

Homicide for the Sake of Honor: What Dueling and Stand-Your-Ground Laws Share in Common

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*I got just one life
In a world that keeps on pushin' me around
But I'll stand my ground
And I won't back down*

Tom Petty
I Won't Back Down

INTRODUCTION

Nineteenth-century dueling and today's "Stand-Your-Ground" laws differ in several respects. Dueling was a highly ritualized, consensual practice, intended in part to allow tempers to cool, while those who stand their ground do so in the heat of the moment. Dueling was originally an upper-class practice before it devolved into "fast draw" conventions in the American West, while stand-your-ground laws apply to anyone faced with a lethal threat. Dueling, where permitted, allowed both parties to employ lethal force, including by parties who, by the time they acted, knew that their counterparts ceased to present lethal threats, while persons may stand their ground only in the face of what they reasonably believe to be imminent lethal force. Dueling was a response to aspersions upon a person's honor, while persons may stand their ground only in response to threats of death or grievous bodily injury. Dueling adhered to scripted rules of fair and even chances for both participants, while stand-your-ground laws permit the shooting of unsuspecting persons. And dueling, where permitted, allowed lethal force in the face of lawful threats, while stand-your-ground laws authorize lethal force only in the face of what actors believe to be threats of unlawful force. A salient difference between dueling and stand-your-ground, however, is that, by well into the nineteenth century, nearly all states in the United States had prohibited the lethal practice of dueling, while today a majority of states authorize persons to use lethal force in self-defense in places in which they ordinarily have a right to be, despite their ability to retreat with complete safety. That difference is both significant and paradoxical because, at their core, permissions to duel and stand-your-ground laws share a common aim—that of

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safeguarding the pride of persons who, though capable of avoiding bloodshed without any physical danger to themselves, prefer instead to put the lives of themselves and others at risk for the sake of honor.

I. DUELING

Dueling had long been an aristocratic,¹ typically masculine² social convention³ in Europe by the time it arrived in the American colonies,⁴ though, in nineteenth century America, it became more democratic⁵ and, with the spread of firearms, more lethal.⁶

Dueling was a form of private, consensual dispute resolution, conducted in private with a few selected witnesses and outside the supervision of the state.⁷ It was a social convention governed by the so-called “Code Duello.”⁸ The *Code* prescribed a protocol that an offended party commenced by communicating an objection to a putative offender. Both parties named “seconds” whose role it was to find a peaceful compromise; if compromise failed and the offended party followed with a formal challenge that a counterpart accepted, the seconds took charge of negotiating mutually acceptable times, locations, and choices of weapons for engagement, and

¹ See RICHARD HOPTON, *PISTOLS AT DAWN: A HISTORY OF DUELLING* 23–24 (Andrew John ed., 2007).

² See FRANCOIS BILLACOIS, *THE DUEL: ITS RISE AND FALL IN EARLY MODERN FRANCE* 205 (Trista Selous ed., trans., 1990).

³ See V.G. KIERNAN, *THE DUEL IN EUROPEAN HISTORY: HONOUR AND THE REIGN OF ARISTOCRACY* 53, 153, 159–60, 164 (1988).

⁴ The first reported duel in the colonies was fought in 1621 in Plymouth, Massachusetts, a year after the Pilgrims arrived. See Alison L. LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 *HOFSTRA L. REV.* 501, 508 (2004).

⁵ See Carrie Stemke, *In Defense of Honor: The Rise and Fall of Dueling in America*, THE ULTIMATE HISTORY PROJECT, <https://web.archive.org/web/20140916055204/http://www.ultimatehistoryproject.com/dueling.html> [<https://perma.cc/9C6D-9QCP>] (last visited Apr. 11, 2025) (“[u]nlike in Europe, where the privilege of fighting duels was restricted to aristocratic gentlemen, men from all backgrounds and stations fought duels in America. Politicians, newspaper editors, and attorneys – men whose professions required them to make public remarks or whose public reputations were of the utmost importance – often frequently received and accepted challenges to fight.”).

⁶ See LaCroix, *supra* note 5, at 517; Antony E. Simpson, *Dandelions on the Field of Honor: Dueling, the Middle Classes, and the Law in Nineteenth-Century England*, 9 *CRIM. JUST. HIST.* 99, 114 (1988).

⁷ See HOPTON, *supra* note 2, at 34–120.

⁸ John Lyde Wilson, a former governor of South Carolina, wrote an American version of the *Code Duello* in 1831, entitled *A Code of Honor or Rules for the Government of Principles and Seconds of Dueling*, and it was soon adopted by duelists in the U.S. See Dore Lev Feith, *Dueling Ideas of Honor and Anti-Dueling Networks: Moral Reform in Antebellum Charleston and Savannah* 6 (Apr. 4, 2018) (B.A. thesis, Columbia University) (on file with Columbia University).

they oversaw that duels proceeded in fair rather than unruly fashion.⁹ Where a choice of weapons involved pistols, the seconds negotiated matters such as the distance at which the parties were allowed to shoot, the presence of surgeons, and the giving of signals upon which the parties were allowed simultaneously to shoot once. If initial volleys resulted in injury, duels typically terminated. If not, and if satisfactory reparations were not offered, seconds took charge of negotiating whether duels would continue.¹⁰

The sorts of “offenses” that triggered the *Code Duello* were highly specific: they consisted of what principals regarded as challenges to their *reputational honor*¹¹— challenges that parties perceived as being so damaging to their public reputations for being “virtuous, strong, and brave”¹² that they had no choice but to be willing to kill and to die to vindicate themselves.¹³ Dueling was a practice by which participants, in displaying their willingness to risk their lives for their reputations, could both vindicate and gain honor for themselves.¹⁴ That dueling served as “affairs of honor”¹⁵ and took place on “fields of honor”¹⁶ originally confined it to aristocratic classes that Europeans regarded as the only estates capable of and sensitive to reputational honor.¹⁷ However, in the United States, where formal aristocracy is absent,¹⁸ dueling was adopted principally but not solely by politicians who, in the maelstrom of democratic party politics, rested their careers upon their public reputations.¹⁹ Believing that libel and slander laws were inadequate to

⁹ See HOPTON, *supra* note 2, at 30.

¹⁰ See David Withers, *Outlawed Honor: A Thesis on Dueling in South Carolina 18–20* (2013) (B.A. thesis, University of Wisconsin–Eau Claire) (on file with University of Wisconsin–Eau Claire); LaCroix, *supra* note 5, at 521.

¹¹ C.A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805, 1823 (2001) (in honor societies, “the being and truth about a person are identical with the being and truth that others acknowledge in him.”) (footnote omitted).

¹² See Withers, *supra* note 11, at 2.

¹³ See JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* 167 (2002) (for participants, duels were “ritualized displays of bravery . . . and, above, all, willingness to sacrifice one’s life for one’s honor.”); LaCroix, *supra* note 5, at 503 (“[T]o duel was to perform the specific role of gentlemen by asserting the right assert personal honor in the realm of public notice.”).

¹⁴ See BILLACOIS, *supra* note 3, at 206 (“[Dueling] is the mortal trial which reveals honour; it is also the mortal trial that creates honour.”).

¹⁵ LaCroix, *supra* note 5, at 502 (“Duels were referred to as . . . ‘affairs of honor’ – [an] accurate term, for only the participants’ insistence that their honor required them to take the field allowed them to comprehend the duel as distinct from the common brawl or gunfight.”).

¹⁶ *Id.*

¹⁷ See HOPTON, *supra* note 2, at 23–24.

¹⁸ See U.S. Const. art. I, § 9, cl. 8 (“No [t]itle of [n]obility shall be granted by the United States. . .”).

¹⁹ See LaCroix, *supra* note 5, at 522–23.

vindicate personal honor,²⁰ and desiring to vindicate their honor, Americans resorted to dueling, particularly in the South and West.²¹

The most notorious American duel was that between Alexander Hamilton and then-Vice President Aaron Burr in 1804. But theirs was scarcely an outlier. Andrew Jackson, before becoming President, participated in multiple duels,²² including an 1806 duel in which he reputedly violated rules of honor by firing more than once,²³ killing his opponent and incurring a chest wound that plagued him for the rest of his life. Stephen Decatur, who famously declared, “[o]ur country, right or wrong,”²⁴ died at the hands of a fellow commodore in a 1820 duel.²⁵ U.S. Attorney General William Wirt challenged his predecessor in office, William Pinckney, to a duel that was averted only after Pinckney apologized for any perceived slight.²⁶ Henry Clay and John Randolph fought a duel against one another in 1825; Vice-Presidential candidate John C. Breckinridge fought a duel in 1854;²⁷ and Abraham Lincoln employed humor to avoid an 1824 duel by first electing to use “broadswords” and then demonstrating that, with his height, he had such a reach advantage that he could cut off a tree branch above his opponent’s head, an action that induced his opponent to change his mind.²⁸ And those duels were hardly the only ones.²⁹

²⁰ See Harwell Wells, *supra* note 12, at 1823 (“Honor was not a quality that could be repaired through the legal system. For a man to turn to the legal system to repair his honor, perhaps by filing a libel or slander suit, was akin to a man admitting that he was unable to protect himself. It was an admission of both weakness and cowardice. A libel suit also carried the message that the plaintiff was one who thought his honor could be repaired by monetary damages.”).

²¹ See Kenneth Greenberg, *The Nose, the Lie, and the Duel in the Antebellum South*, 95 AMER. HIST. REV. 57, 58 (1990); Richard M. Brown, *Southern Violence—Regional Problem or National Nemesis?: Legal Attitudes Toward Southern Homicide in Historical Perspective*, 32 VAND. L. REV. 225, 234, 239 (1979).

²² See 1 ROBERT REMINI, *ANDREW JACKSON: THE COURSE OF AMERICAN EMPIRE 1767-1821* 38–39, 123, 125–43, 180–86 (1977).

²³ See Withers, *supra* note 11, at 12; LaCroix, *supra* note 5, at 522; *id.* at 512 (“[C]onformity to the code was essential to the duelist’s claim of having behaved honorably. A duelist who acted outside accepted norms jeopardized himself by failing to present his actions as quotations of a socially approved system of behavior.”).

²⁴ ALEXANDER SLIDELL MACKENZIE, *LIFE OF STEPHEN DECATUR: A COMMODORE IN THE NAVY OF THE UNITED STATES* 294 (1846) (quoting a toast reportedly given by Stephen Decatur in Norfolk, Virginia, in April 1816).

²⁵ See LaCroix, *supra* note 5, at 524.

²⁶ See Harwell Wells, *supra* note 12, at 1808 n.25.

²⁷ See Withers, *supra* note 11, at 25.

²⁸ See Jeff Schogol, *The Untold History of the US Military’s Strange Law Against Dueling*, TASK & PURPOSE (June 22, 2022), <https://taskandpurpose.com/military-life/military-outlaws-troops-dueling/> [<https://perma.cc/H2A4-SUCJ>].

²⁹ See HOPTON, *supra* note 2, at 297–308; Schogol, *supra* note 29 (“Between 1798 and the Civil War, the Navy lost two-thirds as many officers to dueling as it did to more than 60 years of combat at sea.”) (citation omitted).

The Hamilton/Burr duel illustrates the extent to which dueling served the correlative goals of vindicating honor and avoiding appearances of cowardice.³⁰ Hamilton and Burr, both military officers, both lawyers, and both competing New York bankers, had long been political rivals as well. Hamilton, a Federalist, worked behind the scenes in 1800 to tip the presidential election in favor of his archrival Jefferson over his greater nemesis, Burr; Hamilton further endeavored to defeat Burr for the Governorship of New York in 1804.³¹ The spark that ignited their duel on the shores of the Hudson River was a purloined letter to Hamilton's father-in-law by an acquaintance of Hamilton, Dr. Charles Cooper, a letter that a New York newspaper had somehow acquired and published. Cooper stated in the letter that he had attended a meeting at which Hamilton's said, "in substance," that Burr was a "dangerous man" who ought not be "trusted with the reins of government," and Cooper further stated that Hamilton had expressed "a still more despicable opinion" of Burr.³² Burr, learning of the letter weeks later, wrote to Hamilton that the latter's alleged "calumny" against Burr had brought "dishonor" upon Burr by becoming public, forcing Burr to demand that Hamilton give a "prompt and unqualified acknowledgement or denial" of having said anything about Burr that Dr. Cooper could have so construed.³³ Hamilton refused, claiming that Dr. Cooper's account of anything he might have said was too vague to merit an "acknowledgement or denial," while adding that he was willing to avow or deny any supposedly derogatory thing Burr chose to "specify."³⁴ Burr, believing that he was not in a position to "specify" what Hamilton said in his absence, went further and demanded that Hamilton deny having *ever* said *anything* derogatory to Burr's "honor."³⁵ When Hamilton refused, Burr concluded that his "honor" had been impeached, and, to "vindicate [his] honor at such hazard as the nature of the case demands," challenged Hamilton to a duel.³⁶ Hamilton, believing that "honor" obliged him to offer Burr satisfaction, agreed.³⁷

Despite their seconds' best efforts to resolve the dispute short of bloodshed, Hamilton and Burr met in Weehawken, New Jersey, on July 11, 1804. Standing ten

³⁰ See Withers, *supra* note 11, at 26 ("To refuse [a duel was] to admit cowardice"); Stemke, *supra* note 6 ("The value placed on a man's honor and bravery made refusing a challenge nearly impossible and the consequences of doing so severe. In the South, for instance, those men who declined a challenge were humiliated publicly with a uniquely American form of punishment called 'posting.' The name of a man who refused to fight was included in a written statement that called him a coward; these were hung in public areas or printed in the paper for all to read.").

³¹ See INTERVIEW IN WEEHAWKEN: THE BURR-HAMILTON DUEL AS TOLD IN THE ORIGINAL DOCUMENTS 3–35 (Harold C. Syrett & Jean G. Cooke eds. 1st ed.1960) [hereinafter "INTERVIEW IN WEEHAWKEN"].

³² *Id.* at 41–49.

³³ *Id.* at 56–58.

³⁴ *Id.* at 43–44, 52–54, 81.

³⁵ *Id.* at 87–90.

³⁶ *Id.* at 94–99.

³⁷ *Id.* at 99–102.

paces apart, they both fired, though Hamilton may have deliberately fired high.³⁸ Burr's ball pierced Hamilton's liver and spine, causing wounds from which he died in agony thirty-one hours later. Concerned, Burr initially approached Hamilton's prone body until Burr's second persuaded him to leave before the physician in attendance recognized him. Burr was soon charged with murder in both New York and New Jersey.³⁹ Hamilton, having anticipated a fatal outcome, left a last testament to be opened in the event of his death. Hamilton, whose own son had died in a duel, wrote that he had the "most cogent reasons" for avoiding the duel. He "abhor[ed] the practice of dueling" on both "religious and moral" grounds and "would ever [suffer] pain to be obliged to shed the blood of a fellow creature in private combat forbidden by the laws." But, in considering "what men of the world denominate honor" and considering "public prejudice in that particular," he felt he could not decline Burr's challenge without foregoing any "ability to be in future useful" in the "public affairs" of his country.⁴⁰ Burr, in turn, fearing he would be arrested for murder, fled south.⁴¹

Public outrage and grief over the Hamilton/Burr duel led to increased condemnation of dueling,⁴² particularly from ministers,⁴³ for being both a flagrant flouting of the law⁴⁴ and an un-Christian form of homicide/suicide that elevated matters of personal honor above the preservation of innocent life.⁴⁵ As the Rev. Timothy Dwight of Yale College put it in 1804:

God . . . has published a law, which forbids homicide. . . . At the same time, it is . . . averred, that He often places his creatures in such circumstances, that they may lawfully disobey it. But what is this suffering? It is nothing but the anguish of wounded pride. Ought, then, this imperious, deceitful, debasing passion to be gratified at the expense of murder, and suicide?⁴⁶

³⁸ *Id.* at 150–55.

³⁹ *Id.* at 152–53, 160, 169.

⁴⁰ *Id.* at 99–102.

⁴¹ *Id.* at 169–75.

⁴² See HOPTON, *supra* note 2, at 295–96.

⁴³ See LaCroix, *supra* note 5, at 504, 524–25.

⁴⁴ See Richard Bell, *The Double Guilt of Dueling: The Stain of Suicide in Anti-Dueling Rhetoric in the Early Republic*, 29 J. EARLY REPUBLIC 383, 384, 387, 402 (2009)

⁴⁵ See *id.* at 384, 390, 407; Dean M. Kelley, *The Rationale for the Involvement of Religion in the Body Politic*, in THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 159, 163 (James E. Wood, Jr. & Derek Davis eds., 1991) ("One of the earliest efforts by the churches to affect the body politic occurred in the early 1800s, and was so successful that it is virtually forgotten today, even by church historians! . . . The object of this reform was the elimination of dueling, precipitated by the killing of Alexander Hamilton by Aaron Burr in a duel in 1804."); Bell, *supra* note 45, at 394–90, 404.

⁴⁶ TIMOTHY DWIGHT, THE FOLLY, GUILT, AND MISCHIEFS OF DUELLING: A SERMON, PREACHED IN THE COLLEGE CHAPEL AT NEW HAVEN ON THE SABBATH PRECEDING THE ANNUAL COMMENCEMENT, SEPTEMBER, 1804, 16–17 (1805).

Despite its prevalence, dueling had long been a crime at common law in England and by statute or decree in Western Europe.⁴⁷ As part of English common law, dueling was also regarded as a crime in newly-independent American states, and many states further criminalized it by statute.⁴⁸ Nevertheless, dueling continued to persist in practice in Antebellum America, particularly in the South and West, because prosecutors were reluctant to prosecute, and juries were reluctant to convict.⁴⁹ By the end of the Civil War, however, in part because of the war's toll in human life, public opinion, which had once sympathized with or tolerated dueling, had decidedly turned against it,⁵⁰ except, perhaps, in the form of twentieth-century tropes regarding fast-draw gunfights in the Wild West.⁵¹ States and the public regarded dueling as deserving of punishment precisely because they believed it caused needless loss of life—needless, in that participants knew they could safely retreat at no cost, except, at most, to their pride.

⁴⁷ See BILLACOIS, *supra* note 3, at 21–48, 96–98.

⁴⁸ See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 145, 199 (1771–72); Wells, *supra* note 12, at 1813–30; W.J. Rorabaugh, *The Political Duel in the Early Republic: Burr v. Hamilton*, 15 J. EARLY REPUBLIC 1, 14 (1995); HOPTON, *supra* note 2, at 311–12. Criminal sanctions were also combined with civil disenfranchisements, such as disqualifications to hold public office. See Wells, *supra* note 12, at 1807 n.17, 1828–30. And they may have helped change the public view that duelist were “gentlemen” who were worthy of leadership. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 971–72 (1995).

⁴⁹ See Wells, *supra* note 12, at 1831–37.

⁵⁰ See Withers, *supra* note 11, at 10; Wells, *supra* note 12, at 1832–41. The last formal duel is unknown but believed to have taken place at the end of the 19th century. See LaCroix, *supra* note 5, at 502.

⁵¹ For the degree to which gunfights differed from dueling, see HOPTON, *supra* note 2, at 318–21. For the extent to which such twentieth-century tropes were myths, see RICHARD SLOTKIN, GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA (1992). President Dwight Eisenhower remembered such gunfights being a “code” of behavior in his childhood home of Abilene, Kansas:

I was raised in a little town of which most of you have never heard. . . It's called Abilene, Kan. We had as our Marshal for a long time a man named Wild Bill Hickok. . . Now that town had a code, and I was raised as a boy to prize that code. It was: Meet anyone face to face with whom you disagree. . . If you met him face to face and took the same risk as he did, you could get away with almost anything, as long as the bullet was in the front.

Dwight Eisenhower, *President's Speech to B'nai B'rith Group*, N.Y. TIMES, Nov. 24, 1953, at 20. For a description of Hickok's most iconic duel, see RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 49–53 (1991).

II. STAND-YOUR-GROUND LAWS

“Stand-your-ground” is a legal term for a subset of “no-duty-to-retreat” rules within the law of self-defense.⁵²

England and the United States have long accepted the general rule that blameless persons—that is, those who are not original aggressors—may use force to protect their persons and property from unlawful harm, provided that they reasonably believe use of force is both immediately necessary to prevent such injuries and proportional to threatened injuries.⁵³ “Duties to retreat” are a gloss on that rule. As a general proposition, blameless actors have no duty to retreat before using *non-lethal* force in self-defense.⁵⁴ But all actors, whether blameless or blameworthy, and whether in stand-your-ground jurisdictions or not, have a duty to retreat before using *lethal* force when, in the state’s view, their ability to retreat renders lethal force either unnecessary or disproportional: unnecessary, because retreat would fully safeguard the totality of what the state regards as their legitimate interests; or disproportional, because, regardless of whether retreat would safeguard their legitimate interests, the use of lethal force is, in the state’s view, too high a price to pay to protect those legitimate interests.⁵⁵

To illustrate how duties to retreat relate to necessity and proportionality, contrast two rules: the widespread English/U.S. rule that *blameless* actors have no duty to retreat before using *non-lethal* force in self-defense, even when such actors could fully safeguard their bodily security and property by retreating;⁵⁶ and the similarly widespread rule that *blameworthy* actors—i.e., those who are original aggressors—may not use either *lethal* or *non-lethal* force in self-defense, unless they have first done their best to cease fighting, including, where possible, by desisting

⁵² “No duty” to retreat is simply the absence of a “duty” to retreat. A Hohfeldian “duty” is an obligation to act or to refrain from acting in a certain way, enforceable by others. See Peter Westen, *Poor Wesley Hohfeld*, 55 SAN DIEGO L. REV. 449, 449–68 (2018). Jurisdictions that enforce so-called “duties to retreat” punish persons for using lethal force when they could safely retreat instead. But such persons have no Hohfeldian duty to retreat. That is, they have no enforceable obligation to withdraw from where they are. On the contrary, they are fully permitted to remain in place. To say that they have a “duty” to retreat is a misnomer for the fact that, *if* they do not retreat, and *if* they thereafter resort to lethal force, they have no lawful claim of self-defense.

⁵³ See ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 114–15 (1st ed. 1991) (describing English law); see generally WAYNE R. LAFAVE, CRIMINAL LAW § 10.4 (4th ed. 2003) (describing American law).

⁵⁴ See LAFAVE, *supra* note 54, § 10.4(f) (describing American law); JOHN FREDERICK ARCHBOLD, ARCHBOLD ON PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES § 2495 (Fitzwalter Butler & Marston Garsia, eds., 37th ed., 1969) (describing English law).

⁵⁵ As discussed below, when jurisdictions with stand-your-ground laws impose no duties of retreat on those who use lethal force in the face of lethal aggression, they do so because they take the view that standing one’s ground is both necessary and proportional to protect an innocent actor’s dignitary interests in remaining steadfast in those situations.

⁵⁶ See LAFAVE, *supra* note 54, § 10.4(f); see ARCHBOLD, *supra* note 55, § 2495.

and retreating as fully as possible.⁵⁷ The two rules treat blameless and blameworthy actors differently even when both could fully safeguard their bodily security and property by retreating. The former rule gives blameless actors a right to stand their ground before using non-lethal force because, regardless of whether actors can protect their *bodies* and *property* by retreating, retreat may not protect what rule makers regard as actors' legitimate *dignitary* interests in standing up to unlawful aggressors and eschewing the "cowardly conduct"⁵⁸ of fleeing from places where they are ordinarily allowed to be. Such actors are not required to retreat before using non-lethal force because, in the rule makers' view, allowing persons to stand their ground while using non-lethal force to defend themselves is both necessary and proportional to protect their "reputation and self-respect" in eschewing "cowardice."⁵⁹ In contrast, blameworthy actors are obliged to do their best to retreat before using non-lethal force in self-defense because, being at fault for having to defend themselves, they have no *legitimate* dignitary interest in remaining in place.

The two, aforementioned rules—along with the "castle" rule to the effect that homeowners have no duty to retreat before using lethal force to protect themselves and their property from unlawful intruders within their homes⁶⁰—have remained stable for hundreds of years. The opposite is the case regarding *blameless* actors who would use *lethal* force *outside* their homes. That is an area in which rule makers' views of necessity and proportionality have ebbed and flowed over the centuries.

A. *The Nineteenth Century*

American states, upon their founding, generally adopted English common law and, in doing so, relied heavily on William Blackstone's *Commentaries on the Laws of England*.⁶¹ Blackstone acknowledged that blameless actors had a right to use non-lethal force to protect their persons and property from unlawful assault, regardless of whether they could avoid the use of force by safely retreating. But Blackstone argued that the state had a special interest in reserving to itself the use of *lethal*

⁵⁷ See LAFAYE, *supra* note 54, at 546; 2 PENAL CODE AND COMMENTARIES § 304, at 44–46 (1985) ("Model Penal Code"). The Florida stand-your-ground statute and those in other states that have adopted it incorporate the same rule. They provide that original aggressors have no right to use lethal force in self-defense unless they have "exhausted every reasonable means to escape such danger other than the use or threatened use of force which is likely to cause death or great bodily harm to the assailant." FLA. STAT. ANN. § 776.041(2)(a) (West 2024).

⁵⁸ PAUL ROBINSON, CRIMINAL LAW DEFENSES § 131(c)(4), at 81 (1984).

⁵⁹ LAFAYE, *supra* note 54, at 547.

⁶⁰ See ROBINSON, *supra* note 59, at 84.

⁶¹ See generally DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES (1996). For the argument that Blackstone has been misunderstood regarding the common law doctrine of retreat, see Rollin Perkins, *Self-Defense Re-Examined*, 1 UCLA L. REV. 133, 137–49, 154–59 (1954) (arguing that English common law did not mandate retreat in open spaces by persons who were not at fault in causing to lethal encounters).

force.⁶² To be sure, the state excused persons who—when confronted outside their homes with “sudden and violent” assault for which they were blameless, and where “certain and immediate suffering would be the consequence of waiting for the assistance of the law”—defended themselves by means of “force,” including “homicide,” provided that they had “no other possible means of escaping.”⁶³ However, in order for a blameless actor to have “no other possible means of escaping,” an actor was obliged to “retrea[t] as far as he can conveniently or safely can . . . before he turns upon his assailant.” Regarding actors who balked at retreating in order to avoid the appearance of “cowardice,” Blackstone wrote, the “law countenances no such point of honor.” Instead, the law demands that an actor put such “honor” aside in order to avoid “shedding his brother’s blood.”⁶⁴

Despite Blackstone’s preeminence, American courts began early on to reject his views regarding retreat,⁶⁵ sometimes quite explicitly.⁶⁶ By the end of the nineteenth century, a majority of states had ruled that blameless actors faced with unlawful, lethal threats in places where they were otherwise allowed to be could use lethal force to protect themselves without having to retreat, even if they could retreat with complete safety.⁶⁷ Some of the states took special note of the dishonor to an actor’s masculine pride in having to retreat in the face of lethal threats. Thus, the Ohio Supreme Court announced in 1876 what American courts embraced as the “true-man” norm of self-defense. The defendant in that case, being outside the curtilage of his house, shot and killed his angry son-in-law when the latter, armed with an axe, continued to approach after being warned to stop. Reversing the defendant’s conviction, the court held that “a *true man*, who is without fault, is not obliged to fly from an assailant, who . . . maliciously seeks to take his life or do him enormous bodily harm.”⁶⁸ The Indiana Supreme Court ruled the next year that “*the American mind* seems to be very strongly against the enforcement of any rule which requires a person to *flee* when assailed . . . even to save human life.”⁶⁹

⁶² See 4 BLACKSTONE, *supra* note 49, at 185 (“[T]he king and his courts are the *vindices injuriarum* [‘avengers of justice’]”).

⁶³ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3–4 (1768); see also 4 BLACKSTONE, *supra* note 49, at 184.

⁶⁴ 4 BLACKSTONE, *supra* note 49, at 185. The English courts in 1971 and later Parliament in 2008 abandoned a strict requirement of retreat and adopted the position that retreat is only a factor to be considered in deciding whether it was necessary to use force. See *R v. McInnes* [1971] 3 All. E.R. 295, 300–01; Criminal Justice and Immigration Act 2008 § 76(6A) (Eng.).

⁶⁵ The first case in which duties to retreat were rejected appears to have been *Commonwealth v. Selfridge* (Mass. 1806) [unreported], as recounted in *Erwin v. State*, 29 Ohio St. 186, 197–98 (1876).

⁶⁶ See, e.g., *Miller v. State*, 119 N.W. 850, 857 (Wis. 1909) (noting that Blackstone’s notion of the “chivalry” of retreating “to the wall” was “unadaptable” to “modern” America).

⁶⁷ See Jeanne Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J. L. & GENDER 237, 243 (2008).

⁶⁸ *Erwin v. State*, 29 Ohio St. 186, 199–200 (1876) (emphasis added). The U.S. Supreme Court embraced *Erwin*’s “true man” doctrine in *Beard v. United States*, 158 U.S. 550, 560 (1895).

⁶⁹ *Runyan v. State*, 57 Ind. 80, 84 (1877) (emphasis added).

B. *The Twentieth Century.*

With the closing of the frontier in the 1890s, the tide ebbed back toward Blackstone's original duty to retreat. The ebbing back began with a passionate decision of the Alabama Supreme Court in 1892,⁷⁰ followed by supporting scholarship in 1903,⁷¹ and culminating in the Model Penal Code of 1962.⁷² The new norm accepted the long-standing "castle doctrine,"⁷³ viz., that persons faced with unlawful threats to person or property within their homes have no duty to retreat. But, with that exception, the new norm mandated that blameless actors retreat before using lethal force. Thus, by the end of the twentieth century, many states had embraced the MPC norm that persons faced with wrongful threats of death or grievous bodily injury outside the home and the home's immediate surroundings have no right to use lethal force in self-defense, provided they can fully safeguard their bodily security by retreating.⁷⁴

The rationale for the reemergent norm resembled Blackstone's rationale: the duty to retreat furthers the state's interest in minimizing loss of life and bloodshed, and it does so without sacrificing an actor's physical security; for it comes into play only when an actor can withdraw with complete safety.⁷⁵ Retreat involves no cost other than loss of pride that actors may feel in yielding to unlawful, lethal threats by fleeing from where they are otherwise allowed to be. In weighing those competing interests, the state obliges actors to retreat because, as Joseph H. Beale wrote in 1903, the state values the preservation of life more highly than an actor's desire to avoid the apparent "ignominy, dishonor, and disgrace of a cowardly retreat":

The conclusion of the courts which deny the duty to retreat . . . rest[s] upon two arguments: that no one can be compelled by a wrongdoer to yield his rights, and that no one should be forced by a wrongdoer to the ignominy, dishonor, and disgrace of a cowardly retreat.⁷⁶

* * *

[T]he law permits one to protect his own rights, but in no case may he do this unless in accordance with the interests of the state. . . The interests of the state alone are to be regarded in justifying [homicide]; and those

⁷⁰ See *Springfield v. State*, 11 So. 250, 251 (Ala. 1892).

⁷¹ See, e.g., Joseph Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903) [hereinafter Beale, *Retreat from a Murderous Assault*]; Joseph Beale, *Homicide in Self-Defence*, 3 COLUM. L. REV. 526, 539-42 (1903).

⁷² 2 PENAL CODE AND COMMENTARIES, *supra* note 58, § 3.04(2)(b)(ii).

⁷³ Perkins, *supra* note 62, at 152; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 228 (3d ed. 2001).

⁷⁴ See 2 PENAL CODE AND COMMENTARIES, *supra* note 58, at 45.

⁷⁵ *Id.* at 44-45.

⁷⁶ Beale, *Retreat from a Murderous Assault*, *supra* note 72, at 580.

interests· require that one man should live rather than that another should stand his ground in a private conflict.⁷⁷

* * *

[I]n the case of killing to avoid a stain on one's honor . . . [a] really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands.⁷⁸

C. *The Twenty-First Century.*

The tide once again ebbed in the opposite direction in the early 2000s, this time in favor of the “true-man” doctrine that blameless actors in places where they are otherwise allowed to be *may* use lethal force to protect themselves from immediate and unlawful threats of death or grievous bodily injury, despite being able to avoid using lethal force by retreating with complete safety. The change began with a National Rifle Association-sponsored statute that the state of Florida adopted in 2006 and that, with some variations, thirty other states have since adopted, in addition to eight states that possessed judge-made, stand-your-ground rules.⁷⁹

The Florida statute contains multiple provisions, including a pretrial procedure for immunizing actors from criminal and civil liability⁸⁰ and a rule that the beliefs of homeowners, who believe they must use lethal force to safeguard themselves from immediate threats of death, grievous bodily injury, forcible felony or unlawful felony at the hands of unlawful intruders, are conclusively presumed to be “reasonable.”⁸¹ For our purposes, however, the statute’s relevant portion concerns retreat. It provides that persons have no duty to retreat but instead may “stand” their “ground” and use such lethal force as they reasonably believe to be necessary to prevent death, great bodily harm, or the commission of a forcible felony, provided they are otherwise acting lawfully in places where they have “a right to be.”⁸²

The Florida statute promotes two apparently distinct values on behalf of law-abiding persons who, despite being able to withdraw with complete safety, wish to use lethal force against those whom they reasonably believe to present lethal danger: (i) the value of their being able to remain anywhere where they have a “right” to be, and (ii) the value of their avoiding the “dishonor” of appearing to resort to

⁷⁷ *Id.* at 581–82.

⁷⁸ *Id.* at 581.

⁷⁹ *Stand-your-ground Law*, WIKIPEDIA, https://en.wikipedia.org/wiki/Stand-your-ground_law [https://perma.cc/FKZ4-QMZS] (last visited Apr. 6, 2025).

⁸⁰ *See* FLA. STAT. ANN. § 776.032 (West 2024).

⁸¹ *See* FLA. STAT. ANN. § 776.013 (West 2024). The Florida courts have not yet ruled that the presumption is conclusive. But commentators agree that the legislature intended it to be conclusive. *See* Bell, *supra* note 45, at 413.

⁸² *See* FLA. STAT. ANN. § 776.012 (West 2024).

“cowardly” retreat.⁸³ The statute frames the first value, the value of remaining anywhere where persons have a “right to be” in a misleading fashion because, without such statutes, persons possess *no* “right” to use lethal force in places from which they can safely retreat. To be sure, statutes such as Florida’s, once in effect, function to *vest* persons with “rights” that they previously lacked. But, absent such statutes, persons possess the very converse of such a right, i.e., a duty to retreat. Statutes such as Florida’s would be less tendentious if, instead of referring to places where persons have a “right to be,” they referred to places where persons who resort to lethal force *otherwise* have a right to be.

The second value underlying statutes such as Florida’s, i.e., the value of a safeguarding an armed person’s “honor” and bravado, is enshrined in the terms, “Stand Your Ground” and “Make My Day,” by which courts and legislatures refer to such statutes.⁸⁴ The terms echo Tom Petty’s most popular song, “I Won’t Back Down,” a song that Petty wrote in defiance of an arsonist who set fire to his house and in which Petty sings of his no longer abiding to be “pushed around.”⁸⁵ Like Florida’s statute that licenses defiance in the face of danger, the song is a declaration of courage to do what “ain’t easy” by those who “know what’s right,” namely, to “stand” one’s “ground.”

III. DUELING AND STANDING YOUR GROUND, COMPARED

Dueling and stand your ground both promote notions of honor. With respect to duelists, it was the honor of participants who, believing their good reputations had been wrongfully impugned, risked their lives and the lives of their counterparts rather than back down. With respect to those who stand their ground, it is the honor of actors who, believing their lives to be in wrongful, mortal danger, risk their lives and the lives of others rather than safely retreat. Yet, despite their similarities, the law and American public opinion emphatically reject dueling, while largely accepting stand your ground. The question, therefore, is whether differences between dueling and stand your ground justify the law’s disparate treatment of them.

⁸³ See Beale, *Retreat from a Murderous Assault*, *supra* note 72, at 580.

⁸⁴ The Florida bill was officially titled “The Protection of Persons Bill.” See Daniel Michael, *Florida’s Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 203 (2006). But legislators and courts typically refer to it and its analogs as “Stand Your Ground” and “Make My Day” statutes. See, e.g., Stand Your Ground Law, 2006 Okla. Sess. Laws ch. 145; Stand Your Ground Act of 2023, H.R. 3142, 118th Cong. (2023) (introduced in the U.S. House of Representatives May 9, 2023); Jay Zitter, *Annotation, Construction and Application of “Make My Day” and “Stand Your Ground” Statutes*, 76 A.L.R. 6TH 1 (2012).

⁸⁵ See Melissa Block, “A Song for Any Struggle”: Tom Petty’s “I Won’t Back Down” Is an Anthem of Resolve, NPR (May 8, 2019, at 1:57 PM ET), <https://www.npr.org/2019/05/08/721228788/tom-petty-i-wont-back-down-american-anthem-resolve> [https://perma.cc/VZM2-BJVD]; Jacob Uitti, *The Meaning Behind the Song: “I Won’t Back Down” by Tom Petty*, AM. SONGWRITER (June 2, 2022, at 11:15 AM), <https://americansongwriter.com/the-meaning-behind-the-song-i-wont-back-down-by-tom-petty/> [https://perma.cc/T8N4-AFMN].

A. Honor regarding Different Traits of Character?

Dueling and stand your ground might be thought to differ with respect to the character traits at issue. Duelists like Hamilton and Burr risked human life in defense of their self-proclaimed *good conduct and honesty*. Persons who stand their ground risk human life in asserting *physical and steadfast courage* in the face of what they perceive to be unlawful threats.

In reality, however, dueling called upon the very kinds of steadfast courage that stand your ground demands. Dueling was conventionally designed to enable participants to defend themselves against accusations of dishonorable conduct—including accusations of physical cowardice⁸⁶ by displaying death-defying courage.⁸⁷ It called upon challengers like Aaron Burr to possess sufficient courage to risk their lives in one-on-one combat to vindicate their reputations for good conduct and honesty; and, in return, it called upon their counterparts like Hamilton to possess significant courage and sense of honor to risk their lives in identical combat in order to offer offended parties “satisfaction.”⁸⁸ The consequence of failing to do so was to be regarded in public as a coward.⁸⁹ Aaron Burr said as much, writing that he had elected to “vindicate [his] honor *at such hazard as the nature of the case demands*,”⁹⁰ that is, the “hazard” of losing his life and/or being charged with murder. Indeed, if anything, dueling demanded greater courage than standing one’s ground because duelists alone knew that, under the controlled conditions of the *Code Duello*, each participant had an equal chance to kill and, hence, an equal chance of dying. In that respect, dueling vindicated a participant’s reputational honor, including the honor of not being a coward, *by displays of physical courage*, while stand your ground vindicates physical courage alone.

B. Honor in the Minds of Whom?

⁸⁶ See Feith, *supra* note 9, at 9, 17. See also HENRY FIELDING, *THE HISTORY OF TOM JONES, A FOUNDLING* 387 (Fredson Bowers ed., 1994) (1749) (“[A]nd now, having grasped his new-purchased Sword in his Hand, he was going to issue forth, when the Thought of what he was about to undertake laid suddenly hold of him, and he began to reflect that in a few Minutes he might possibly deprive a human Being of Life, or might lose his own. ‘Very well,’ said he, ;and in what Cause do I venture my Life? Why, in that of my Honour. And who is this human Being? A Rascal who hath injured and insulted me without Provocation. But . . . shall I incur the divine Displeasure rather than be called-a-Coward. . . ? I’ll think no more, I am resolved and must fight him.”).

⁸⁷ See BILLACOIS, *supra* note 3, at 205 (“Loss of honour in the chivalric ethical code is ‘a kind of civil death’; it confines the individual to so unbearable an existence that death is preferable. . . Life without honor is so devalued that it can be risked in a duel, which offers a simple way to reach an end that is infinitely superior to such life.”).

⁸⁸ See HOPTON, *supra* note 2, at 26.

⁸⁹ See Stemke, *supra* note 6, at 3 (“In the South . . . those men who declined a challenge were humiliated publicly with a uniquely American form of punishment called ‘posting’. The name of a man who refused to fight was included in a written statement that called him a coward; these were hung in public areas or printed in the paper for all to read.”).

⁹⁰ See INTERVIEW IN WEEHAWKEN, *supra* note 32, at 98.

Dueling may be thought to differ from stand your ground in so far as the former involved reputational honor, while persons who stand their ground do so out of subjective pride in not fleeing from places where they otherwise have a right to remain. Yet the distinction is hardly clear cut. Even though participants engaged in dueling to vindicate public honor, most probably internalized their sense of public honor as subjective honor as well. And in most instances in which persons stand their ground, they do so either in the presence of others whose opinions they value or knowing that others will subsequently hear that they stood their ground.

Even where the distinction exists, however, it is not clear that it justifies the law's disparate treatment of dueling and stand your ground. Duelists did not act out of meretricious or transient senses of honor. They did so because, having had time for reflection and knowing dueling to be illegal, they concluded, perhaps quite rationally,⁹¹ that their public standing was more important to them than their lives, and, to preserve their public standing, they had to manifest that they regarded their honor to be more important than their lives.⁹² Alexander Hamilton said as much before his fatal encounter with Aaron Burr, writing that "I hazard much" in dueling because "my life is of the utmost importance to my wife and children," and, yet, that "what men of the world denominate honor" left him no choice but to face the hazard. The criminal law's disparate treatment of dueling and stand your ground thus raises the question: in so far as dueling involved public reputation alone and stand your ground involves subjective pride alone, does society truly value subjective pride more highly than a person's good name in the community? Does it rank the former so much more highly than the latter as to justify risking human life for the former and not for the latter?

C. *More at Issue than Honor?*

Dueling enhanced personal reputation by manifesting a duelist's willingness to risk life to vindicate it. In contrast, stand-your-ground laws are said to promote two distinct values: (1) a person's honor in refusing to appear cowardly by fleeing from wrongful, lethal assault; and (2) the right of persons not to be driven by unlawful threats from places where they have a "right" to be. Consequently, if stand-your-ground laws do, indeed, promote an additional value besides honor—or, more precisely, if value #2 is, indeed, distinct from value #1—the presence of value #2 may explain why the law permits persons to stand their ground while prohibiting them from dueling.

⁹¹ See Christopher G. Kingston & Robert E. Wright, *The Deadliest of Games: The Institution of Dueling*, 76 S. ECON. J. 1094 (2010) (explaining that circumstances could conspire to render dueling a rational choice); Lessig, *supra* note 49, at 970, 1015–16 (same).

⁹² See KIERNAN, *supra* note 4, at 53; Bell, *supra* note 45, at 393 ("[D]uels were . . . ritualized displays of bravery, military prowess, above all, willingness to sacrifice one's life for one's honor.").

Closely examined, however, #1 and #2 appear to be different ways of framing the same underlying value. We have already seen that it is misleading to say that that stand-your-ground laws authorize persons to remain in places where they have a “right to be” because, absent such laws, persons who can safely retreat have no right to use force while remaining anywhere, other than in their homes. But let us assume, *arguendo*, that we take such laws on face value. Consider, then, the “right” that is supposedly at stake in #2—the supposed preexisting right to remain in a public place rather than safely retreat. How likely is it that people who invoke that right by resorting to lethal force do so in order to continue remaining there afterwards? Such public places are hardly locations where people wish to abide after resorting to lethal force. On the contrary, what such law-abiding people want is to *stand and defend* themselves rather than seek refuge. To do so, of course, they must necessarily stand firm where they are. Yet what they value are not the *places*, as such, but the value that also underlies #1: the self-respect, the pride—or, better yet, the honor—of law-abiding persons like themselves in not backing down in the face of wrongful threats.

Suppose, for example, that John falls asleep on a bus and is left off on Sunday in a neighborhood where, having been bullied as a child, he resolved never to return. Anxious to exit before anyone recognizes him, he hurries to leave. Before he can do so, he comes face to face with a childhood nemesis who, threateningly, blocks his way. Reasonably fearing that his nemesis will again assault him, yet knowing he could backtrack with complete safety to a welcoming church door, he shoots his nemesis, shouting “I’m out of this hellhole.” Florida’s stand-your-ground law fully protects John because, reasonably fearing grievous injury, John used lethal force in a place where he had a “right to be.” Yet, despite the statute’s references to “places” where one has a right to be, the interest that it protects is not any desire on John’s part to remain in, or to frequent, his old neighborhood. Rather, the statute’s reference to a “place” where John has a “right to be” is an alternative way of stating that, *not being* a trespasser or aggressor, John had *not* forfeited his privilege of using force in self-defense.

D. *Alternative Ways of Vindicating Honor?*

It might be argued that the existence of civil defamation actions to redress libel and slander rendered it unnecessary for nineteenth-century Americans to vindicate their reputations by resorting to dueling. But, apart from the fact that persons who stand their ground in lieu of safely retreating also possess the alternative of having the state redress wrongful assaults,⁹³ the fact that nineteenth-century Americans

⁹³ See 4 BLACKSTONE, *supra* note 49, at 185; Beale, *Retreat from a Murderous Assault*, *supra* note 72, at 181–182.

could have resorted to civil litigation disregards the fact that, for them, hazarding their lives was the essential *point* of dueling⁹⁴:

Honor was not a quality that could be repaired through the legal system. For a man to turn to the legal system to repair his honor, perhaps by filing a libel or slander suit, was akin to a man admitting that he was unable to protect himself. It was an admission of both weakness and cowardice. A libel suit also carried the message that the plaintiff was one who thought his honor could be repaired by monetary damages.⁹⁵

Andrew Jackson's mother instilled that lesson in her son, advising Jackson to "Never tell a lie, . . . nor sue anybody for slander, assault, or libel. Always settle them cases yourself."⁹⁶ For "[t]he law affords no remedy that can satisfy the feelings of a true man."⁹⁷

E. *Heat of the Moment as a Distinction?*

Standing one's ground and dueling differ in that the former occurs in the heat of the moment, while dueling does not. Indeed, the *Code Duello* was designed to mandate a kind of cooling-off period that persons who stand their ground do not enjoy.⁹⁸ Not surprisingly, some exponents of stand-your-ground laws seek to justify them on precisely the ground that cooling-off is not an option. Quoting Justice Oliver Wendell Holmes' quip that "detached reflection cannot be demanded in the presence of an uplifted knife,"⁹⁹ they argue that persons who confront what they

⁹⁴ Immanuel Kant believed that, although, *morally*, dueling deserved the death penalty, the state had no legitimate authority to impose it on soldiers who dueled because, he wrote, legislation "cannot . . . wipe away the stain of suspicion of cowardice from a subordinate officer who fails to respond to a humiliating affront with a force of his own rising above fear of death." Mika LaVaque-Manty, *Dueling for Equality: Masculine Honor and the Modern Politics of Dignity*, 34 POL. THEORY 715, 718 (2006).

⁹⁵ See Wells, *supra* note 12, at 1823; see also Feith, *supra* note 9, at 9.

⁹⁶ Wells, *supra* note 12, at 1823.

⁹⁷ LaCroix, *supra* note 5, at 559 n.177 (emphasis added). Blackstone observed that, despite its being a crime, dueling would not cease until participants found an alternative for obtaining "satisfaction" besides risking the "hazard of . . . life and fortune." 4 BLACKSTONE, *supra* note 49, at 113. ("[T]he strongest prohibitions and penalties of the law will never be entirely effective to eradicate this unhappy custom; till a method be found of compelling the aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable as that which is now given at the hazard of the life and fortune, as well as of the person insulted, as of him who hath given the insult.")

⁹⁸ See LaCroix, *supra* note 5, at 518.

⁹⁹ Brown v. United States, 256 U.S. 335, 343 (1921).

believe to be wrongful, mortal threats cannot be expected to coolly deliberate upon whether they can retreat with complete safety.¹⁰⁰

Justice Holmes is undoubtedly right that courts cannot expect “detached reflection” in the face of imminent threats of physical assault. But jurisdictions that impose a duty of retreat do not require *detached* reflection. What they require is that the beliefs of persons who conclude they cannot safely retreat be “reasonable”—reasonableness being measured by what persons of good character would conclude if they found themselves in exactly the same circumstances as the actors at hand, *including* all of the accompanying stresses of the moment.¹⁰¹ If the state cannot expect such reasonableness of persons who stand their ground, it cannot expect reasonableness of *anyone* who uses self-defensive force, whether lethal or non-lethal force, in *any* context.

F. *Stand-Your-Ground Threats as Distinctively Imminent and Physical?*

Persons who stand their ground do so in response to perceived threats of imminent and wrongful mortal harm. In contrast, nineteenth-century Americans resorted to dueling in response to perceived threats of *less-than-imminent* and wrongful *reputational* harm. It might, therefore, be argued that the *immediacy* of the former harms spark emotions of fear and resistance that less-than-imminent threats of reputational harm do not. Threats of immediate harm do, indeed, trigger present emotions that threats of less-than-imminent harm do not. The issue, however, is the place such present emotions occupy in stand-your-ground laws. Traditional duties of retreat have long taken account of such emotions by allowing lethal force by persons who, influenced by their present fears or desires to resist, reasonably conclude that they lack safe retreat. In contrast, stand-your-ground laws do the opposite: they effectively render such emotions legally irrelevant by allowing lethal force by persons who, regardless of their fears or desires to resist, nevertheless *know full well* that they can retreat with complete safety.

It might also be argued that, apart from the immediacy of the emotions they trigger, threatened harms of death and grievous bodily injury are more *grievous* than reputational harm, rendering persons who stand their ground more justified in using lethal force than duelists. The argument, however, is misleading for several reasons. For one, it overlooks that dueling existed precisely because duelists embraced a contrary scale of values: they regarded *reputational* harm as more grievous than risks of mortal harm. Furthermore, persons who use lethal force in standing their ground do *not* do so because they would otherwise face mortal harm. Rather, they do so because they would otherwise face *either* mortal harm *or* retreat with complete

¹⁰⁰ See Talk of the Nation, *Op-Ed: Why I Wrote “Stand Your Ground” Law*, NPR (Mar. 26, 2012, at 1:00 PM ET), <https://www.npr.org/2012/03/26/149404276/op-ed-why-i-wrote-stand-your-ground-law> [<https://perma.cc/JR9T-HMCS>] (interviewing Rep. Dennis Baxley).

¹⁰¹ See generally Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHI. 137 (2008).

safety, just as duelists who engaged in death-defying exchange otherwise faced either reputational harm or withdrawal. In each case, to choose lethal force over the value of human life is to choose lethal force for the sake of honor. For the same reason, it is fallacious to argue that what distinguishes stand your ground from dueling is that persons who stand their ground uniquely face *criminal* wrongs rather than, at most, *civil* wrongs of defamation, criminal wrongs being arguably more grievous than civil wrongs. Persons who stand their ground do not resort to lethal force because they otherwise face criminal harms. They do so because they would otherwise have to retreat.

G. *Dueling as Distinctively Consensual?*

Dueling was consensual in that duelists faced lethal risks to which they consented. In contrast, standing one's ground might be regarded as nonconsensual in that actors appear to confront threats to which they do not consent. From this it might be argued that persons who stand their ground are more justified in using lethal force than duelists. In reality, however, duelist and actors who stand their ground consent to an equal degree: both possess the ability to withdraw or retreat with complete safety and, hence, both ultimately confront only lethal threats to which they consent.

From the standpoint of stand-your-ground *victims*, however, the normative difference between consent and nonconsent militates in the opposite direction. Victims of stand your ground may not know that they are putting their counterparts in fear of death or grievous bodily injury. They may not know that their stand-your-ground counterparts are armed. And they do not know, as duelists do, they have as much as a chance of *being* killed by their counterparts as killing them. In that respect, it is harder to justify the deaths of such persons than the deaths of duelist who consent to equal chances of killing and being killed.

CONCLUSION

The state of Nevada did two things in 2011: it enacted a stand-your-ground statute;¹⁰² and it simultaneously retained its long-standing anti-dueling statute, making fatal duels punishable as first-degree murder.¹⁰³ This legal discrepancy is easily understood today. America has changed in the two hundred years since Alexander Hamilton dueled Aaron Burr. For better or for worse, public figures in the United States no longer place such value on possessing honorable reputations for good conduct and honesty, much less value honor above life itself.¹⁰⁴

¹⁰² See NEV. REV. STAT. § 200.120 (2024); 2011 Nev. Stat. ch. 59.

¹⁰³ See NEV. REV. STAT. § 200.410 (2024).

¹⁰⁴ See, e.g., Ryan Sturk, *Bill Would Repeal Last Reference to Dueling in Idaho Law*, ASSOCIATED PRESS (Feb. 13, 2015) (discussing a proposal to repeal the state's law against dueling on grounds of obsolescence).

The question, however, is not whether consistency requires that stand-your-ground states also legalize dueling. The question, rather, is whether today's stand-your-ground laws are predicated on notions of honor akin to those vindicated by dueling in antebellum America, and, if they do, whether, in regard to the value of human life, the complete defense to homicide in stand-your-ground laws¹⁰⁵ is, from a moral viewpoint, any more acceptable today than the criminal practice of dueling was in the nineteenth century. Joseph Beale, for one, answered the questions for himself, writing in 1903 that American courts, mostly in the South and West, adopted stand-your-ground rules in order to spare actors from "dishonor" and thus embraced "the ethics of the duelist."¹⁰⁶

¹⁰⁵ Stand-your-ground laws are not alone in accommodating notions of honor. Voluntary-manslaughter laws do so in mitigating murder to manslaughter, whether they do so by basing mitigation upon specified insults to honor, *see* LaFave, *supra* note 54, at 777–84; or, like Model Penal Code § 210.3, leave it to juries to decide whether defendants who otherwise commit murder in states of "extreme emotional or mental disturbance" had "reasonable explanation or excuse" for being so disturbed. But stand-your-ground laws are unique in providing complete defenses to homicide.

¹⁰⁶ *See* Beale, *Retreat from a Murderous Assault*, *supra* note 72, at 577.