, at 1.

Act 2008.[138] The Act does not define the defense but simply codifies the common law pursuant to which self-defense is a defense to criminal charges.[139]

Prior to 1969, there was little precedent regarding the duty to retreat in the context of self-defense, but it appeared, based on authorities like Blackstone, that the duty to retreat before using force in self-defense was without exception.[140] In 1969, however, the court in *R v. Julien* found that the duty to retreat did not necessarily require flight in every circumstance, but it at least required that the defendant displayed a willingness not to fight, evidenced perhaps by "physical withdrawal."[141] In *Julien*, the defendant had an altercation with another man in which the defendant threw a milk bottle at the man, striking him atop the head and causing injury.[142] The defendant claimed that he was acting in self-defense after his victim had first threatened him with a "chopper."[143] The court determined that although the facts were subject to dispute, the sole question for the jury was whether or not the defendant was justified under the self-defense doctrine.[144] The defendant argued that the trial judge should not have included that the defendant had a duty to retreat in his self-defense instruction to the jury.[145] Instead, the defendant argued for an abrogation of the duty to retreat suggesting to the court that "an Englishman is not bound to run away when threatened, but can stand his ground and defend himself where he is."[146]

The court in *Julien* was quick to point out that the defendant cited no authority for his assertion that the law gives a person the right to "stand his ground and defend himself where he is."[147] Although the court made clear that it agreed with the defendant that the primary texts on the law do not require a preliminary retreat before using force in self-defense, the court also indicated that there is no right to stand one's ground.[148] The court concluded that:

> It is not, as we understand it, the law that a person threatened must take to his heels and run in the dramatic way suggested by [defendant's counsel]; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make

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[138] Criminal Justice and Immigration Act 2008, c. 4, § 76(2)(a) (Eng.).
[139] *See id*.
[140] *See* R v. Julien, [1969] 1 W.L.R. 839 (AC) at 843 (Eng.); LEVERICK, *supra* note 19, at 70.
[141] LEVERICK, *supra* note 19, at 70 (citing *Julien*, 1 W.L.R. at 843.).
[142] *See Julien*, 1 W.L.R. at 841.
[143] *See id*.; *Chopper*, OXFORD ENGLISH DICTIONARY 166 (James A.H. Murray et al. eds., 2d ed. 1989) (defining "chopper" as a "large-bladed short-handled axe . . . ; a butcher's cleaver").
[144] *See Julien*, 1 W.L.R. at 841.
[145] *See id*. at 842.
[146] *See id*.
[147] *See id*.
[148] *See id*. at 842–43.

> some physical withdrawal; and that that is necessary as a feature of the justification of self-defence is true, in our opinion, whether the charge is a homicide charge or something less serious.[149]

By reducing retreat to a demonstration of a will not to fight rather than requiring actual physical removal from the confrontation, the rule in *Julien* reflects a less-stringent interpretation of the duty to retreat than English law was historically understood to require; however, it also expressly rejects the argument that a person has the right to "stand his ground and defend himself where he is."[150]

In 1985, the rule on the duty to retreat further evolved into its present form.[151] In *R v. Bird*, after an argument broke out, the defendant dumped a glass of liquor over her ex-boyfriend.[152] He retaliated by slapping the defendant, and a verbal and physical altercation followed.[153] According to the defendant, her ex-boyfriend was holding her against a wall when she struck him with her hand.[154] When she struck him, she was still holding the empty liquor glass, which broke and caused him injuries resulting in the loss of an eye.[155] The trial court gave the instruction fashioned in *Julien*, stating that there was a duty to retreat, but the duty only required the defendant to demonstrate her unwillingness to fight—not necessarily her physical withdrawal.[156] The author of the *Bird* opinion, Lord Chief Justice Lane, was also on the *Julien* court and used the *Bird* opinion to expound upon the principles expressed in *Julien*.[157] He explained in *Bird* that the *Julien* justices were "anxious to make it clear that there was no duty, despite earlier authorities to the contrary, actually to turn round or walk away from the scene."[158] Despite achieving this purpose, Lord Chief Justice Lane stated that the *Julien* court "placed too great an obligation on a defendant in circumstances such as those in the instant case."[159] The appeals court held that the possibility of retreat was treated properly in Smith and Hogan's *Criminal Law*, a criminal law treatise, which the appellate court quoted with approval.[160] That passage stated:

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[149] *Id.* at 843.

[150] *Id.* at 842–43 ("[I]t is, of course, well known to us all that for very many years it has been common form for judges directing juries where the issue of self-defence is raised in any case (be it a homicide case or not) to say that the duty to retreat arises."); *see* LEVERICK, *supra* note 19, at 70.

[151] *See* R v. Bird [1985] 2 All E.R. 513 (AC) at 514 (Eng.); LEVERICK, *supra* note 19, at 72.

[152] *See Bird*, 2 All E.R. at 514.

[153] *Id.*

[154] *Id.*

[155] *See id.*

[156] *See id.*

[157] *See id.* at 514–16.

[158] *See id.* at 516.

[159] *See id.*

[160] *See id.*

> There were formerly technical rules about the duty to retreat before using force, or at least fatal force. This is now simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable. If the only reasonable course is to retreat, then it would appear that to stand and fight must be to use unreasonable force. There is, however, no rule of law that a person attacked is bound to run away if he can; but it has been said that—" . . . what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps make some physical withdrawal." It is submitted that it goes too far to say that action of this kind is *necessary*. It is scarcely consistent with the rule that it is permissible to use force, not merely to counter an actual attack, but to ward off an attack honestly and reasonably believed to be imminent. A demonstration by D [the defendant] at the time that he did not want to fight is, no doubt, the best evidence that he was acting reasonably and in good faith in self-defence; but it is no more than that. A person may in some circumstances so act without temporising, disengaging or withdrawing; and he should have a good defence.[161]

This present rule—the rule stated in Smith and Hogan's *Criminal Law*—does not consider the duty to retreat as a separate element of a self-defense justification.[162] Instead, retreat is treated as an element for the trier of fact to consider in deciding whether the defendant's use of force in self-defense was reasonable.[163] British legal scholars have suggested that this reconfiguration of the English law is a legal reply to the dissolution of the duty to retreat in the United States; through this reconfiguration, English law does not require a strict duty to retreat but maintains that retreat ought to remain a factor to be considered for the justification of self-defense.[164]

There was further adjustment to English self-defense law in 2013 when, in order to provide additional assurances for people in their homes, the Crimes and Courts Act adjusted the rules for reasonableness of self-defense that had been set out in the Criminal Justice and Immigration Act in 2008.[165] The section added in 2013 made special accommodations for cases involving householders, allowing them to use disproportionate force so long as it was not grossly disproportionate to the circumstances as the defendant believed them

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[161] *Id.* (quoting SMITH & HOGAN, *supra* note 6, at 327).

[162] *See id*.

[163] *See id*.

[164] *See* LEVERICK, *supra* note 19, at 73–74.

[165] Crimes and Courts Act 2013, c. 22, § 43(2) (Eng); Criminal Justice and Immigration Act 2008, c. 4, § 76(5A), (6) (Eng.); Home Affairs, *supra* note 59, at 1.

to be.[166] Householder cases are those in which a person uses force to defend him or herself (but not for another purpose, like defending his or her property), inside or partially inside a dwelling where he or she is not a trespasser, from another person who he or she honestly believes to be a trespasser.[167]

Thus while the U.S. justification of self-defense evolved primarily by abrogating the duty to retreat, under English law, the defense has developed so as to incorporate the duty to retreat within the determination of whether a defendant's use of force was reasonable.[168]

C. Gun Ownership and Homicide Rates in the United States and England

When considering the law of self-defense in the United States and England, it is important to bear in mind the relative gun-ownership figures in each country.[169] In the United States, self-defense and retreat laws operate in the most heavily armed country in the world.[170] There are likely between 83 and 97 guns for every 100 Americans.[171] Only machine guns and sawed-off long guns are prohibited at the federal level.[172] There is no nationally required license for the ownership of legal firearms, and such a license exists in only a few states.[173] Dealers—and in some states, private sellers—are, however, required to conduct background checks for all sales.[174] In 2011, there were 4.7 homicides in the United States for every 100,000 U.S. residents.[175] Additionally, for every 100,000 U.S. residents, there were 3.2 gun homicides in 2011.[176] That is, about 68% of homicides were gun homicides.[177]

The situation is much different in England and Wales.[178] In the 2014 statistical year, there were 0.92 homicides for every 100,000 of population.[179] The

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[166] *See* Crimes and Courts Act 2013, c. 22, § 43(2); Criminal Justice and Immigration Act 2008, c. 4, § 76(5A), (6); *Self-Defence and the Prevention of Crime*, *supra* note 57.

[167] *See Self-Defence and the Prevention of Crime*, *supra* note 57.

[168] *See, e.g.*, Crimes and Courts Act 2013, c. 22, § 43(2) (Eng.); Criminal Justice and Immigration Act 2008, c. 4, § 76(5A), (6) (Eng.); *Runyan*, 57 Ind. at 84; LEVERICK, *supra* note 19, at 73; *Self-Defence and the Prevention of Crime*, *supra* note 57.

[169] *See* GRADUATE INST. OF INT'L STUDIES GENEVA, SMALL ARMS SURVEY 2007: GUNS AND THE CITY 47 (2007).

[170] *Id.*

[171] *Id.*

[172] *See* COOK & GOSS, *supra* note 1, at 120.

[173] *See id.*

[174] *Id.*

[175] Erica L. Smith & Alexia Cooper, *Homicide in the U.S. Known to Law Enforcement, 2011*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE 4 (Dec. 2013), http://www.bjs.gov/content/pub/pdf/hus11.pdf [https://perma.cc/M7LY-BA8K].

[176] *Id.* at 6.

[177] *See id.* at 4, 6.

[178] *See* COOK & GOSS, *supra* note 1, at 120; GRADUATE INST. OF INT'L STUDIES GENEVA, *supra* note 169, at 47. *Compare* Smith & Cooper, *supra* note 175, at 4, 6, (compiling U.S. homicide statistics as of 2011), *with* OFFICE FOR NAT'L STATISTICS, CHAPTER 2: VIOLENT CRIME AND SEXUAL OF-

homicide rate generally increased beginning in the late 1960s, peaked in the 2002 statistical year, and since has been in decline.[180] The homicide victim was killed by a gun in just 29—or 6%—of the 2014 homicides.[181] This number remained consistent from the previous year but is currently at its lowest since 1980.[182]

Gun ownership in England and Wales is also much lower than it is in the United States.[183] Estimates suggest that there are between 3.3 and 7.8 firearms for every 100 people in England and Wales.[184] Handguns were effectively banned throughout Great Britain in 1998, and semiautomatic assault weapons and automatic weapons also are banned from civilian ownership.[185] A license, which requires a background check and character reference, is required to own legal guns.[186] Additionally, civilians wishing to own legal guns must demonstrate an acceptable reason they need to own the gun, such as collecting or shooting sports.[187]

III. ANALYSIS

Many U.S. jurisdictions have abrogated the duty to retreat via mechanisms such as the true man doctrine and the stand your ground doctrine; meanwhile, English law has reconfigured the duty to retreat such that it is no longer a strict duty but a factor in determining the reasonableness of the use of force in self-defense.[188] Because Florida's law removing the duty to retreat is stated simply and is typical of similar laws in the United States, it serves as a good example for comparative purposes.[189] Such a comparison shows that the English formulation should be adopted in U.S. jurisdictions instead of shed-

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FENCES—HOMICIDE 1, 2, 4 (Feb. 12, 2015), http://www.ons.gov.uk/ons/dcp171776_394478.pdf [https://perma.cc/7RCR-PECQ] (compiling England and Wales homicide statistics as of 2014).

[179] *See* OFFICE FOR NAT'L STATISTICS, *supra* note 178, at 1. The report gives statistics per one million of population. *Id.* The figure 0.92 for every 100,000 was calculated from the reported figure of 9.2 per 1 million to match the format of the U.S. statistics. *See id.*

[180] *See id.* at 4. The statistical year begins and ends in March. OFFICE FOR NAT'L STATISTICS, COMPENDIUM: ABOUT THIS RELEASE pt. 3 (Feb. 12, 2015), *available at* https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/2015-02-12/aboutthisrelease [https://perma.cc/43AU-LEPT].

[181] *See* OFFICE FOR NAT'L STATISTICS, *supra* note 178, at 2.

[182] *See id.*

[183] *See* GRADUATE INST. OF INT'L STUDIES GENEVA, *supra* note 169, at 47.

[184] *See id.*

[185] *See* COOK & GOSS, *supra* note 1, at 120, 138.

[186] *See id.* at 120.

[187] *See id.*

[188] *See, e.g.*, FLA. STAT. ANN. § 776.012(2); 18 PA. STAT. AND CONS. STAT. ANN. § 505(b)(2.3); Erwin v. State, 29 Ohio St. 186, 199–200 (1876); R v. Bird [1985] 2 All E.R. 513 (AC) at 516 (Eng.).

[189] *See* FLA. STAT. ANN. § 776.012(2); Peter Jamison, *One Nation, Under No Duty to Retreat*, TAMPA BAY TIMES (Mar. 7, 2014), http://www.tampabay.com/news/perspective/one-nation-under-no-duty-to-flee/2169112 [https://perma.cc/Q653-U8KK].

ding the duty to retreat or implementing stand your ground laws.[190] In analyzing both formulations, it is important to consider the benefits and drawbacks of each approach in relation to the prosecution and defense in the context of trial, the ability of the jury to understand and apply the law, and the respective cultures and histories of both countries.191

A. The Effect of Both Approaches on Trials and Juries

Laws and doctrines that eliminate the duty to retreat often require the jury to decide whether or not the defendant reasonably believed that the use of deadly force was necessary to prevent death or serious injury or various felonies being committed against him or her.[192] In Florida, for example, this means "the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force."[193] The availability of safe retreat, however, is not a factor in this determination because the statute has explicitly removed it.[194] Thus, the question that remains for the jury is one of reasonableness—regardless of the possibility of retreat.[195]

Meanwhile, the modern English formulation asks jurors to determine whether or not the force used by a defendant acting in self-defense was reasonable under the circumstances as that defendant believed them to be, so long as his belief about the circumstances is honest.[196] Pursuant to the case law, this reasonableness assessment includes the consideration of whether or not safe retreat was an option.[197]

In both the U.S. and English articulation of self-defense law, the jury is required to examine the reasonableness of the use of force.[198] The difference

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[190] FLA. STAT. ANN. § 776.012(2).

[191] *See infra* Part III.A–B.

[192] *See, e.g.*, *infra* Part III.A–B; FLA. STD. JURY INSTR. (CRIM.) 3.6(f).

[193] FLA. STD. JURY INSTR. (CRIM.) 3.6(f).

[194] FLA. STAT. ANN. § 776.012(2) ("A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.").

[195] *See id*.

[196] *See* Criminal Justice and Immigration Act 2008, c. 4, § 76(3), (4) (Eng.).

[197] *See Bird*, 2 All E.R. at 516; LEVERICK, *supra* note 19, at 72–73.

[198] *Compare* Criminal Justice and Immigration Act, 2008 c. 4, § 76(3), (4) (Eng.) (addressing the reasonableness of the use force is self-defense and the reasonableness of the defendant's beliefs about the circumstances of the use of force), *and Bird*, 2 All E.R. at 516 (holding that retreat is not a separate element of self-defense, but part of the assessment of reasonableness), *and* LEVERICK, *supra* note 19, at 73 (citing *Bird* and and Australian case to recount that retreat is currently part of reasonableness, and no longer a separate requirement), *with* FLA. STAT. ANN. § 776.012(2) (establishing that there is no duty to retreat before using force in self-defense in certain situations outside the home, but retaining the requirement that the defendant reasonably believe that force is necessary), *and* FLA. STD. JURY INSTR. (CRIM.) 3.6(f) (stating that even in cases involving stand your ground, the defendant

lies in whether and where the opportunity to retreat should enter the reasonableness equation.[199] In U.S. jurisdictions without a duty to retreat, as articulated in *Erwin v. State*, the jury may not consider whether the defendant had an opportunity for safe retreat.[200] On the other hand, under the English rule in *R v. Bird*, a defense could stand or fail depending on whether a jury believed that the opportunity to retreat did not present itself or that it presented itself, but the defendant was not unreasonable in not retreating.[201]

It is true that the adoption of the English approach may confuse American juries or give the juries a considerable amount of nullification power while considering the facts of individual cases.[202] As commentator Fiona Leverick points out, a racially prejudiced jury would have an easier time acquitting a white defendant for the killing of a black victim when the law only requires a consideration of retreat in a reasonableness assessment, rather than a strict duty to retreat as in older common law.[203] Professor Leverick's argument may be true when the modern English articulation of self-defense law is compared to a strict duty to retreat.[204] Even under the English version of retreat, however, such a racist acquittal is more difficult than a racist acquittal under a law that requires no duty to retreat at all, which is currently the standard in a majority of U.S. states.[205] Further, it may remain true to some degree that a required duty to retreat lies—as the 1877 Indiana court phrased it—counter to the "American mind."[206] In 2013, a Quinnipiac University poll found that 53% of

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must have "reasonably believed that it was necessary to [use force] to prevent death or great bodily harm . . . or to prevent the commission of a forcible felony.").

[199] *Compare* Criminal Justice and Immigration Act 2008, c. 4, § 76(3), (4), *and Bird*, 2 All E.R. at 516, *and* LEVERICK, *supra* note 19, at 73, *with* FLA. STAT. ANN. § 776.012(2), *and Erwin*, 29 Ohio St. at 199–200 (stating that there is no duty to retreat), *and* FLA. STD. JURY INSTR. (CRIM.) 3.6(f) (stating that there is no duty to retreat).

[200] *See Erwin*, 29 Ohio St. at 192–93, 199–200; LEVERICK, *supra* note 19, at 74–75.

[201] *See Bird*, 2 All E.R. at 516; LEVERICK, *supra* note 19, at 72–74.

[202] *See* LEVERICK, *supra* note 19, at 81–82.

[203] *See id*.

[204] *See id*.

[205] *See* Volokh, *supra* note 74; *cf.* LEVERICK, *supra* note 19, at 81–82 (suggesting that a modified retreat requirement more easily permits acquittals based on racial prejudice). *Compare* Criminal Justice and Immigration Act 2008, c. 4, § 76(3), (4), *and Bird*, 2 All E.R. at 516, *and* LEVERICK, *supra* note 19, at 73, *with* FLA. STAT. ANN. § 776.012(2), *and* FLA. STD. JURY INSTR. (CRIM.) 3.6(f).

[206] Runyan v. State, 57 Ind. 80, 84 (1877) ("[T]he tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence."); Sean Sullivan, *Four Reasons Why 'Stand Your Ground' Laws Won't Be Repealed*, WASH. POST: THE FIX (July 19, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/07 /19/four-reasons-why-stand-your-ground-laws-wont-be-repealed/ [https://perma.cc/7PQX-SPVA] (identifying the prevalence of Republicans in state legislatures, lobbying by the powerful National Rifle Association, permanence of the criticized Florida law, and the close of most legislature's business for 2013 as reasons "stand your ground" laws had not been repealed); Lauren Fox, *Poll: Majority of Americans Support 'Stand Your Ground' Laws*, U.S. NEWS & WORLD REP. (Aug. 2, 2013), http://www.usnews.com/news/articles/2013/08/02/poll-a-majority-of-americans-

Americans support stand your ground laws, which eliminate the duty to retreat, but this support varied greatly along political and racial lines.[207] Allowing retreat to become an element of the reasonableness assessment may provide the flexibility sought by the American public, and it may assuage Americans' concerns that a strict doctrine of retreat would be too rigid to provide adequate protection and self-defense.[208] In addition, it would prevent avoidable deaths by setting a higher bar than that set by stand your ground laws—particularly in cases where a person has an opportunity to safely retreat.[209]

Compared to the complete elimination of the duty to retreat, including retreat in an analysis of reasonableness would narrow the range of situations in which self-defense could be applied successfully.[210] This means that a defendant would have to offer more evidence in order to effectively present a claim of self-defense.[211] Specifically, convincing evidence would have to show that retreat was not available, or that if it were, the defendant's use of force was not unreasonable despite the availability of retreat.[212] Likewise, a prosecutor may have a stronger case if he can present convincing evidence that retreat was an option and that the defendant's actions were not reasonable because he neglected to retreat.[213] The ultimate effect of adopting the English-inspired approach to the duty to retreat is that it would narrow the successful application of the justification of self-defense.[214]

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support-stand-your-ground-laws [https://perma.cc/X4AK-T88B] (Quinnipiac University poll showing that 53% of Americans support "stand your ground" laws).

[207] Fox, *supra* note 206 (discussing that support was strongest among gun owners, white Americans, and Republicans, with 57% of white Americans supporting the laws and 57% of black Americans opposing them).

[208] *See Runyan*, 57 Ind. at 84; LEVERICK, *supra* note 19, at 78–79; Fox, *supra* note 206; Sullivan, *supra* note 206.

[209] *See* LEVERICK, *supra* note 19, at 78–79.

[210] *Cf. id.* at 81–82 (presenting that weakening the duty to retreat could expand the application of self-defense claims without establishing a clear standard for reasonableness). *Compare* Criminal Justice and Immigration Act 2008, c. 4, § 76(3), (4) (Eng.), *and Bird*, 2 All E.R. at 516, *and* LEVERICK, *supra* note 19, at 73, *with* FLA. STAT. ANN. § 776.012(2), *and* FLA. STD. JURY INSTR. (CRIM.) 3.6(f).

[211] *Cf.* LEVERICK, *supra* note 19, at 81–82 (stating that when the strict duty to retreat is eliminated, juries have a significant amount of latitude in determining the reasonableness of the use of force). *Compare* Criminal Justice and Immigration Act 2008, c. 4, § 76(3), (4) (Eng.), *and Bird*, 2 All E.R. at 516, *and* LEVERICK, *supra* note 19, at 73, *with* FLA. STAT. ANN. § 776.012(2), *and* FLA. STD. JURY INSTR. (CRIM.) 3.6(f).

[212] *See* Criminal Justice and Immigration Act 2008, c. 4, § 76(3), (4)*; Bird*, 2 All E.R. at 516; LEVERICK, *supra* note 19, at 73, 81–82.

[213] *See* Criminal Justice and Immigration Act 2008, c. 4, § 76(3), (4)*; Bird*, 2 All E.R. at 516; LEVERICK, *supra* note 19, at 73, 81–82.

[214] *Compare* Criminal Justice and Immigration Act 2008, c. 4, § 76(3), (4), *and Bird*, 2 All E.R. at 516, *and* LEVERICK, *supra* note 19, at 73, *with* FLA. STAT. ANN. § 776.012(2), *and* FLA. STD. JURY INSTR. (CRIM.) 3.6(f).

B. Retreat in Culture and History

The Ohio Supreme Court wrote its famous true man doctrine in 1876, stating, "a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."[215] Despite its wide acceptance, this doctrine was met with scathing reviews in two 1903 articles published in the *Columbia Law Review* and the *Harvard Law Review* by Joseph H. Beale, a distinguished American legal scholar.[216]

In the more animated of the two critiques, Beale emphasized that it remained unquestioned that necessary killings in self-defense were to be "excused, and must be acquitted when indicted."[217] He then presented the historical development of the law of self-defense and pointed out that it was much more frequently argued in U.S. courts than in English courts.[218] He criticized the elimination of the duty to retreat—which was becoming prevalent in the southern and western United States—as being rooted "in the ethics of the duelist, the German officer, and the buccaneer."[219] To demonstrate that these ideals did not represent all of American culture, he cited a contemporary Alabama judge who rejected the notion of "wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly" over human life as "trash."[220]

Beale highlighted that the problem of being met with a dangerous attack is centuries old, and he acknowledged that safe retreat at the barrel of a gun is much rarer than safe retreat when met with less-deadly implements.[221] According to Beale, however, "[t]he problem is the same now in America as it was three centuries ago in England," and the growing improbability of safe retreat should not mean that the law should require the attempt to retreat safely any less frequently.[222] Airing his distaste for the evolution of abolishing retreat, Beale exclaimed that it was born from the same "feeling which is responsible for the duel, for war, for lynching"—all of which Beale believed had been dis-

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[215] *Erwin*, 29 Ohio St. at 199–200.

[216] *See* Joseph H. Beale Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 577–82 (1903) [hereinafter Beale, *Retreat*]; Joseph H. Beale Jr., *Homicide in Self-Defence*, 3 COLUM. L. REV. 526, 539–42 (1903) [hereinafter Beale, *Homicide*]. Beale's career included holding a professorship at Harvard where he was one of the founders of the Harvard Law Review, holding the inaugural deanship of the University of Chicago Law School, and authoring several books and articles on American law. Samuel Williston, *Joseph H. Beale: A Biographical Sketch*, 56 HARV. L. REV. 685, 685–87 (1943); KADISH ET AL., *supra* note 13, at 865.

[217] Beale, *Retreat*, *supra* note 216, at 567.

[218] *See id.* at 567–77.

[219] *Id.* at 577.

[220] *Id.* at 578 (quoting Springfield v. State, 11 So. 250, 251 (Ala. 1892) (internal quotations omitted)).

[221] *Id.* at 580.

[222] *Id.*

paraged by societal progress.[223] He made one more quip about American culture, stating, "It is undoubtedly distasteful to retreat; but is ten times more distasteful to kill."[224] Assuredly—despite the slim margin of support among Americans for modern stand your ground laws and the reconfiguring of the duty to retreat by English courts—the primacy and preservation of human life stands.[225]

Beale's argument is not based in social and cultural considerations alone but is also grounded in the law of self-defense.[226] He was careful to explain that the requirement of retreat was not blind to the circumstances.[227] Instead, retreat was never required when it could not be done in complete safety.[228] There were further exceptions, such as the ubiquitous castle doctrine, which never required retreat in or around the home.[229] Beale understood that more attacks in the United States were being carried out with guns, and in light of this, he maintained that, as retreat was only required when it could be done safely, self-defense still justifies the use of force in such situations where safe retreat is impossible.[230]

Of course, Beale was advocating for a required duty to retreat, not the version of retreat that was developed in English courts in the twentieth century.[231] His arguments for retaining the duty to retreat, however, lend themselves to the argument in support of the English application of the duty to retreat, where retreat is a consideration in an analysis of reasonableness.[232] For example, if modern jurors believe—as Beale did—that it is distasteful to retreat but even more distasteful to kill, then they are less likely to find the use of force in self-defense to be reasonable when safe retreat is an option.[233] Further, Beale's observations about the prevalence and unique nature of guns as well as the limited likelihood of safe retreat stand true today.[234] By acknowledging that retreat may be the best means of proving the reasonableness of the use of force in self-defense but accepting that it is not the only means, the English rule would allow jurors assessing the availability of retreat as an element of reasonable-

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[223] *See id.* at 581.

[224] *Id.*

[225] *See Bird*, 2 All E.R. at 516; LEVERICK, *supra* note 19, at 78–79; Beale, *Retreat*, *supra* note 216, at 581; Fox, *supra* note 206.

[226] *See* Beale, *Retreat*, *supra* note 216, at 579, 581.

[227] *See id.* at 579.

[228] *See id.*

[229] *Id.* at 579; *see* KADISH ET AL., *supra* note 13, at 866.

[230] *See* Beale, *Retreat*, *supra* note 216, at 579–80; Beale, *Homicide*, *supra* note 216, at 540.

[231] *See*, *Bird*, 2 All E.R. at 516; Beale, *Retreat*, *supra* note 216, at 580; *supra* Part III.A–B.

[232] *See* LEVERICK, *supra* note 19, at 78–79; Beale, *Retreat*, *supra* note 216, at 579–81.

[233] *See* LEVERICK, *supra* note 19, at 78–79, 81–82; Beale, *Retreat*, *supra* note 216, at 581.

[234] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 230 (5th ed. 2009); GRADUATE INST. OF INT'L STUDIES GENEVA, *supra* note 169, at 47; COOK & GOSS, *supra* note 1, at 120; Beale, *Retreat*, *supra* note 216, at 580; Smith & Cooper, *supra* note 175, at 4, 6.

ness to consider the situation in a manner that incorporates American culture regarding self-defense and the prevalence of guns in American society without allowing them to ignore retreat entirely.[235]

C. Mechanism for Change

In the United States, the shedding of the duty to retreat was both a judicial and legislative initiative.[236] In England, the reconfiguration of the duty to retreat from duty *per se* to a factor in the assessment of reasonableness was effected by judicial policymaking.[237] If U.S. jurisdictions wish to change their retreat laws to reflect the English formulation suggested by this Note, they should do so by legislative enactment.[238] This should be done because, whereas the common law is often changed slowly and incrementally, statutory law allows the legislature to make extensive modifications to the law.[239]

The English case *Bird* offers guidance on how U.S. jurisdictions could adjust their self-defense laws to include retreat.[240] The *Bird* court relied on an authoritative criminal law text, which was likely linked to an earlier ruling in an Australian case, *R v. Howe*.[241] In turn, the court in *Howe* held that retreat before using force was no longer a singular requirement of self-defense, and it stated that "[w]hether a retreat could or should have been made is merely an element for the jury to consider as entering into the reasonableness of the conduct of the accused."[242] State legislatures could adopt similar language into self-defense laws across the United States.243

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[235] *See Bird*, 2 All E.R. at 516 ("A demonstration by D [the defendant] at the time that he did not want to fight is, no doubt, the best evidence that he was acting reasonably and in good faith in self-defence; but it is no more than that. A person may in some circumstances so act without temporising disengaging or withdrawing; and he should have good defence." (quoting SMITH & HOGAN, *supra* note 6) (internal quotations omitted)); COOK & GOSS, *supra* note 1, at 120; GRADUATE INST. OF INT'L STUDIES GENEVA, *supra* note 169, at 47; Beale, *Retreat*, *supra* note 216, at 580; Fox, *supra* note 206; Smith & Cooper, *supra* note 175, at 4, 6.

[236] *See* KADISH ET AL., *supra* note 13, at 865; Jamison, *supra* note 189; *see, e.g.*, FLA. STAT. ANN. § 776.012(2); *Erwin*, 29 Ohio St. at 199–200.

[237] *See Bird*, 2 All E.R. at 516; LEVERICK, *supra* note 19, at 72.

[238] *See* Allan C. Hutchinson, *Work-in-Progress: Evolution and Common Law*, 11 TEX. WESLEYAN L. REV. 253, 255–56 (2005); *cf.* FLA. STAT. ANN. § 776.012(2); *Erwin*, 29 Ohio St. at 199–200 (shedding the duty to retreat in favor of the "true man" doctrine by judicial innovation).

[239] Hutchinson, *supra* note 238.

[240] *See Bird*, 2 All E.R. at 516 (citing SMITH & HOGAN, *supra* note 6, at 327 (5th ed. 1983)).

[241] *See Bird*, 2 All E.R. at 516; LEVERICK, *supra* note 19, at 72–73 (citing *R v. Howe* (1958–59) 100 CLR 448 (Austl.)).

[242] *R v. Howe* (1958–59) 100 CLR 448, 448 (Austl.); LEVERICK, *supra* note 19, at 73.

[243] *See Bird*, 2 All E.R. at 516; *Howe*, 100 CLR at 448; *cf.* FLA. STAT. ANN. § 776.012(2) (imposing by statute Florida's stand your ground provision).

As an example, Florida's stand your ground provision could be reformed using the *Bird* ruling and considering the *Howe* terminology.[244] The current Florida law states:

> A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.[245]

The abrogation of the duty to retreat is clearly stated in the second sentence of the provision.[246] To institute the English-style retreat, drafters should delete this sentence.[247] Then, a separate subsection should include language similar to the following: "Necessity of self-defense means reasonable necessity and is an issue of fact. In considering reasonable necessity, a fact-finder shall take into account retreat or demonstration of an unwillingness to fight."[248] This change would incorporate the English rule's inclusion of retreat in a reasonableness assessment that is to be determined by the jury.[249] If the legislature was so inclined, it could include additional factors that may be taken into account in the assessment of the reasonableness of the defendant's actions such as whether he or she was "engaged in a criminal activity and is in a place where he or she has a right to be."[250] Such an edit to the existing law does not create a strict duty to retreat, but it does include retreat in a way that allows American jurors to consider the entirety of the circumstances, including cultural views on retreat.[251] Borrowing such a concept from English law would not only be more protective of life than abolishing the duty to retreat but also more in line with American history and perception of self-defense.[252]

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[244] *See* FLA. STAT. ANN. § 776.012(2); *Bird*, 2 All E.R. at 516; *Howe*, 100 CLR at 448.

[245] FLA. STAT. ANN. § 776.012(2).

[246] *See id.* The duty to retreat is also explicitly abolished in § 776.012(1) in regard to non-deadly force. *Id.* § 776.012(1). The re-drafting recommended in the text above, though discussed in terms of subsection two, would apply to both sections. *See id.* § 776.012.

[247] *See id.* § 776.012(2); *Bird*, 2 All E.R. at 516.

[248] *See Bird*, 2 All E.R. at 516; *Howe*, 100 CLR at 448.

[249] *See Bird*, 2 All E.R. at 516; *Howe*, 100 CLR at 448.

[250] *See* FLA. STAT. ANN. § 776.012(2); *Bird*, 2 All E.R. at 516; *Howe*, 100 CLR at 448.

[251] *See Bird*, 2 All E.R. at 516; COOK & GOSS, *supra* note 1, at 120; GRADUATE INST. OF INT'L STUDIES GENEVA, *supra* note 169, at 47; Beale, *Retreat*, *supra* note 216, at 579–80; Fox, *supra* note 206; Smith & Cooper, *supra* note 175, at 4.

[252] *See Bird*, 2 All E.R. at 516; COOK & GOSS, *supra* note 1, at 120; GRADUATE INST. OF INT'L STUDIES GENEVA, *supra* note 169, at 47; Beale, *Retreat*, *supra* note 216, at 579–80; Atkins, *supra*

CONCLUSION

Evaluating the ways in which the U.S. and English legal systems have adjusted the common-law duty to retreat shows that there are options for how modern law may apply the historic duty before permitting the use of force in self-defense. Many states in the United States have removed the duty to retreat from the consideration of self-defense entirely. England, on the other hand, has not entirely eliminated the duty to retreat but has reconfigured it to be a factor to consider when evaluating the reasonableness and necessity of self-defense. The modern English approach as articulated in the 1985 case *R v. Bird* should be adopted in the United States.

The English approach conceived in *Bird* maintains that retreat is an important factor in self-defense while also recognizing that certain circumstances might outweigh it. In the United States, those circumstances might include American perceptions of self-defense and the cultural prevalence of guns, which likely would render the application of the law different from its application in England and Australia. The law in the various states of the United States should be updated to include language reflecting the English rule in *Bird*. Scholars critical of weaker retreat rules have posited that such an articulation of retreat might empower juries to act on individual biases and prejudices rather than legal concepts. Practically speaking, however, in the United States, an English-style retreat rule is actually more in line with cultural perceptions about self-defense and is also more protective of human life than the outright elimination of the duty to retreat. Adopting the English approach would allow a type of compromise that would be both sensitive to Americans' gun ownership and more protective of human life.

note 136; Fox, *supra* note 206; Smith & Cooper, *supra* note 175, at 4; Speri, *supra* note 135; Sullivan, *supra* note 206.