

Ralph Bunche Journal of Public Affairs

Volume 5

Issue 1 *social and equal justice in America in the case of stand your ground (SYG) law.*

Article 4

Spring 2016

Codification of Fear: SYG Laws

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Recommended Citation

Harmon, Thelma L. (2016) "Codification of Fear: SYG Laws," *Ralph Bunche Journal of Public Affairs*: Vol. 5: Iss. 1, Article 4.
Available at: <http://digitalscholarship.tsu.edu/rbjpa/vol5/iss1/4>

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There is a long history of American states' codification of "fear" into laws which have a nefarious effect on Blacks. Laws conceived and enacted under the guise of a "color blind" U.S. Constitution can be traced as far back as the 17th century were devised to appease white America's perceived fear of Blacks. Slave Codes were the first such legislations. When slavery was abolished making Slave Codes obsolete, Black Codes and then Jim Crow laws took effect. For over three centuries, these overt racial laws justified racial fear and legitimized the deprivation of Black Americans' human¹ and civil rights (Belvins 2006; Bradley 2000). Overt racial laws may have been ostensibly abolished, but they never lost their foothold on American shores. They are now subtly lurking in the shadows of face-neutral laws such as war on drugs, voter identification, and Stand Your Ground ("SYG").

SYG laws are rooted in the "castle doctrine;" a common law doctrine that allows a homeowner to use force, including deadly force to protect themselves, their property, or others against a home invader without imposing a duty to retreat prior to the use of such force. If outside of the "castle," an individual must retreat or attempt to retreat, if safely possible, before using force or deadly force (Abuznaid et al. 2013; Catalfamo 2007). SYG extends the right to use force or deadly force and eliminates the retreat duty to places outside the home, such as businesses, vehicles, or anywhere else a person has a legal right to be (such as a park or public sidewalk) if and to the extent one reasonably believe that force or deadly force is immediately necessary (Lave 2012). In addition, SYG provides blanket civil and criminal immunity for a person who uses deadly force under this expanded right (Abuznaid et al. 2013).

Studies show SYG disproportionately impact black victims (McCormick 2014). Their killings are considered to be the 20th century adaptation of extrajudicial killing (lynching); killings that reached its height during the Jim Crow era (Hall 2013; Lave 2012; Armour 1994). The killings were justified in the name of justice for some presumed criminal offense typically involving "a white victim and an alleged black perpetrator" (Hall 2013, 101). Lynching gave whites the right to end black life with impunity, SYG does the same.

As states and the federal government confront the challenges created by SYG laws and the right of self-defense, a balance must be struck between the competing interests. On the one hand, states have a legitimate interest in promulgating laws to protect the safety and welfare of its citizens; on the other, the federal government has an interest in ensuring that such laws are applied equitably and do not violate an individual's human and civil rights. In finding the proper balance, the preeminent concern must be the protection of individual civil and human rights. Achieving this balance will be difficult since SYG involves state police powers reserved to the states under the Tenth Amendment (Siegel 2006).

Part I of this article examines the concept of fear and white America's "Negrophobia"² (Brooks 2012). It will then discuss the promulgation of racial laws premised solely on this fear. Part II will examine the historical context of the war on drugs and voter identification laws and how their racialization is eerily reminiscent of those of Slave Codes, Black Codes, and Jim Crow. Part III will provide a brief overview of SYG laws and examine how "black typification of crime" plays into it. It will further discuss how Black stereotypes and implicit bias affect the application of SYG laws and how this racialized application has a disparate impact on Blacks. Part IV examines three possible solutions to SYG laws; federal legislation, judicial intervention, and state amendment. Part V concludes this article.

I. RACIAL LAWS

A. Fear. Of the emotions that typically color decision-making, one stands alone in both its impact and the frequency with which it arises--fear. Fear is subjective and hard to quantify; yet, it motivates,³ distorts,⁴ and creates danger (Guzelian 2004; Gordon 1980; Dunn and Hoegg 2014; Buss 2001; Buck 1977; Clarke and Chess 2009). "Man's

¹ Human rights violated by slavery included protective rights (right to life, liberty and security; right to freedom (freedom of religion, assembly, vote); social rights (right to freely work, residential choice); rights of participation (right to participate in democratic process, right to economic life). 31 T. Marshall L. Rev. 253, 273 (2006).

² "Negrophobia has been defined as the profound fear or hatred of black people and black culture. See Aida A. Brooks, *Black Negrophobia and Black Self-Empowerment: Afro-Descendant Responses to Societal Racism in São Paulo, Brazil*, UW-L Journal of Undergraduate Research XV (2012). <http://www.uwlax.edu/urc/JUR-online/PDF/2012/brooks.adia.pdf>.

³ Robert M. Gordon, *Fear*, 89 Philosophical Review 560, 560 (1980) (Fear motivates avoidance of vulnerability); Lea Dunn and JoAndrea Hoegg, *The Impact of Fear on Emotional Brand Attachment*, 41 J. Consumer Research 433, 433 (2014) (Fear motivates people to seek out others to share their fearful experience).

⁴ David M. Buss, *Cognitive Biases and Emotional Wisdom in the Evolution of Conflict between the Sexes*, 10 Current Directions in Psychological Science 219,220 (2001) (Fear distorts reason.); Peter Buck, *Seventeenth-Century Political Arithmetic: Civil Strife and Vital Statistics*, 68 Isis 67, 70 (1977) (Fear distorts understanding and perceptions).

fear is fear of something or for something, i.e., of illness, loss of money, dishonor, and/or social status to name a few. The relation of the first something to the second something and their respective relevance determine the particular kind and intensity of our fear” (Riezler 1944, 489). Man’s most prevalent fears can be categorized as social, political,⁵ and economic (Oladosua 2008). Fears are catalysts that trigger irrational actions from citizens, courts, and legislatures (Chambers 2004). Laws, like the U.S. Constitution (considered the supreme law of the land) are intended to act as barriers against such irrational actions (Krygier 1999). Without them to help “keep the peace...and restrain and disarm potentially combative citizens,” chaos ensues (Krygier 1999, 68). However, since the 17th century’s institution of slavery, Blacks have been prevented from fully enjoying the aegis of the Constitution. Whites were fearful of losing their social status, political standing, and economic well-being should Blacks be considered citizens entitling them to all the rights and privileges of citizenship (Spear 2007; Smith 1987). These collective fears of Blacks, known as “Negrophobia,”⁶ proved to be the catalyst that triggered racial laws like Slave Codes, Black Codes, and Jim Crow;⁷ all of which denied Blacks their human and civil rights⁸ (Finkelman 2006).

Slave Codes were a series of laws that defined the legal relation between slave owner and slave. Slave Codes dehumanized slaves, relegated them to the status of non-persons, and stripped them of their human and civil rights that were enjoyed by whites. Although slave codes varied from state to state, there were three fundamental tenets: (1) lifetime slave status,⁹ (2) inheritance of slave status,¹⁰ and (3) slaves deemed chattel property¹¹ (Wiecek 1977).

The lifetime slave status ensured a permanent, reliable, and free workforce that was crucial to the commercial and industrial development of the South (Moore 1941). Inheritance of slave status provided a limitless workforce. Designation as chattel property emphasized the economic importance of slaves as creators of wealth for their owners (Copeland 2010). Furthermore, chattel produced chattel which was even more important in that it increased the slave owner’s productivity and profitability, and provided an additional stream of revenue at slave auctions (Copeland 2010; Franklin 1980; Marquis 1996). “[B]efore the Civil War, [a slave] child was worth \$100 at birth, \$500 at the age of five” (Marquis 1996, 100). These three tenets were crucial in the development of the institution of slavery and in adapting slavery to play the role it needed to play—answering the economic, social, and political fears of whites.

Blacks’ refusal to yield to slavery led to numerous insurrections (Woodson 1922). Anticipating such insurrections, early Slave Codes sought to minimize them by restricting slave assemblies for religious purposes (May 2007). However, as whites’ fears “engendered by...Negro insurrection[s]...”¹² grew in intensity, harsher and more expansive slaves laws always followed further abridging Blacks’ civil and human rights¹³ (Olson 1944, 147; Stewart

⁵ Afis Ayinde Oladosu, *Is It Because My Face Is Black?* 39 J. Arabic Literature 184, 193(2008) (Author notes that Britain came to Africa in search of wealth without which the country would not have realized its economic aspirations and political identity.).

⁶ 34 *Annals of Cong.* 1223 (1819) (In a bill debate on inserting a clause prohibiting slavery in the new territory that was to become the State of Arkansas, Kentuckian Rep. Clay accused New Yorkers “being under the influence of ‘negrophobia.’” This was the earliest known written use of the term “negrophobia.”).

⁷ Slave codes were established in most of the colonies. Although they varied, there were common areas such as not allowing slaves to travel, bear arms, receive religious training or education, to be tried in court, to buy and sell, to marry interracially. Paul Finkelman, *Black Codes and Slave Codes*, Colonial, Encyclopedia of African American History, 1619 – 1895; <http://www.oxfordasc.com/article/opr/t0004/e0060>.

⁸ Civil rights protect individuals from discrimination. Human rights are basic rights inherent with birth, whereas civil rights are the creation of society.

⁹ Wiecek, William M., *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 Wm & Mary Qtrly. 258, 262 (1977) (Maryland and New York passed laws mandated lifelong servitude for all black slaves).

¹⁰ Wiecek, William M., *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 Wm & Mary Qtrly. 258, 262 (1977). (Virginia Slave Code stated that all black children born in Virginia acquired the status of their mother).

¹¹ Wiecek, William M., *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 Wm & Mary Qtrly 3d Series 258, 262 (1977). South Carolina slaves were deemed chattel.

¹² Edwin Olson, *The Slave Code in Colonial New York*, 29 J. Negro Hist. 147,147 (1944). (New York slave rebellion of 1712 resulted in enactment of harsher slave codes); Marjorie Alexander Stewart, *A Comparative Analytical Study of the Black Code and Slave Code of Georgia*. (thesis) (1934) 4 (unpublished) (Georgia imposed harsher laws after Nate Turner Rebellion); Darold D. Wax, *The Great Risque We Run": The Aftermath of Slave Rebellion at Stono, South Carolina, 1739-1745*, 47 J. Negro His., 136, 138 (1982). (South Carolina enacted harsher slave laws after the slave rebellion at Stono, South Carolina in 1739).

¹³C. G. Woodson, *The Negro in Our History* (Associated Publishers) (1922) 36-37. (More stringent laws regulating

1934; Wax 1982, 136; Woodson 1922).

Negative stereotypes predating the slavery era fueled Negrophobia and fell into two distinct categories: bestiality and criminality (Bradley 2000; Constantine 1966). The first stereotype is conveyed by Thomas Jefferson's classification of slaves on nature's hierarchical ladder as creatures standing between wild beasts and human beings (Bradley 2000). The portrayal of Black slaves as primitive and animalistic demonized them and stripped them of their humanity (Richeson 2009).

In recalling how his master's property was assessed, Frederick Douglass wrote, "We were all ranked together at the valuation. Men and women, old and young, married and single, were ranked with horses, sheep, and swine. There were horses and men, cattle and women, pigs and children, all holding the same rank in the scale of being..." (Constantine 1966, 172). Slave owners recognized that dehumanization of slaves had to occur for slavery to exist. The second stereotype is conveyed by the pseudoscience, popular culture, literature, and laws¹⁴ during this period (Higginbotham 1908; Parks and Heard 2009). For example, a travelogue of Africa written in the 18th century noted that:

The Negroes are all without exception, crafty, villainous, and fraudulent, and very seldom to be trusted, being sure to slip no opportunity of cheating an European, nor indeed one another. A man of integrity is as rare among them as a white falcon, and their fidelity seldom extends farther than to their master: and it would be surprising, if, upon a scrutiny into their lives, we should find any of them whose perverse nature would not break out sometimes, for they indeed seem to be born and bred villains; all sorts of baseness having got such sure footing in them, that it is impossible to lie concealed, and herein they agree very well with what authors tell us of the Muscovites. These degenerate vices are accompanied with their sisters, sloth and idleness, to which they are so prone that nothing but the utmost necessity can force them to labour [sic]: they are besides so incredibly careless and stupid, and are so little concerned at their misfortunes, that it is hardly to be observed by any change in them whether they have met with any good or ill success (Constantine 1966, 172).

It was these types of scenes and writings that formed white fear and the "black beast" construct.

B. Black Codes. The Civil War, emancipation, and the thirteenth amendment made slave laws obsolete (Diamond and Control 1983; Browing 1930). In the South, however, the success of these events was impeded by "Black Codes."¹⁵ "Black Codes relegated freedman to social, economic, and political inferiority" (Rogers 2004, 39). They were racially repressive legislation borne out of whites' social, economic, and political fears. Whites were fearful that freedom would unleash the alleged bestiality and criminality of blacks and that the south would lose its stable labor supply (Waldrep 2002; Stewart 1998). Black Codes were enacted in almost every southern state; though they varied, there were common elements (Waldrep 2002). These codes prevented blacks from sitting on juries, prohibited blacks' from voting, limited blacks' testimony in court, and denied blacks the right to work in certain occupations (Robinson 1978; Forte 1997). Like Slave Codes, Black Codes were designed to deny recently freed slaves their human and civil rights (Robinson 1978).

The 14th Amendment to the U.S. Constitution neutralized Black Codes by mandating that no state "shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States...[or] deprive any person of life, liberty, or property without due process of law, [or] deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const. amend. XIV). The 14th Amendment and the 15th Amendment (which was enacted later) sought to confer civil and human rights unto former slaves denied by Black Codes (Bridges 1986). Undeterred, southern states responded by repealing their Black Codes and implementing Jim Crow laws which

traveling) ;available at

<https://ia801402.us.archive.org/12/items/negrohistory00woodrich/negrohistory00woodrich.pdf>. Also see Marjorie Alexander Stewart, *A Comparative Analytical Study of the Black Code and Slave Code of Georgia* (thesis) (1934) 4 (unpublished). (Made it illegal to teach a slave to read or write; illegal for slave or free blacks to hold any assembly or meeting, for religious or other purposes, either in the day time or at night).

¹⁴Leon Higginbotham, Jr., *In the Matter of Color—Race & the American Legal Process: The Colonial Period*, reviewed by Alphonso Gaskins, 23 *Howard L.J.* 135,144 (1980). (South Carolina's 1712 slave code label slaves as barbarous, wild, savage creatures that rendered them wholly unqualified to be governed by the laws and customs of South Carolina, thus the need for slave codes to restrain the disorders, rapines and inhumanity, to which they are naturally prone and inclined; and also for the safety and security of the people of South Carolina.

¹⁵ In reaction to the passage of the Civil Rights Act of 1866, every southern state passed Black Codes to restrict opportunities for and behavior of Blacks. They outlawed everything from interracial marriage to serving on juries.

remained largely unchanged until the mid-1950s.

C. Jim Crow Laws. Jim Crow laws were the progeny of Slave Codes and Black Codes and were enacted throughout the south following the abolishment of Black Codes by federal legislation. They were a series of rigid segregation laws calculated to “ensure the separation, disenfranchisement, and political...economic...[and social] subordination of *all* black Americans” (Forman 2012, 53). The most common types of laws forbade miscegenation;¹⁶ mandated segregated public accommodations, transportation, and instructional facilities; mandated residential segregation, and disenfranchisement (Constitutionality of Anti-Miscegenation Statutes 1949; Sandoval-Strausz 2005; Andrews 1978; Greene 1998). Jim Crow laws were legitimized by the U.S. Supreme Court, anthropologists, craniologists, eugenicists, phrenologists, pro- and antislavery newspapers and literature, and social Darwinists which all declared blacks as innately intellectually and culturally inferior to whites (*Plessy v. Ferguson* 1896; Berwanger 1972; Stanfield 1995; Nineteenth-Century Racism: The Anthropologist Who First Defined the Negro’s Place in Nature 2008). As noted by one scholar, “Jim Crow created...legally imposed U.S. apartheid”¹⁷ (Ward Randolph 2010). This systemic policy of racial discrimination was an affront to human dignity which violated Black Americans’ human and civil rights (Slye 1999). Like its progenies, Jim Crow laws also came to an end.

Jim Crow laws that began in 1837 came to an inglorious end with the 1954 U.S. Supreme Court’s landmark decision *Brown v. Board of Education*¹⁸ and the Civil Rights Act of 1964 (Smythe 1949; *Brown v. Board of Education* 1954; Civil Rights Act of 1964). Blacks hoped these measures would bring them closer to living out the full promise of the words of the Declaration of Independence, “all men are created equal,” after living through centuries of slavery, servitude, and Negrophobia. However, the notion of equality proved elusive (Lawson 2012). The fear of Blacks was too strong—economic, social, and political motives continued to translate into doctrines, albeit appearing race neutral on their face, but in reality having a disparate impact on racial minorities. Race neutral laws such as voter-identification, war-on-drugs, and SYG are a continuum of America’s slavery legacy (Welch 2007).

II. WAR ON DRUGS AND VOTER IDENTIFICATION

Blacks’ progress toward first class citizenship has been a long and bitter experience. Traditional discriminatory laws that consisted of overt expressions of racial antipathy that once landscaped America are no longer visible. America’s new landscape are contemporary discriminatory laws such as “war on drugs” and “voter identification” that are facially-neutral and overtly racist in their application (Nunn 2002, 381).

A. War on Drugs. A “War on Drug” was declared by President Nixon in 1970’s with the creation of Drug Enforcement Agency, followed by President Reagan in October 1982 with the creation of federal drug task force units, and then President Bush in September 1989 whose plan called for “significant expansion...in terms of prisons, U.S. attorneys, U.S. marshals, and the judiciary” (Reuter 2013; Blachmann and Sharpe 1989, 135).

Targeting minority communities, the “war on drugs” and the “Anti-Drug Abuse Act of 1986”¹⁹ gave rise to a disproportionate explosion of Black inmates in the prison population (Block and Obioha 2012; Drug Policy Alliance 2015). Statistics indicate that although Blacks comprised 13% of the U.S. population, they comprised nearly 40% of those incarcerated in state or federal prison for drug law violations, causing critics to call the war on drugs the new Jim Crow (Carson 2014; Forman 2012). According to one civil rights attorney, “[t]he war on drugs subjects America to much of the same harm, with much of the same economic and ideological underpinnings, as slavery itself. Just as Jim Crow responded to emancipation by rolling back many of the newly gained rights of African-Americans, the drug war is again replicating the institutions and repressions of the plantation...” (Boyd 2002, 845).

¹⁶ Unknown author, *Constitutionality of Anti-Miscegenation Statutes*, 58 Yale Law J. 472, 472 (1949). (29 states had such laws while 9 states repealed such law).

¹⁷ Adah L. Ward Randolph, *Jim Crow*, Encyclopedia of African American Education (2010), <http://dx.doi.org/10.4135/9781412971966.n134>. (Apartheid extended to churches, schools, housing jobs, restaurants, bars, public transportation, sports, recreation, hospitals, prisons, asylums, funeral homes, morgues, cemeteries, and housing).

¹⁸ *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown* struck down the apartheid system created by the Jim Crow laws.).

¹⁹ Congress passed the Act in response to the crack epidemic in the 1980s. Federal mandatory sentences were drastically different for the two forms of cocaine. Crack cocaine, the drug choice for Black, is 100 times that of the mandatory minimum sentence for powder cocaine offenses. 21 U.S.C. sec. 841(b) (1) (A) (iii) and sec. 841(b)(1)(A)(ii)(2014).

B. Voter Identification Laws. In response to the controversial issues that arose during the 2000 presidential election, Congress passed the Help America Vote Act of 2002 (“HAVA”) to improve the electoral process, specifically requiring voter “ID” for voters who register by mail ²⁰ (Hawley 2013; Help America Vote Act 2006). HAVA made it clear that the id requirement was a “minimum standard” and that states had the power to enact stricter standards (Hawley 2013). States seeking to enact stricter voter identification laws took full advantage. As of April 2015, seventeen of the thirty-two states that require voters to show some form of identification require photo identification (National Conference of State Legislatures 2015) Designed to limit Black voting, they have become the equivalence of Jim Crow “poll taxes” and other restrictive voter eligibility requirements²¹ to prevent Black participation in America’s political process. This modern day poll tax is expected to achieve the same result achieved by the Jim Crow poll tax—Black disenfranchisement (Cianci Salvatore 2009; Stoughton 2013). Judge Richard Posner, a leading conservative jurist who wrote the key appellate court opinion upholding Indiana’s strict voter identification law seven years ago, came out against such laws. In a scathing dissent, Judge Posner described such laws as a means of voter suppression (Frank v. Walker 2014). In America, ballot access is the core principal of political democracy and equality, its denial to Black Americans obstructs not only their political rights, but also their social and economic rights (Ellis 2009).

III. STAND YOUR GROUND LAWS

National attention was brought to SYG laws after the killing of Trayvon Martin, an unarmed Black teen on February 25, 2012 (Lave 2012). SYG laws evolved from English common law known as the “castle doctrine” (Catalfamo 2007). The castle doctrine permits individuals to use reasonable force or deadly force with no duty to retreat to protect themselves against an intruder in their home (Jaffe 2005). If outside the home, individuals have a duty to retreat before using deadly force (Jaffe 2005).

Twenty-six states have enacted SYG laws,²² 11 of which were slave states just prior to the Civil War and enacted brutal Slave and Black Codes--Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and West Virginia. All 11 states have enacted statutes that include either civil immunity, criminal immunity, or both (Isijola 2014). These former slave states’ 400 year history of government-led, systemic and systematic discrimination against blacks calls in to question whether their SYG laws are race-neutral.

In 2005, Florida passed the first comprehensive SYG law (Randolph 2014). The law expanded the castle doctrine three ways; public places, presumption, and immunity (Hall 2013; Randolph 2014). First, SYG extended the castle doctrine to public places such as vehicles, movie theatres, the workplace, or any place where one has a legal right to be. Thus, allowing crime victims to use deadly force to defend themselves anywhere outside the home without retreat (Florida Statue §776.013(3) 2015).

Second, it created an absolute and irrebuttable presumption that an individual who kills or harms another has acted in self-defense and cannot be prosecuted (Ross 2008). Using deadly force because of some perceived crime with impunity harks back to lynching in the South during the late 19th and early 20th century (Hall 2013). Studies indicate lynching was a manifestation of white America’s social, political, and economic fears (Brundage 1993). Depressed economic conditions among whites and perceived or real social or economic threat on the part of whites with respect to blacks were the driving forces behind lynching (Cook 2011). Whites considered arguing with a white man, unruly remarks, and demanding respect criminal offenses (Braziel n.d.). Blacks were lynched for such offenses as punishment and as a way to and re-impose slavery’s social order (Braziel n.d.).

SYG’s presumption favors defendants in that it negates the need of them to demonstrate the necessity for using deadly force (Sullivan 2013). It forces the prosecution to disprove the defendant’s story a difficult if not impossible task given that the key or only witness is dead (Megale 2005). The presumption provides defendants an excessive degree of discretion and permits them to act as judge, jury and executioner. Furthermore, it feeds into black typification.

Third, it grants civil and criminal immunity (Florida Statute §776.032. (2015)) SYG provides immunity from prosecution to any person who justifiably uses deadly force in bona fide defense of oneself (or of others) from a deadly

²⁰ 42 U.S.C. § 15483(b) (2) (A).

²¹ Susan Cianci Salvatore, *Landmarks Program Civil Rights in America: Racial Voting Rights* (2009); available at http://www.nps.gov/nhl/learn/themes/CivilRights_VotingRights.pdf (Secret ballots, literacy tests, and restrictive and arbitrary registration processes were also used to prevent Blacks from voting).

²²The following states have enacted SYG laws: Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and West Virginia.

threat (Randolph 2014). If the defendant is successful in proving his self-defense claim at the pre-trial immunity hearing²³ the criminal case is dismissed, and the defendant is deemed immune from criminal prosecution (*Peterson v. State* 2008; Florida Statute §776.032 (2015)). Once immune from criminal prosecution, the defendant is automatically immune from civil liability (Lawson 2012). These immunities encourage vigilantism or create quasi-deputies cloaked with State power to take deadly action based on their subjective fear of Blacks (Sullivan 2013). A correlation between lynching and SYG exists in that the application of SYG laws have allowed more Whites to kill Blacks with impunity for some perceived wrong the same as lynching allowed more Whites to kill Blacks with impunity for some perceived wrong (Hall 2013).

It was this convergence of the unholy three--public places, presumption, and immunities---that created the perfect storm that gave rise to the disproportionate impact of SYG on Blacks and legitimized the racialization of crime.

A. Black Typification of Crime. SYG laws perpetuate the concept of “black typification of crime” which refers to the degree in which individuals view crime as a predominantly Black phenomenon (Chiricos, Welch and Gertz 2004; Welch 2004). “The perception that criminals are black is...so pervasive throughout society that...[the] criminal predator has become a euphemism for young black male” (Welch 2004, 5). This association between black males and criminality is why SYG laws are applied in racially biased and inconsistent ways. Several empirical studies examining the application and effect of SYG laws on Blacks corroborate these critiques. One such study was conducted by the Urban Institute.²⁴ Data of homicide rates from 2005-2010 from the FBI Supplemental Homicide Reports in SYG states and non-SYG states was analyzed. The analysis isolated the factor of race and found that when both individuals are strangers, white-on-black gun death cases are found justifiable almost 40% of the time, more than any other kind of homicide (Roman 2013). Specifically, the Urban Institute determined that in SYG states, when white shooters killed black victims, 34% of the resulting homicides were deemed justifiable (Roman 2013). When black shooters killed white victims, only 3% of the deaths were ruled justifiable (Roman 2013; Roman 2012).

A 2014 study provides insight into how SYG laws perpetuate black typification of crime. Although the 2014 study does not provide a breakdown of white-on-black and white-on-white incidents;²⁵ viewed as a whole it reveals a nexus between SYG laws and race. The study reviewed 307 Florida SYG cases for the period October 1, 2005, the law’s effective date, through 2012 (McCormick 2014).

Data on the defendant’s and the victim’s ethnicity indicated that White defendant represented more than 51% of the total number of defendants (McCormick 2014). In fact, White defendants nearly equaled the total number of all other defendants, excluding those labeled “unknown” (McCormick 2014). A mere 1% difference separated them²⁶ (McCormick 2014). The most salient statistic of the research was the number of victims actually armed. The study found that Black victims were unarmed in approximately 60% of the cases (McCormick 2014). Black typification leads White defendants to see a deadly weapon even though one doesn’t exist.

A breakdown of white-on-black and white-on-white incidents was provided in a 2012 study by the Tampa Bay Times of approximately 200 Florida SYG cases²⁷ (Cameron and Higgins 2014). Of the known fatality cases that resulted in a trial verdict, the conviction rate was 14% for white-on-black crime (white defendant-black victim)²⁸ (Cameron and Higgins 2014). However, the conviction rate was 42% for white-on-white crimes (white

²³ *Peterson v. State*, 983 So. 2d 27, 29 (Fla. 1st DCA 2008) (Court held that when immunity under the law is properly raised by a defendant, the trial court (at a hearing) must decide the matter by confronting and weighing only factual disputes).

²⁴ John Roman currently serves as a member of the Task Force; however, his studies were completed before the Task Force’s formation or his participation with it.

²⁵ “White-on-black”—“white” refers to the ethnicity of the individual claiming the “SYG” defense and “black” refers to ethnicity of the individual who allegedly posed the threat. “Black-on-white” “black” refers to the ethnicity of the individual claiming the “SYG” defense and “white” refers to ethnicity of the individual who allegedly posed the threat.

²⁶ Albert E. McCormick, Jr., *The Enforcement of Florida’s “SYG” Law: Preliminary Findings*, 6 J. Pub. and Professional Sociology 1,6 (2014) (White assailants represented 47.4% of the total number of assailants, whereas the ethnicity of known assailants represented 48.3%).

²⁷ Tampa Bay Times, *Florida’s SYG Laws*. <http://www.tampabay.com/stand-your-ground-law/fatal-cases> (last updated: Dec. 21, 2013) (The newspaper analyzed approximately 200 cases; such analysis was the first to examine the role of race in SYG laws.).

²⁸ At the time of the study, there were 7 trials involving white-on-black crimes. Only in one of the trials was there a guilty verdict for the white defendant. See, Tampa Bay Times, *Florida’s SYG Laws*. <http://www.tampabay.com/stand-your-ground-law/fatal-cases> (last updated: Dec. 21, 2013).

defendant-white victim).²⁹ Overall, the study found that defendants claiming SYG justification were more successful if the victim was black. Seventy-three percent of those who killed a black person faced no penalty (Martin, Hundley, and Humburg 2012). Only 59% of those who killed a white person got off. A study done for Tampa Bay Times analyzed a pool of 43,500 homicides by race in states with SYG laws and those without them (Hall 2013). This study found that white-on-black homicides are 354% more likely to be ruled justified than white-on-white homicides (Childress 2012).

Finally, the U.S. Senate Committee on the Judiciary commissioned a study on whether interracial justifiable homicides, particularly white-on-black justifiable homicides, increased during the 2001-2010 time period (Krouse and Deaton 2013). Without looking specifically at SYG laws, the Congressional Research Service found disparity nationwide in which interracial shootings were ruled justified (Krouse and Deaton 2013). For “white-on-black homicides, the research indicated that “the number of incidents and percentages increased for 2006-2010, the time period in which several states enacted SYG laws compared to 2001-2005” (Krouse and Deaton 2013, 2). The studies confirm that racial bias comes into play when defendants use and juries and judges consider SYG defenses. It also confirms the disparate impact the application of SYG laws have on Blacks.

B. Racial Bias. SYG laws require “reasonable fear” of imminent danger or great bodily harm, thus making reasonableness “the linchpin of a valid self-defense claim” (Armour 1994, 786; Florida Statue § 776.013(1) 2015). “[U]nder “SYG” race can be incorporated into considerations of the nature of the threat, its projected degree of harm, and perceived benefits of using force” (Kaduce and Davis 2013, 3). Such race-based fear allows the defendant to commit murder and escape civil and criminal liability (Randolph 2014). As noted by one scholar, the defendant “need not be correct in his perception of danger and deadly threat, but...reasonable” (Lawson 2012, 277). However, the reasonableness standard applied in SYG laws fails to take into account implicit racial bias³⁰ and the entrenched stereotypes that see Black Americans as criminals (Roberts 2012; Richardson and Goff 2012). In America, implicit racial bias towards Blacks is pervasive (Lee 2013). It affects perception, decisions, forming of impressions, processing of information, use of information, and retrieval of information (Roberts 2012). Studies indicate that a “preconscious, anticipatory fear” grows out of implicit racial bias and that such fear when directed toward a perceived danger-relevant stimulus (i.e. Black racialization) resists extinction (Maroney 2009). Implicit bias and fear extinction play critical roles in SYG cases since an individual’s perceptions and motivations are central in assessing “reasonable fear.” A renowned critical race theorist wrote that the reasonableness of an individual’s fear in SYG cases is an oxymoron given black typification of crime and the growing use and acceptance of race-based evidence and arguments (Armour 1994). To support his argument, race based claims were analyzed using three different argumentation frameworks (Armour 1994). The first, “Reasonable Racist [argues] that, even if his belief that blacks are ‘prone to violence’ stems from pure prejudice, he should be excused for considering the victim’s race before using force because most similarly situated Americans would have done so as well” (Armour 1994, 787). The second, Intelligent Bayesian argues that “given statistics demonstrating blacks’ disproportionate involvement in crime, it is reasonable to perceive a greater threat from a black person than a white person...I must act differently” towards Blacks (Armour 1994, 791). The third, Involuntary Negrophobe argues racist animus did not exist until the occurrence of a traumatic event that induced the fear of blacks (Armour 1994). The article argues that in permitting the use of any one of the three frameworks, “courts [are] implicitly apply[ing] an impermissible racial category that gives effect to private prejudices in violation of the Equal Protection Clause (Armour 1994, 781). For that reason, he argues courts should exclude raced-based claims of reasonableness (Armour 1994).

The exclusionary basis for race-based evidence in a SYG case is analogous to the exclusionary basis of “prior sexual history” in a rape case (Estrich 1986, 1133). Rape Shield Laws prohibit the introduction of evidence of the victim’s sexual history in a rape case. Just as “sexual conduct” is not probative of a victim’s consent, racial based evidence should not be probative of a defendant’s state of mind (Slobogin 2001, 768). Giving effect to racial basis evidence is why earlier courts enforced such racial laws as fugitive slave laws, Jim Crow, separate but equal doctrine, and anti-miscegenation laws (Armour 1994). Negative past encounters, statistical data, and black typification are poor reasons why people die.

²⁹ “White-on-white,” “white” refers to the ethnicity of the individual claiming the “SYG” defense and “white” refers to ethnicity of the individual who allegedly posed the threat. According to the survey,

³⁰Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 Conn. Law Rev. 827, 834 (2012). (Defines implicit biases as unconscious attitudes or stereotypes that affect one’s understanding, decision-making, and behavior).

IV RECOMMENDATIONS

The 14th amendment made Blacks citizens of the United States and of the States (U.S. Constitution amend. XIV). It is within the power of Congress to enforce and the U.S. Supreme Court to interpret the affirmative as well as the prohibitive provisions of this amendment. When a state refuses to act to protect the rights of all citizens within its borders, it is up to Congress or the Supreme Court to right this wrong. Congress should pass legislation that minimizes or eliminates the racially disproportionate and inconsistent outcomes of SYG Laws. The U.S. Supreme Court should declare SYG laws unconstitutional in that they violate the 14th Amendment. SYG States should repeal their SYG laws in its entirety or modify them to eliminate onerous elements such as presumption of reasonableness, allowing the initial aggressor to claim self-defense, or using pre-trial immunity hearings in determining self-defense.

A. State Action. Under the 10th Amendment,³¹ state legislative enactments passed under the state's admitted police powers that are alleged to be related to the domestic peace, order, health, and safety of its citizens are sacrosanct unless destructive of some right secured by the Constitution (U.S. Constitution amend. X). It has often served as a tool for the states against federal government intervention (Solan 2012). Unless such power is enunciated or implied under the Constitution, neither Congress nor the executive branch can mandate SYG states to repeal or change their laws³² (O'Brien 2013).

Since the shooting of Trayvon Martin, legislators in 20 states have introduced legislation to weaken or repeal their SYG laws. All have languished in committee (Conterio n.d.; LegisScan 2013). Upon research, no case law could be found whereby a SYG state court struck down SYG in part or in whole. This leaves only two other pathways to the elimination of SYG laws in whole or in part; the Supreme Court via judicial review or Congress via federal legislation.

B. Judicial Review. On the grounds that SYG laws disproportionately affect Blacks in violation of the 14th Amendment, the Supreme Court should nullify SYG by using its judicial review power and declare such laws unconstitutional. Judicial review is the doctrine under which legislative and executive actions are subject to review, and possible invalidation, by the judiciary (Treanor 2005). The Supreme Court--deemed the law of the land---holds the ultimate power to declare state laws unconstitutional when it finds such laws in conflict with a higher authority, the U.S. Constitution (Treanor 2005). Over the years and on numerous occasions, the Supreme Court has liberally interpreted and expanded Congressional power under Section 5 of the 14th Amendment (Schapiro 2006; *Brown v. Board of Education* 1954; *Gideon v. Wainwright* 1963; *Miranda v. Arizona* 1966). Currently, such is not the case. Judicial review declaring the law unconstitutional is highly unlikely owing to the Supreme Court's strong support of state sovereignty under Chief Justice John Roberts (Weinberg 1997; Baker 2002; Banks and Blakemany 2008). In *Bond v. United States*, Chief Justice Roberts wrote, "our constitutional structure leaves local criminal activity primarily to the states"³³ (*Bond v. United States* 2014, 2083). He reiterated that only the states have broad police powers, while the federal government possesses only limited powers (*Bond v. United States* 2014). Based on such language, it is highly unlikely that the Roberts' Court will grant certiorari involving stand your ground issue(s) given the Supreme Court grants such certiorari to but a small fraction of cases it has authority to review.

C. Federal Legislation. As Justice Thurgood Marshall said, "[t]he Constitution does not prohibit legislatures from enacting stupid laws"³⁴ (*New York State Board of Elections v. Torres* 2008). However, Section 5 of the 14th amendment "nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws" (U.S. Constitution amend. 14, § 5).

Historically, Congress has used its power under Section 5 of the 14th Amendment to repeal state criminal laws found in Black Codes and Jim Crow laws including, such as vagrancy, convict-lease, and contract-enforcement laws³⁵ (U.S. Constitution amend. 14, § 5). Vagrancy laws made it a crime to be unemployed; convict-lease laws leased convicts who were primarily Black to private companies, thus making slavery a punishment for crime; and contract-

³¹ U.S. CONST. amend. X. (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people).

³² Nothing came out of President Barack Obama and Sen. John McCain's call for states to review their respective SYG laws. See NBC news blog (July 23, 2013); available at <http://www.nbcnews.com/news/other/mccain-joins-obama-calling-review-stand-your-ground-laws-f6C10699239>

³³ *Bond v. United States*, 134 S. Ct. 2077, 2083(2014). (The Court held that individuals, not just states, have standing to raise Tenth Amendment challenges to a federal law).

³⁴ *New York State Board of Elections v. Torres*, 552 U.S.196 (2008) (Justice Stevens, concurring).

³⁵ U.S. Const. amend. 14, § 5. (The Civil Rights Act of 1865 abolished slavery,)

enforcement made it a criminal offense to break a labor contract virtually legalizing involuntary servitude, another word for slavery (Roback 1984). Congress quickly responded to the Black Codes by passing the Civil Rights Act of 1866, which made it illegal to discriminate against blacks by assigning them an inferior legal and economic status.³⁶ (Civil Rights Act 1866, Stat. 14). In essence, the last vestiges of Jim Crow criminal laws were abolished by the Civil Rights Act of 1964,³⁷ the Voting Rights Act of 1965,³⁸ and the Fair Housing Act of 1968.³⁹ (Civil Rights Act 1964, 2000a et seq; Voting Right Act 1965, § 1971 et seq; Fair Housing Act 1968, § 3601 et seq).

Congress should use its powers to repeal SYG laws. However, according to legal scholars, jurists, and political pundits, this will more than likely never happen because law enforcement and the criminal code are "traditionally done at the state and local levels, not at the federal level" (Obama 2013; Cotterell 2013). For the same reasons stated earlier regarding the Roberts' court view on state sovereignty, should Congress enact federal legislation to repeal SYG laws, it appears the Roberts' Court would have no difficulty in striking down such legislation in that it treads upon an area traditionally within the realm of state sovereignty. Unfortunately, repealing or modifying SYG is solely within the power of the states.

IV. CONCLUSION

America has a long history of codifying racial disparity in state laws, from the openly race-based policies of slavery and segregation, to the more recent and subtle policies of voting id laws, war on drugs, and SYG laws. In SYG states, crime statistics show that the killing of black individuals by white individuals is more likely to be considered 'justified' than the killing of white individuals by black individuals. This is not a minor disparity. Comparing self-defense cases where the defendant is white to those of a black defendant suggests that the consequences of adopting SYG laws are more deadly for Blacks. Until the fear of Blacks is eliminated or greatly minimized, little progress is likely to be made in eliminating or minimizing Blacks' loss of civil and human rights under overt racial laws like SYG.

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³⁶ 4 Stat. 27-30 (1866) (The legislation granted all citizens the "full and equal benefit of all laws).

³⁷ 42 U.S.C.A. § 2000a et seq.

³⁸ 42 U.S.C.A. § 1971 et seq.

³⁹ 42 U.S.C.A. § 3601 et seq.

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