

Don't Retreat On "Stand Your Ground" Laws

Having kicked the debt-ceiling can down the road, Congress is back to grandstanding over the non-economic issues that occupied its time before it was reminded that it hadn't passed a budget in nearly five years. One of those bizarre discursions is the crusade against Stand Your Ground (SYG) laws, which have been blamed for every recent shooting death, most notably that of Trayvon Martin.

The Senate Judiciary Committee, led by chairman Dick Durbin, D-Ill., recently held a subcommittee hearing to discuss the issue, while SYG laws remain a tremendously misunderstood part of the debate over criminal-justice reform.

Notwithstanding recent efforts to politicize the issue, there's nothing particularly novel, partisan or ideological about these laws. All they do is allow people to assert their right to self-defense in certain circumstances without having a "duty to retreat." The SYG principle has been enshrined in the law of a majority of states—currently more than 30—for more than 150 years.

Of the 15 states that have enacted SYG since 2005, a majority were signed by Democratic governors, including Jennifer Granholm, Janet Napolitano and Kathleen Sebelius. Louisiana and West Virginia passed them with Democratic control of both state houses. Florida's supposedly controversial law passed the state senate unanimously and split Democrats in the state house. When Illinois strengthened its long-standing SYG law in 2004, state senator Barack Obama joined in unanimous approval. Even in more restrictive states, courts have held that retreat isn't required at home or when preventing a serious crime.

Indeed, it's a universal principle that a person can use force when she reasonably believes it's necessary to defend against an imminent use of unlawful force. Where there's no duty to retreat, she's further justified in using deadly force if she reasonably believes it necessary to prevent death, great bodily harm or a forcible felony like rape.

It's not an easy defense to assert, and it certainly doesn't mean that you can shoot first and ask questions later. These laws aren't a license to be a vigilante. They just protect law-abiding citizens from having to leave a place where they're allowed to be.

That's why this debate isn't new. In ancient Britain, when the deadliest weapons were swords, a duty to retreat greatly reduced blood feuds. British law reflects a "deference to the constabulary," by which the king owed a duty of protection to his subjects. That's obviously not part of our tradition.

Despite what gun prohibitionists claim, the no-retreat rule has deep roots in American law. At the Supreme Court, SYG dates to the unanimous 1895 case of *Beard v. United States*, in which Justice John Harlan affirmed the right to armed self-defense.

In places with a duty to retreat, crime victims can be imprisoned just for defending themselves. That's the controversial side of the issue: A mugger can't have your wallet, but he can make you leave a public space?

Among those harmed by the "duty to retreat" are domestic violence victims who turn on their assailants. Feminists thus support SYG and point out that "you could have run away" may not work when faced with a stalker. It's bad enough for an innocent person to find herself threatened by a criminal, but to then have to worry about whether she can retreat, lest she face prosecution, is too much to ask.

As the great progressive Justice Oliver Wendell Holmes wrote in the 1921 case

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the *Cato Supreme Court Review*.

of *Brown v. United States*, "detached reflection cannot be demanded in the presence of an uplifted knife." Nearly a century later, we shouldn't demand more of crime victims.

Of course, any self-defense rule bears the potential for injustice. For example, in a two-person altercation, one may be dead and the other dubiously claims self-defense.

But these cases, like Trayvon Martin's, implicate the self-defense justification generally. If George Zimmerman was the aggressor, he has no self-defense rights at all, whether the incident took place in a SYG jurisdiction or not. If Trayvon attacked Zimmerman, the only question is whether Zimmerman reasonably believed he was in danger, not whether he could've retreated. If Zimmerman provoked the confrontation, he lost the protections of SYG law.

In short, hard cases make for skewed policy debates—a demagogic dynamic with which Congress is well familiar after Sandy Hook. While anti-gun lobbyists have used both that tragedy and Trayvon Martin to pitch all sorts of legislation, what they really target is the right to self-defense. With SYG laws, yes, prosecutors need to show evidence to counter claims of self-defense, not simply argue that the shooter could've retreated. But for those who value due process—which should include historically mistreated minorities—that's a feature, not a bug. ☐

*Adapted from testimony that Shapiro gave on Oct. 29, 2013, before the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Human Rights. Originally published in *National Review*. Reprinted with permission.*