Florida’s Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense

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I. Introduction

The transformation of Florida’s self-defense law is best explained through illustration. Imagine a woman walking to her car at midnight. She keeps a gun in her purse. She notices a man quickly approaching; he has a knife and charges toward her. Should the woman attempt to outrun the man or use defensive force and fire at her attacker? Consider a similar scenario where an elderly man who lives alone refuses to leave his home of fifty years, despite the deterioration of his neighborhood. He awakes in the middle of the night to see the shapes of two men approaching. He instinctively reaches for his gun and shoots. In these situations, both individuals would likely assert self-defense. Under Florida common law, the woman would have had a legal duty to retreat before using deadly force in self-defense.\(^1\) The man would have had to prove that he had a reasonable fear of imminent death or grievous bodily injury.\(^2\) However, the jury would have had the benefit of twenty-twenty hindsight, and would have known the information, which the old man did not, that the two teenage intruders were

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\(^1\) Danford v. State, 43 So. 593, 596 (Fla. 1907) (“[I]t is the duty of a party to avoid a difficulty which he has reason to believe is imminent, if he may do so without apparently exposing himself to death or great bodily harm.”); Reimel v. State, 532 So. 2d 16, 18 (Fla. Dist. Ct. App. 1988) (“Before taking a life, a combatant must ‘retreat to the wall’ using all means in his power to avoid that need.”); Cannon v. State, 464 So. 2d 149, 150 (Fla. Dist. Ct. App. 1985) (“The fact that the Defendant was wrongfully attacked cannot justify her use of force likely to cause death or great bodily harm if, by retreating, she could have avoided the need to use that force.”).

\(^2\) See Joshua Dressler, Understanding Criminal Law 223 (5th ed. 2009).
Lastly, even if the individuals were found not guilty, the victim’s family could sue them.\(^4\)

Such was the state of Florida law prior to the enactment of the highly publicized and controversial Stand Your Ground law in 2005, which abrogated the duty to retreat.\(^5\) Predictably, battle lines were drawn between the law’s proponents and its critics.\(^6\) This Article seeks objectively to examine Florida’s new law. Part II will discuss the history and policies behind the development of the doctrine of self-defense in America to lay a foundation for understanding the development of self-defense law in Florida.\(^7\) Part III will examine Florida’s self-defense law before 2005, focusing on the Castle Doctrine, the duty to retreat, and the burden of criminal prosecution and civil liability.\(^8\) Part IV will discuss the substantive provisions of the Stand Your Ground law, the arguments given by its proponents and critics, issues with the law, and the impact of the new law on incidents involving self-defense.\(^9\) Part V will discuss Florida’s role as a national trendsetter in gun policy, highlighting the similarities between the passage of the Stand Your Ground law and Florida’s concealed carry law.\(^10\)

**II. ENGLISH CIVILITY VERSUS THE AMERICAN TRUE MAN**

**A. What is Self-Defense?**

“Every state in the United States recognizes a defense for the use of force, including deadly force, in self-protection.”\(^11\) Traditionally, a nonaggressor was justified in using deadly force if he reasonably be-

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\(^5\) 2005 Fla. Laws 199, 202; Zachary L. Weaver, Note, Florida’s “Stand Your Ground” Law: The Actual Effects and the Need for Clarification, 63 U. MIAMI L. REV. 395, 395 (2008); see also infra Part IV.B.

\(^6\) See infra Part IV.C.

\(^7\) See infra Part II.

\(^8\) See infra Part III.

\(^9\) See infra Part IV.

\(^10\) See infra Part V.

\(^11\) Dressler, supra note 2, at 223 (noting if a law abolished self-defense, it could be struck down as unconstitutional according to District of Columbia v. Heller, 554 U.S.
Zbrzeznj believed such force was "necessary to protect himself from imminent use of unlawful [deadly] force by [another] person." Therefore, the standard was not actual harm, but that the appearance of imminent harm was reasonable. Further, the protection of this defense was only available to an innocent actor, as the general rule was an aggressor could not successfully establish self-defense. A prima facie case of self-defense consisted of (1) a necessity component, (2) a proportionality component, and (3) a reasonable-belief requirement. The necessity requirement may have reinforced the duty to retreat before using deadly force, because if retreat was available deadly force was not necessary to avoid the harm. However, American jurisdictions diverge on the imposition of a legal duty to retreat, with a majority of states applying a no-duty-to-retreat rule.

A person may also have justifiably used force to defend a third party from an unlawful attack. In this situation, the intervenor may

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570 (2008), which held that the Second Amendment provides an individual right to possess a firearm and to use it for lawful purposes, including self-defense).
12 Id.
13 Id. at 225.
14 Id. at 226.
15 Id. at 224. Force should not be used against another person unless it is necessary, "and only to the extent that[ ] it is necessary." Id. Consequently, force is not necessary unless there is an imminent threat of harm. Id.
16 Id. A person is not justified in using force that is disproportionate to the threat of harm. Id. For example, "a person is never permitted to use deadly force to [defend] what he knows is a nondeadly attack, even if deadly force is the only way to prevent the [harm]". Id.
17 Id. The reasonable standard is determined through a hybrid objective and subjective analysis. Id. at 225. "[T]he jury must determine [both] that the defendant subjectively believed that he needed to use deadly force to repel an imminent unlawful attack" and that the defendant's belief was objectively reasonable, one that a reasonable person under the same circumstances would have possessed. Id. This is a conjunctive determination. See id. If the defendant subjectively believed he was in danger but was objectively unreasonable, he is guilty of murder. Id. On the other hand, if it was a reasonable mistake, self-defense applies. Id.
18 Id. at 229.
19 Id.
20 Id. at 259 (identifying this defense as the defense of others).
have used force to the extent the intervenor reasonably believed the force was necessary to prevent imminent harm to the third party.\textsuperscript{21}

In examining the policies that have shaped self-defense, it is important to recognize the categorization of this defense in American jurisprudence.\textsuperscript{22} Affirmative defenses raised by a defendant in response to criminal charges are classified as claiming either an excuse or justification for the allegedly wrongful action.\textsuperscript{23} Self-defense is a justification defense, while insanity is an excuse defense.\textsuperscript{24} This distinction is important because an action that is justified is considered morally superior to an action that is merely excused.\textsuperscript{25} Consequently, “when a person claims self-defense, she is stating that killing the aggressor was the right thing to do—that the result of a dead human being is a good result or, at least, a non-wrongful result.”\textsuperscript{26}

\textbf{B. English Common Law}

The legal duty to retreat to the wall before using deadly force in self-defense originated at English common law.\textsuperscript{27}

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\item \textsuperscript{21} Id. at 260; see, e.g., State v. Cook, 515 S.E.2d 127, 137 (W. Va. 1999) (noting that the reasonable belief must be both objectively and subjectively reasonable or what a reasonable person in the intervenor’s shoes would have believed under the circumstances).
\item \textsuperscript{22} See infra notes 23-26 and accompanying text.
\item \textsuperscript{23} Marcia Baron, Justifications and Excuses, 2 OHIO ST. J. CRIM. L. 387, 388 (2005).
\item \textsuperscript{24} Id. at 388-89.
\item \textsuperscript{25} Id. at 389. “To say that an action is justified is to say that although it is of a type that is usually wrong, under these circumstances it was right. To say that an action is excused is to say that it was wrong . . . but the agent is not blameworthy.” Id. at 395 (emphasis added).
\item \textsuperscript{26} Joshua Dressler, Feminist (or “Feminist”) Reform of Self-Defense Law: Some Critical Reflections, 93 MARQ. L. REV. 1475, 1478 (2010).
\item \textsuperscript{27} Benjamin Levin, Note, A Defensible Defense?: Reexamining Castle Doctrine Statutes, 47 HARV. J. ON LEGIS. 523, 527-28 (2010); see Regina v. George Smith, (1837) 173 Eng. Rep. 441, 443 (explaining that using deadly force to defend oneself was only justified if the defendant had “retreated as far as he could”). By requiring a duty to retreat, English law put an emphasis on the value of human life, even the life of a person breaking the law by attacking another. Levin, supra 27, at 528 (claiming the law upheld humanistic values).
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The law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honour.28

However, the duty to retreat did not extend to the home, where deadly force was justified.29 A person could use deadly force to prevent an unlawful intrusion into the home (burglary)30 or, if an intruder was inside the home, to prevent imminent harm to oneself or another.31 This exception to the duty to retreat came to be known as the Castle Doctrine: "the law of England has [s]o particular and tender a regard to the immunity of a man's house, that it considers it his castle, and will never suffer it to be violated with impunity."32

C. The American True Man Cannot Accept English Civility

In America, the majority of states abandoned the duty to retreat.33 This shift was founded on ideals of strength and valor (such as the American mind34 and true man35 justifications for self-defense), along with a frontier-inspired abhorrence for the cowardice of retreat in

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28 4 William Blackstone, Commentaries *184-85 (emphasis added).
30 Id.
31 See id.
32 4 Blackstone, supra note 28, at *223 (emphasis added).
33 See, e.g., Garrett Epps, Any Which Way but Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American "Retreat Rule", LAW & CONTEMP. PROBS., Winter 1992, at 310-11 (noting that in the New World courts began to discard the duty to retreat); Levin, supra note 27, at 529 (noting, in the late nineteenth century, states began to abandon the duty to retreat); Suk, supra note 29, at 243 (noting the "remarkable change" in the nineteenth century as states moved away from the duty to retreat).
34 Runyan v. State, 57 Ind. 80, 84 (1877).
35 Erwin v. State, 29 Ohio St. 186, 199-200 (1876).
the face of a wrongful attack. In *Runyan v. Indiana*, the court opined that American jurisdictions abandoned the duty to retreat because “the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed . . . or even to save human life.” In *Erwin v. Ohio*, the court reasoned that “a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.” Many courts expressed an aversion for imposing a legal duty to retreat in the face of danger and pointed out the dubious logic of requiring the person obeying the law to retreat from the person breaking it. Undeniably, the increased availability of handguns drastically changed the circumstances from those of early English common law where the duty to retreat originated. The original policy justification that retreating in the face of an attacker

36 Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 Harv. L. Rev. 567, 577 (1902-1903). The critical view of the gentilities of English common law was clearly articulated in Miller v. State, 119 N.W. 850, 857 (Wis. 1909), when the court stated, “The ancient doctrine requiring the party assaulted to ‘retreat to the wall’ . . . may have been all right in the days of chivalry . . . [but] it is unadaptable to our modern development and, therefore, has been pretty generally, and in this state very definitely, abandoned.”

37 *Runyan*, 57 Ind. at 84 (emphasis added).

38 *Erwin*, 29 Ohio St. at 199-200 (emphasis added).

39 See, e.g., *State v. Bristol*, 84 P.2d 757, 763 (Wyo. 1938) (quoting *State v. Bartlett*, 71 S.W. 148, 152 (Mo. 1902)) (“The right to go where one will, without let or hindrance, despite of threats made, necessarily implies the right to stay where one will, without let or hindrance. These remarks are controlled by the thought of a lawful right to be in the particular locality to which he goes or in which he stays. It is true, human life is sacred, but so is human liberty. One is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist . . . . In other words, the wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor.”); *Bartlett*, 71 S.W. at 152 (“We hold it a necessary self-defense to resist, resent, and prevent such humiliating indignity,—such a violation of the sacredness of one’s person,—and that, if nature has not provided the means for such resistance, art may; in short, a weapon may be used to effect the unavoidable necessity.”).

40 See *State v. Gardner*, 104 N.W. 971, 975 (Minn. 1905) (reasoning that although the duty to retreat, which originated before the general introduction of guns, wisely encouraged individuals to retreat from hand to hand combat, now this demand defies logic by requiring someone to retreat in the presence of a gun).
wielding a sword may save a life is less compelling when the attacker may have a gun.41

In jurisdictions that abrogated the duty to retreat if the nonaggressor was somewhere he or she had a right to be and was acting lawfully, he or she could stand his or her ground and resist force with force.42 Alternatively, every jurisdiction required an aggressor to retreat, consistent with the purpose of self-defense, which is to protect law-abiding citizens.43

The United States Supreme Court also rejected the duty to retreat and declared that “if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and . . . if he kills him he has not succeeded the bounds of lawful self defence.”44 Justice Holmes explained that imposing a legal duty to retreat on an individual in a moment of terror was an ideological aspiration, not a realistic expectation.45

Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore . . . it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.46

Despite the majority trend, a minority of states continue to impose a duty to retreat before using deadly force in self-defense.47 Defenders of the minority rule contend that no matter how cowardly one

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41 See, e.g., DRESSLER, supra note 2, at 230 (noting it is impractical to retreat from a gun); Beale, supra note 36, at 580 (explaining that it is much easier to retreat from a fist or pitchfork than a gun).
42 Long v. State, 52 Miss. 23, 35 (1876); see also Cooper v. United States, 512 A.2d 1002, 1005 (D.C. 1986) (explaining that, in jurisdictions that follow the American rule, “one can stand one’s ground regardless of where one is assaulted, or by whom”).
43 DRESSLER, supra note 2, at 229 n.34.
44 Brown v. United States, 256 U.S. 335, 343 (1921).
45 See id.
46 Id.
conceived retreat, it was a better alternative to the taking of a life.\textsuperscript{48} This rationale is potentially weakened because an attacked individual only makes a claim for self-defense when he or she prevails. Therefore, in situations where the individual did not retreat but killed the attacker, a judge or jury can only speculate regarding the hypothetical outcome if the individual had retreated in the face of attack.\textsuperscript{49} Additionally, the duty to retreat effectively attaches greater importance to the life of the person breaking the law than to the person who has done nothing wrong.\textsuperscript{50} If a person disregards the law by initiating an unprovoked attack upon another individual, a logical inference is that retreat will not deter the attacker.\textsuperscript{51}

\subsection*{D. The Castle Doctrine}

Despite the divergent rules over the duty to retreat outside the home, virtually every American jurisdiction recognized the Castle Doctrine exception.\textsuperscript{52} Therefore, someone attacked in the home was exempt from the duty to retreat.\textsuperscript{53} The Castle Doctrine gives protection to the

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  \item \textsuperscript{48} Id. at 346-47 (quoting Beale, \textit{supra} note 36, at 581).
  \item \textsuperscript{49} See Weaver, \textit{supra} note 5, at 419.
  \item \textsuperscript{50} See DRESSLER, \textit{supra} note 2, at 229; Bobo, \textit{supra} note 47, at 364-65.
  \item \textsuperscript{51} See, \textit{e.g.}, Richard A. Bierschbach \& Alex Stein, \textit{Deterrence, Retributivism, and the Law of Evidence}, 93 VA. L. REV. IN BRIEF 189, 195 (2007) (noting that self-defense is a deterrence to aggressors).
  \item \textsuperscript{52} DRESSLER, \textit{supra} note 2, at 230; see also Jones v. State, 76 Ala. 8, 16 (1884) ("It is an admitted doctrine of our criminal jurisprudence, that when a person is attacked in his own house, he is not required to retreat further. The reason of the rule is said to be, that the law regards a man's house as his castle \ldots and having retired thus far, he is not compelled to yield further to his assailing antagonist."); State v. Middleham, 17 N.W. 446, 448 (Iowa 1883) (stating that there is no duty to retreat in one's home); Pond v. People, 8 Mich. 150, 177 (1860) ("A man is not \ldots obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life."); People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914) ("It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. \ldots That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England.").
  \item \textsuperscript{53} DRESSLER, \textit{supra} note 2, at 230-31; see also State v. James, 867 So. 2d 414, 416 (Fla. Dist. Ct. App. 2003) (explaining that the duty to retreat had an exception—the Castle Doctrine—which provided the privilege in one's own residence or castle, to
home, designating it a sanctuary where people have the ultimate right to be safe, and should not be forced by the law to flee from this safe haven in the face of an unlawful attack.\textsuperscript{54} Although initially the Castle Doctrine appears to have had a narrow application limited to the home, courts have frequently and extensively defined the confines of a residence, therefore blurring the lines between public areas and one’s castle.\textsuperscript{55} As a policy matter, confusion with respect to legal duties is undesirable, for it creates dangerous risk for citizens subject to these laws, as an incorrect interpretation of the law is the difference between innocence and guilt.\textsuperscript{56}

Despite universal recognition of the Castle Doctrine, there was disagreement on a bright-line formulation of its application.\textsuperscript{57} This was most meaningfully manifested in the jurisdictional split over whether the privilege of nonretreat in the home extended to cohabitants.\textsuperscript{58} A majority of jurisdictions held there was no duty to retreat from the home when attacked by a cohabitant (applying the Castle Doctrine),\textsuperscript{59} while a stand one’s ground and use deadly force if necessary to prevent death or great bodily harm).

\textsuperscript{54} Catherine L. Carpenter, Of the Enemy Within, The Castle Doctrine, and Self-Defense, 86 Marq. L. Rev. 653, 667 (2003); see also James, 867 So. 2d at 416 (stating the home is a person’s ultimate sanctuary); Weiand v. State, 732 So. 2d 1044, 1049-50 (Fla. 1999) (noting the purpose of flight is to find sanctuary, and since the ultimate sanctuary is the home, no further retreat can be required).

\textsuperscript{55} See People v. Canales, 624 N.W.2d 439, 442 (Mich. Ct. App. 2000) (finding that the porch was part of the home for purposes of the Castle Doctrine); State v. Marsh, 593 N.E.2d 35, 38 (Ohio Ct. App. 1990) (finding a tent was the equivalent of a home). But see People v. Hernandez, 774 N.E.2d 198, 201, 203 (N.Y. 2002) (finding the lobby and stairwell of an apartment complex were not part of the residence).


\textsuperscript{57} Bobo, supra note 47, at 352; Carpenter, supra note 54, at 664.

\textsuperscript{58} Bobo, supra note 47, at 352.

minority held that the person attacked by a cohabitant must attempt to retreat if possible (creating an exception to the Castle Doctrine). This distinction can impose grave consequences on the person acting in self-defense, as the majority of homicides are committed against relatives or close acquaintances, who often share a residence. The brutal impact of the minority view is deeply felt by women, who predominately claim self-defense after killing their abusive partners. It is questionable public policy to require a woman to retreat from the person who has already proven physically dominant and capable of inflicting grave bodily harm through past abuse. Additionally, retreat is often not a practical option for a woman with children in the home, where she is unlikely to abandon her children to her attacker's wrath in the face of her retreat.

III. **Florida Self-Defense Law Prior to Stand Your Ground Law**

A. **Florida Courts Upheld the Duty to Retreat**

Prior to October 1, 2005, self-defense law in Florida was a combination of statutory and common law, applying different rules depending upon the location where the person who acted in self-defense was attacked.

Florida was a minority jurisdiction in that its courts consistently held there was a duty to retreat to the wall before using deadly force in self-defense when attacked outside the home. The policy justification

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61 See Shaw, 441 A.2d at 566.

62 DRESSLER, supra note 2, at 231; see also State v. Glowacki, 630 N.W.2d 392, 400-01 (Minn. 2001) (reasoning the majority view is superior for two reasons: (1) bright-line rules are easier to apply and (2) it is more cognizant of the realities faced by individuals living in situations involving domestic violence).

63 See DRESSLER, supra note 2, at 231.

64 See State v. Gartland, 694 A.2d 564, 570 (N.J. 1997) (noting women will be less likely to retreat if their children would be left behind with the attacker).


for imposing a duty to retreat was the importance of preserving human life, even if the life preserved was that of a criminal attacking an innocent civilian. 67 The Florida judiciary imposed the duty to retreat, for it was not required by Florida’s self-defense statute. 68

The duty to retreat was vitiated if, under the circumstances, retreat would be dangerous or futile. 69 In other words, in claiming self-defense a defendant had to show that he or she had done all he or she reasonably could have done to avoid the taking of the aggressor’s life before acting in self-defense. 70 The problem with analyzing whether a person should have retreated under the circumstances was the law’s failure to adequately account for the difficulty in making a reasonable decision as to the availability or feasibility of retreat in a split-second, life or death situation. 71

So. 593, 596 ( Fla. 1907) (“[I]t is the duty of a party to avoid a difficulty which he has reason to believe is imminent, if he may do so without apparently exposing himself to death or great bodily harm.”); Reimel v. State, 532 So. 2d 16, 18 (Fla. Dist. Ct. App. 1988) (“Before taking a life, a combatant must ‘retreat to the wall’ using all means in his power to avoid that need.”); Cannon v. State, 464 So. 2d 149, 150 (Fla. Dist. Ct. App. 1985) (“The fact that the Defendant was wrongfully attacked cannot justify her use of force likely to cause death or great bodily harm if, by retreating, she could have avoided the need to use that force.”).

67 See Redondo, 380 So. 2d at 1110. Because the policy justification is preserving life, there is no duty to retreat before using nondeadly force, for this by definition will not result in the loss of a life. Id. at 1110 n.1.

68 Fla. Stat. § 776.012 (2004) (“A person is justified in the use of force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against such other’s imminent use of unlawful force. However, the person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.”); Weiand, 732 So. 2d at 1049 (“The duty to retreat emanates from common law, rather than from our statutes.”) (emphasis added).

69 See Linsley v. State, 101 So. 273, 275 (Fla. 1924) (noting the duty to retreat is limited to those means that are consistent with the nonaggressor’s safety); Thompson v. State, 552 So. 2d 264, 266 (Fla. Dist. Ct. App. 1989) (reasoning there is no duty to retreat if retreat is futile); Brown v. State, 454 So. 2d 596, 600 (Fla. Dist. Ct. App. 1984) (finding no duty to retreat where the attacker would have caught the victim).


71 See supra notes 45-46 and accompanying text.
B. Florida’s Castle Doctrine

Florida, like a majority of other states, recognized the Castle Doctrine.\(^72\) The Castle Doctrine provided that where one was not the aggressor and was attacked in one’s home, there was no duty to retreat, and one could use such force as reasonably appeared necessary to protect oneself.\(^73\) Again, the Castle Doctrine had not been codified, but the judiciary exclusively controlled its application and limitations.\(^74\)

As the Castle Doctrine developed in Florida, the privilege it provided of nonretreat from the home became a confusing conglomeration of expansions and limitations.\(^75\) First, Florida changed its position on the duty to retreat when attacked inside the home by a co-occupant.\(^76\) In \textit{Weiand v. State}, the Florida Supreme Court overturned \textit{State v. Bobbitt}\(^77\) and joined the majority of jurisdictions that applied a bright-line rule that the law never required retreat from one’s \textit{castle}, even when the attacker was a co-occupant.\(^78\) The court held that the Castle Doctrine granted a limited privilege of nonretreat to anyone lawfully within the premises.\(^79\) The law imposed a limited duty to retreat within the house

\(^{72}\) \textit{Weiand}, 732 So. 2d at 1049.

\(^{73}\) \textit{Falco v. State}, 407 So. 2d 203, 208 (Fla. 1981); \textit{Peele v. State}, 20 So. 2d 120, 121 (Fla. 1944) (en banc); \textit{Russell v. State}, 54 So. 360, 361 (Fla. 1911); \textit{Wilson v. State}, 11 So. 556, 561 (Fla. 1892).

\(^{74}\) Florida’s statute regarding self-defense in the home made no mention of a Castle Doctrine. \textit{See FLA. STAT. § 776.031} (2004) (“A person is justified in the use of force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to prevent or terminate such other’s trespass on, or other tortious or criminal interference with, either real property other than a dwelling or personal property, lawfully in his or her possession or in the possession of another who is a member of his or her immediate family or household or of a person whose property he or she has a legal duty to protect. However, the person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent the imminent commission of a forcible felony.”).

\(^{75}\) \textit{See infra} notes 76-96 and accompanying text.

\(^{76}\) \textit{Weiand}, 732 So. 2d at 1051 (changing Florida’s approach on duty to retreat when attacked by a co-occupant from the minority to the majority viewpoint).

\(^{77}\) \textit{Id.; see also State v. Bobbitt}, 415 So. 2d 724, 724 (Fla. 1982) (holding that when the assailant and the victim are co-occupants the Castle Doctrine did not apply).

\(^{78}\) \textit{Weiand}, 732 So. 2d at 1051.

\(^{79}\) \textit{Id.} at 1056-57. The court extended this privilege to invitees, therefore overturning \textit{Hedges v. State}, 172 So. 2d 824 (Fla. 1965), which held that nonretreat jury instructions would be given only to persons attacked in their own home. \textit{Weiand}, 732
to the extent reasonably possible, but no duty to flee from the residence.\textsuperscript{80} The court gave two explanations for this change, which related to domestic violence.\textsuperscript{81} First, multiple studies of domestic abuse established that a woman in an abusive relationship likely increased danger to herself by retreating.\textsuperscript{82} Second, an instruction to a jury regarding a duty to retreat, under these circumstances, could have reinforced the common misconception that the victim of a violent relationship should have retreated from the relationship after the first violent encounter.\textsuperscript{83} Further, the court reasoned that the right to defend oneself was protected by the right to life, which was guaranteed under the Florida Constitution.\textsuperscript{84}

After Weiand broadened the Castle Doctrine by extending its protection to invitees, a Florida appellate court refused to extend its boundaries further by holding the Castle Doctrine did not extend to social guests.\textsuperscript{85} The court concluded that extensively defining the castle would vitiate the duty to retreat, for if a social guest had a castle anywhere he visited, there would be few places from which one must retreat.\textsuperscript{86} Additionally, the court reasoned that the justification for the Castle Doctrine was the sanctity of a person’s home, but a social guest, by definition, is not a resident of the home.\textsuperscript{87} However, the Supreme

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\textsuperscript{80} Weiand, 732 So. 2d at 1058.
\textsuperscript{81} Id. at 1052, 1054.
\textsuperscript{82} Id. at 1053. The irony of this justification is that the same woman would be required by law to attempt to flee her abusive partner in any place outside the home, although retreat would again exacerbate her danger. \textit{See id.} at 1049, 1053 (stating that when the threat of separation exists, the opportunity for violence rises, not distinguishing between home and other locations).
\textsuperscript{83} Id. at 1057. If the Florida Constitution as interpreted by the Florida Supreme Court protects a person from being required to retreat in one’s home because this infringes on the right to life, the rationale for imposing a duty to retreat outside the home is questionable. \textit{Cf. Dressler, supra} note 2, at 230 (explaining the rule rationale for the duty to retreat outside the home is to preserve life).
\textsuperscript{84} Id. at 1057. If the Florida Constitution as interpreted by the Florida Supreme Court protects a person from being required to retreat in one’s home because this infringes on the right to life, the rationale for imposing a duty to retreat outside the home is questionable. \textit{Cf. Dressler, supra} note 2, at 230 (explaining the rule rationale for the duty to retreat outside the home is to preserve life).
\textsuperscript{86} James, 867 So. 2d at 417.
\textsuperscript{87} Id.
Court of Florida’s holding in *Weiand* that the Castle Doctrine extended to invitees, who are also only temporary visitors in the residence, seriously undermined the validity of this argument.\(^8\) Therefore, the appellate court drew an arbitrary line between invitees and social guests, which stood open to challenge under the reasoning in *Weiand*.\(^9\)

The Castle Doctrine was narrowly extended outside the home to one’s place of employment, on the ground that the law should afford one’s place of employment the same sanctity as the home.\(^9\) However, this extension of the Castle Doctrine was not clearly defined, for it did not apply when the attacker was a coworker because both employees had an equal right to be within the *castle*.\(^9\) However, the reasoning for the distinction relied on Florida’s former failure to apply the Castle Doctrine when a co-occupant attacked another occupant of the home, which the court in *Weiand* had overruled.\(^9\) This distinction, like the distinction between social guests and invitees, would likely have been overruled by the Florida Supreme Court based on its reasoning in *Weiand*.\(^9\)

In *Baker v. State*, a Florida appellate court refused to extend the Castle Doctrine to a car because the car’s mobility provided the means for retreat.\(^9\) The *Baker* court rejected the defendant’s self-defense claim because the defendant, who was sixty years old and five foot six inches tall, had not *retreated* from the three men who attacked him at the door of his car.\(^9\) The defendant’s manslaughter conviction high-

\(^8\) See *Weiand*, 732 So. 2d at 1057; see also supra note 79 and accompanying text.

\(^9\) See *Weiand*, 732 So. 2d at 1057 (stating that the right to fend off attack is the same as the right to life, so it applies to invitees as well as co-occupants).


\(^9\) *Id.*; see also *Weiand*, 732 So. 2d at 1051; State v. Bobbitt, 415 So. 2d 724, 726 (Fla. 1982).

\(^9\) See *Weiand*, 732 So. 2d at 1051-52.


\(^9\) *Baker*, 506 So. 2d at 1057, 1059.
lights the consequence of making the wrong decision about whether, under the circumstances, one has a duty to retreat.96

Therefore, although the parameters of the Castle Doctrine were not clear, arguably the only place it applied outside the home was one’s place of employment.97 In all other locations, a person had a duty to retreat, if feasible, before using deadly force in self-defense.98 A person’s decision about whether to retreat made the difference between innocence and guilt when claiming self-defense.99

C. Criminal Prosecution and Civil Liability

A person charged with homicide or a crime involving force could raise the affirmative defense that his use of force was justified in self-defense.100 Even if the defendant’s actions were justified, this often saved him only from suffering a conviction, not from enduring a trial.101 Further, it placed in the hands of a jury the task of sifting through the difficult and exception-riddled law of self-defense.102

To establish a prima facie case of self-defense, a defendant must prove he or she had a reasonable belief that deadly force was necessary to prevent imminent death to himself or herself, or to another, or to prevent the imminent commission of a felony.103 Whether the defendant possessed the requisite reasonable belief is a question of fact for

96 See id. at 1059.
97 See id. (refraining from extending the Castle Doctrine to automobiles); Redondo v. State, 380 So. 2d 1107, 1110-11 (Fla. Dist. Ct. App. 1980), quashed in part by Redondo v. State, 403 So. 2d 954 (Fla. 1981) (extending the Castle Doctrine to include one’s place of employment).
98 See Weiand, 732 So. 2d at 1056 (stating a person has a duty to retreat unless in his own residence).
99 See infra notes 111-19 and accompanying text.
100 Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010) (explaining that prior to the enactment of Stand Your Ground, a defendant could raise self-defense as an affirmative defense at his criminal trial).
101 See id.
102 See Hernandez v. State, 842 So. 2d 1049, 1051 (Fla. Dist. Ct. App. 2003) ("Whether a person was justified in using deadly force is a question of fact for the jury to decide if the facts are disputed.").
the jury. The jury must determine whether the defendant subjectively held a reasonable belief and whether, under the circumstances, this belief was objectively reasonable. A compelling criticism of the reasonable belief analysis being a question of fact for the jury is the issue of hindsight bias. The jurors most likely cannot separate the knowledge they have of all the facts, which the defendant did not have, and the ability to consider these facts in the calm of a courtroom, which the defendant also lacked.

A defendant could also assert that his use of deadly force was legally justified as a defense to a transferred intent crime. This means that if the defendant used deadly force intending to defend himself against A, but accidentally shot and killed B, the action could still be justified if the defendant established a prima facie case of self-de-

104 Hernandez, 842 So. 2d at 1051.
105 Quaggin v. State, 752 So. 2d 19, 23 (Fla. Dist. Ct. App. 2000). The objective analysis required considering what a reasonably prudent and cautious person would have believed in the same circumstances. Id. Additionally, the standard was apparent danger, not actual danger. Id.
106 See Weiand v. State, 732 So. 2d 1044, 1054 (Fla. 1999) (noting that the myths of domestic violence influence juries as well as judges in self-defense cases).
107 An interesting comparison exists between the danger of hindsight bias in self-defense cases and the hindsight bias concerns that are implicated in Fourth Amendment jurisprudence. See Simon Stern, Constructive Knowledge, Probable Cause, and Administrative Decisionmaking, 82 Notre Dame L. Rev. 1085, 1120 (2007). The fear of hindsight bias is a primary motivator for the warrant requirement. Id. The justification is that a more accurate determination of probable cause will occur if the police must obtain a warrant in advance based on facts as they exist at that time. Id. Therefore, there is no risk of the magistrate being influenced by the knowledge that the search was successful. Id. If safeguards such as these are used to protect a court officer from hindsight bias, how much more concerned should the law be that a jury comprised of laypersons will not be able to extrapolate from the full facts before them the circumstances as they appeared to the defendant at the time of the attack and under the stress of being attacked?
This rebuts the arguments about Stand Your Ground's unique risks for innocent bystanders.109

If the defendant established a prima facie case of self-defense, the burden shifted to the State to rebut the defense by proving beyond a reasonable doubt that the defendant did not act in self-defense.110 If the Castle Doctrine did not apply,112 the prosecution could successfully rebut the self-defense argument by presenting evidence that the defendant could have safely retreated.113 Therefore, if the action in question occurred where the defendant had an obligation under the law to retreat, the jury could disregard the applicability of self-defense if it determined the defendant did not use all reasonable means available, consistent with his own safety, to retreat and avoid killing his attacker.114

On a motion by the defendant, a court could grant a judgment of acquittal as a matter of law if the State failed to rebut the defendant’s claim of self-defense.115 Under the duty to retreat, it was virtually impossible to petition the court successfully for acquittal because of the heavy burden required—the facts were such that no jury could lawfully construe them in favor of the State,116 while the evidence was construed in a light most favorable to the State.117 For example, the defendant

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109 See Brown v. State, 94 So. at 874 (“If the killing of the party intended to be killed would, under all the circumstances, have been . . . justifiable homicide upon the theory of self-defense, then the unintended killing of a bystander, by a random shot fired in the proper and prudent exercise of such self-defense, is also . . . justifiable.”).

110 See infra note 219.

111 Rasley v. State, 878 So. 2d 473, 476 (Fla. Dist. Ct. App. 2004); State v. Rivera, 719 So. 2d 335, 337 (Fla. Dist. Ct. App. 1998); Brown v. State, 454 So. 2d 596, 598 (Fla. Dist. Ct. App. 1984) (“While the defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the State, and this standard broadly includes the requirement that the State prove that the defendant did not act in self-defense beyond a reasonable doubt.”).

112 See supra notes 79-90 and accompanying text.


115 Hernandez, 842 So. 2d at 1051.

116 Id.

would not be justified in using deadly force against an attacker if the defendant could have retreated to avoid the harm. Consequently, if there was a question whether the defendant could have retreated, the court denied the defendant's judgment for acquittal.

In addition to criminal charges, a person with assets would have likely faced a civil suit. In *Cote v. Jowers*, the estate of the decedent brought a civil suit for damages against the defendant. The defendant shot the decedent after the decedent initiated an altercation and forcefully entered the defendant's house. The appellate court affirmed the trial court's decision that the defendant's killing of the decedent was justified as self-defense. Although the defendant was not civilly liable, this determination took place over three years after the date of the incident. Therefore, although the defendant's actions were justifiable under the law, it likely cost the defendant thousands of dollars in attorney's fees to defend himself from this suit.

**D. Incidents**

1. **Duty to Retreat Outside the Home**

   Under previous Florida law, when a confrontation occurred outside the home, the conviction or acquittal of the individual raising self-defense usually turned on the duty to retreat. This was likely because it was easier for the prosecution to attack the failure to retreat than the defendant's reasonable belief of imminent death or great bodily harm. Several cases illustrate the complexity of the defendant's ability to retreat.

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118 *Hernandez*, 842 So. 2d at 1051.
119 *Id.*
121 *Id.*
122 *Id.* at 340.
123 *Id.*
124 *See id.* at 341 (Shivers, J., dissenting) (showing the incident occurred in 1984).
125 *See Fla. Stat.* § 776.032(3) (2010). Section 776.032(3) of the Florida Statutes was created on October 1, 2005, which now allows a defendant in a civil action to be awarded reasonable attorney's fees if the court finds the defendant is immune from prosecution. *Id.*
126 *See Danford v. State*, 43 So. 593, 596 (Fla. 1907) (noting the duty to retreat).
127 *See infra* notes 130-63 and accompanying text.
In *State v. Rivera*, Mr. Rivera had been working at a gun show in Orlando, Florida, and consequently had a few thousand dollars cash and multiple guns in his van.\(^{128}\) Around 2:00 a.m., he drove onto the interstate to find a hotel room for the night.\(^{129}\) While entering the highway, Mr. Rivera flashed his lights at a truck and then passed it.\(^{130}\) The truck, which contained five men, began a high-speed chase after Mr. Rivera that continued for ten miles.\(^{131}\) During this time, Mr. Rivera attempted to flag down police officers, drove close to ninety miles per hour attempting to evade the truck, and stopped on the side of the highway hoping the truck would drive by.\(^{132}\) None of these evasive techniques succeeded.\(^{133}\) Meanwhile, a man in the truck threw objects at Mr. Rivera’s van, including a two-liter bottle of soda, which exploded on the van’s windshield.\(^{134}\) Eventually, Mr. Rivera exited the interstate, but his van stalled at an intersection.\(^{135}\) Allegedly, three men got out of the truck and approached his van.\(^{136}\) Mr. Rivera, who believed the men were carjackers attempting to steal his cash and guns, revved his engine hoping to scare them away.\(^{137}\) When one of the men pulled a pistol, Mr. Rivera raised a shotgun and fired a single shot, striking the man.\(^{138}\) A jury convicted Mr. Rivera of attempted manslaughter with a firearm and aggravated battery with a firearm.\(^{139}\) The trial court then reversed its earlier decision and granted the defendant’s motion for judgment of acquittal finding the State had not rebutted the defendant’s direct testimony that he acted in self-defense.\(^{140}\) The State appealed, contending the defendant’s use of deadly force was not justified because he had not used every possible means to retreat before shooting his attacker, since he could have run the victim over with his van instead of shooting

\(^{129}\) *Id.*
\(^{130}\) *Id.*
\(^{131}\) *Id.*
\(^{132}\) *Id.*
\(^{133}\) *Id.*
\(^{134}\) *Id.*
\(^{135}\) *Id.*
\(^{136}\) *Id.*
\(^{137}\) *Id.* at 336–37.
\(^{138}\) *Id.* at 337.
\(^{139}\) *Id.* at 336–37.
\(^{140}\) *Id.* at 337.
The appellate court rejected this argument for defying common sense, because if Mr. Rivera had done so, he would have still been sitting in court charged with attempted manslaughter, raising self-defense.\textsuperscript{142}

In \textit{Jenkins v. State}, Mr. Jenkins, a middle-aged man, exited his home telling the decedent to leave his property.\textsuperscript{143} The decedent told Mr. Jenkins that he was in a gang and would return with twenty guns to kill everyone.\textsuperscript{144} The decedent then attacked Mr. Jenkins, punching him in the face, leaving a bleeding cut.\textsuperscript{145} This blow caused Mr. Jenkins to stumble backwards.\textsuperscript{146} Mr. Jenkins then pulled a knife and showed it to the decedent, but his undeterred attacker stated he had a Glock handgun and rushed at Mr. Jenkins a second time.\textsuperscript{147} Mr. Jenkins raised the knife to defend the blow.\textsuperscript{148} The knife struck the decedent in the chest, killing him.\textsuperscript{149}

The prosecutor sought to rebut Mr. Jenkins’s claim of self-defense by attacking his failure to retreat from the decedent.\textsuperscript{150} He asked Mr. Jenkins if anyone stopped him from walking away after the first punch.\textsuperscript{151} Mr. Jenkins, who took the stand in his own defense, simply replied: “Where was I going to walk to?”\textsuperscript{152} This simple response highlights the burden the law placed on individuals such as Mr. Jenkins.\textsuperscript{153} Mr. Jenkins was prosecuted for murder for not attempting to flee, while bleeding and injured, from a man half his age who stated he had a gun and was going to kill him.\textsuperscript{154}

\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.} at 338.
\textsuperscript{144} \textit{Id.} at 912.
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.} at 912-13.
\textsuperscript{148} \textit{Id.} at 913.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{See id.}
\textsuperscript{154} \textit{Id.} at 911. Mr. Jenkins ultimately succeeded in his self-defense claim. \textit{Id.} at 917.
In *Baker v. State*, the court convicted a sixty-year-old man of manslaughter for stabbing three men who were attacking him outside his car.\(^{155}\) In reviewing the conviction, the appellate court found there was sufficient evidence the defendant could have retreated from his attackers by driving away in his car.\(^{156}\)

In *Fowler v. State*, Mr. Fowler met a man on a sidewalk in a high-crime area where Mr. Fowler was looking to buy five dollars worth of marijuana.\(^{157}\) There were no witnesses to the confrontation, but Mr. Fowler testified that the man pointed a gun at him and told him he was going to rob him.\(^{158}\) Mr. Fowler grabbed the gun, then shot and killed his attacker.\(^{159}\) The defendant testified retreat would have been futile because his bicycle had slipped between his legs.\(^{160}\) The fact that the defendant testified to his failure to retreat shows that retreat was legally expected, even when one’s attacker had a gun.\(^{161}\)

In *Jenkins* and *Fowler*, the appellate courts overturned their convictions.\(^{162}\) However, these wrongful convictions resulted in two innocent men spending a combined five years in jail.\(^{163}\)

2. No Duty to Retreat Inside Your Castle

Inside the home, where the Castle Doctrine eliminated the duty to retreat, a successful claim of self-defense often turned on the defendant’s *reasonable belief* of imminent death, great bodily harm, or the commission of a felony.\(^{164}\) The difficulty for the defendant in establishing self-defense was the jury could merely speculate on the belief that a


\(^{156}\) Baker, 506 So. 2d at 1059.


\(^{158}\) Id.

\(^{159}\) Id.

\(^{160}\) Id.

\(^{161}\) See id.


\(^{163}\) See Jenkins, 942 So. 2d at 910-11; Fowler, 921 So. 2d at 708-09.

\(^{164}\) See infra notes 166-68 and accompanying text.
hypothetical reasonable person (objective component) would have held under the circumstances (subjective component).\textsuperscript{165} The inherent hindsight bias in the retrospective reasonable belief analysis is highlighted by \textit{Quaggin v. State}.\textsuperscript{166} Mr. Quaggin, a seventy-year-old man, shot and killed a fourteen-year-old boy who had entered his home and was allegedly approaching Mr. Quaggin.\textsuperscript{167} Mr. Quaggin claimed he could not tell the age of the intruder and believed the intruder intended to rob him.\textsuperscript{168} The jury convicted the defendant of manslaughter and sentenced him to fifteen years in prison.\textsuperscript{169} In this case, it would be extremely difficult analyzing what a reasonable person would have believed under the circumstances. The prosecution convincingly argued to the jury that it was impossible for Mr. Quaggin to hold a reasonable fear of imminent harm from an unarmed fourteen-year-old boy.\textsuperscript{170}

IV. \textbf{STAND YOUR GROUND}

A. \textit{Protection of Persons and Property}

Florida's governor signed into law the Protection of Persons/Use of Force Bill, which became effective on October 1, 2005.\textsuperscript{171} This law has been labeled the Stand Your Ground law.\textsuperscript{172} It was strongly supported in the Florida legislature, passing unanimously in the Senate\textsuperscript{173} and by an overwhelming majority in the House of Representatives.\textsuperscript{174} The Florida legislature listed several justifications for enacting the law.\textsuperscript{175} First, "the Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action" for acting in de-

\textsuperscript{165} See \textit{supra} note 47-51 and accompanying text.
\textsuperscript{166} \textit{Quaggin v. State} 752 So. 2d 19, 22-23 (Fla. Dist. Ct. App. 2000).
\textsuperscript{167} \textit{Id.} at 20-22.
\textsuperscript{168} \textit{Id.} at 21-22.
\textsuperscript{169} \textit{Id.} at 19.
\textsuperscript{170} See \textit{id.} at 20-27.
\textsuperscript{171} 2005 Fla. Laws 199, 202; Weaver, \textit{supra} note 5, at 395.
\textsuperscript{172} Weaver, \textit{supra} note 5, at 395.
\textsuperscript{173} FLA S. JOUR. 263 (Reg. Sess. 2005) (showing the vote in the Senate was thirty-nine yeas to zero nays.).
\textsuperscript{174} FLA. H.R. JOUR. 344 (Reg. Sess. 2005) (showing the vote in the House of Representatives was ninety-four yeas to twenty nays.).
\textsuperscript{175} 2005 Fla. Laws 200.
fense of themselves and others.” 176  Second, "the castle doctrine is a common-law doctrine of ancient origins which declares that a person's home is his or her castle." 177  Third, “Section 8 of Article I of the State Constitution guarantees the right of the people to bear arms in defense of themselves.” 178  Fourth, “the persons residing in or visiting this state have a right to expect to remain unmolested within their homes or vehicles.” 179  Lastly, “no person or victim of crime should be required to surrender his or her personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.” 180  The law amended sections 776.012 and 776.031, and created sections 776.013 and 776.032 of the Florida Statutes. 181

B. The Actual Changes to Florida Law

The new law changed self-defense in Florida in three important ways. 182  First, it abrogated the common-law duty to retreat. 183  Section 776.013(3) allows individuals to stand their ground in any place they legally have a right to be:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony. 184

176 Id. (emphasis added).
177 Id.
178 Id.
179 Id. (emphasis added).
180 Id.
181 Id. at 200-02.
182 See infra notes 184-209 and accompanying text.
184 Id. (emphasis added).
This eliminated the analysis of whether a defendant had used every reasonable means available to retreat before using deadly force. Instead, individuals could stand their ground and use deadly force in any place where they had a right to be, as long as they had a reasonable belief that the use of deadly force was necessary to prevent death, serious bodily injury, or a forcible felony. The legislature codified a law specifying that in Florida there is no duty to retreat, irrevocably placing this issue outside of the judicial realm and moving Florida from a minority “duty to retreat” jurisdiction, to a majority “no duty to retreat” jurisdiction.

The second change to the preexisting law was the codification of the Castle Doctrine, which had previously been exclusively applied and defined by the judiciary. This codification expanded the doctrine both by expanding the castle to include occupied vehicles, and by expanding the circumstances in which the use of deadly force was justified in the castle through the creation of two conclusive presumptions.

185 See Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999) (explaining that prior to Stand Your Ground law, there was a common law requirement to use every reasonable means to avoid danger before using deadly force to defend oneself from an unlawful attack).

186 Fla. Stat. § 776.013(3); McWhorter v. State, 971 So. 2d 154, 157 (Fla. Dist. Ct. App. 2007) (“It appears that the new law places no duty on the person to avoid or retreat from danger, so long as that person is not engaged in an unlawful activity and is located in a place where he or she has a right to be.”).

187 See supra Part II.C.

188 See supra Part II.D.

189 Fla. Stat. § 776.013(1)(a), (5)(c). Through expanding the castle to occupied vehicles, the legislature made clear its intention to protect individuals in Florida from carjackers. See id. Interestingly, in 2004 there were 78,295 reported incidents of motor vehicle theft. Fla. Statistical Analysis Ctr., Fla. Dep’t of Law Enforcement, Crime in Florida (2010), http://www.fdle.state.fl.us/Content/getdoc/ee10c69f-651e-4f39-b221-7904be48f949/offst_property.aspx. In 2003, the population of Florida was 17,071,508 and the number of automobile thefts was 81,536. Id. Therefore, approximately one in every two hundred Florida residents had their car stolen. See id. In 2009, Florida’s population had increased to an estimated 18,750,483 and the number of automobile thefts had decreased to 50,204. Id. Consequently, approximately one in every three hundred and fifty people had their car stolen. See id.

190 Fla. Stat. § 776.013(1)(a), (4).
The effect of the presumptions was the elimination of the defendant’s burden to show his or her reasonable belief of imminent harm and that his or her use of deadly force was necessary to prevent the imminent harm. The first presumption (reasonable belief presumption) established that a person has the reasonable belief necessary to justify deadly force against an intruder who unlawfully and forcefully enters a dwelling, residence, or vehicle. The second presumption (necessity presumption) fulfilled the threat of harm necessary to justify deadly force in self-defense by establishing that “[a] person who unlawfully and [forcefully] enters or attempts to enter a person’s dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.” If established, the presumptions are conclusive (irrebuttable). These presumptions work together to establish a prima facie case of self-defense, thereby strengthening the law’s protection for defensive actions taken in the home.

However, the presumptions did not create absolute immunity from liability. The reasonable belief presumption is revoked in four instances: (1) when the individual uses defensive force against a cohabitant, unless there was a restraining order against that person; (2) when the person against whom defensive force was used entered the castle to remove a person in his or her lawful custody; (3) when the homeowner

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192 FLA. STAT. § 776.013(1)(a) (“A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or another [person] . . . if: (a) [t]he person against whom the defensive force was used was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered a dwelling, residence or occupied vehicle . . . .”).
193 FLA. STAT. § 776.013(4) (emphasis added).
195 By establishing a prima facie case of self-defense, the presumption eliminated the analysis of whether the defendant held the requisite reasonable belief for defensive actions taken within the home. Id.
196 See supra notes 191-95 and accompanying text.
197 FLA. STAT. § 776.013(2).
is engaged in an unlawful activity inside the home; and (4) when the homeowner uses deadly force against a law enforcement officer, if the officer identified himself or herself in accordance with applicable law.

The presumptions are susceptible to criticism on two grounds. First, deadly force would be justified against an unarmed intruder who forcibly and unlawfully entered a dwelling, residence, or occupied vehicle. However, this is not a drastic departure from prior law, where killing an unarmed intruder could be justified. Second, the reasonable belief presumption only applies to intruders, not against co-occupants. It appears unnecessary for the legislature to have created this exception, for the presumption requires an intruder to enter forcefully and unlawfully. Clearly, a legal resident of the home is not entering unlawfully. Therefore, the presumption would not have applied even without the exception.

The Florida legislature attempted to protect victims of domestic violence by allowing the reasonable belief presumption when the attacker violated a restraining order. However, the effectiveness of this provision is questionable, as many victims of domestic violence live with the individuals who abuse them and do not have a restraining order against them.

The third change effectuated by the Stand Your Ground law was that criminal and civil immunity was given to individuals whose actions were justified in self-defense. The law mandates that law enfor-

198 Id.
199 See infra notes 200-04 and accompanying text.
200 See FLA. STAT. § 776.013.
202 FLA. STAT. § 776.013(2)(a).
203 See id. § 776.013(1)(a).
204 See id.
205 Id. § 776.013(2)(a).
207 FLA. STAT. § 776.032 (2010).
ment cannot arrest the person claiming self-defense without probable cause that the individual used unlawful force.\(^{208}\) If a court determines that a person was sued when entitled to immunity, the court must award attorney’s fees, court costs, compensation for lost income, and all other expenses incurred by the defendant in defending against the civil action.\(^{209}\)

C. Proponents and Critics

Proponents of the law focused on the need to protect law-abiding Floridians while deterring violent criminals.\(^{210}\) The most prominent lobbying group to support the Stand Your Ground law was the National Rifle Association (NRA).\(^{211}\) Former NRA president Marion Hammer attempted to give the Stand Your Ground law a feminist appeal by seeking “to feminize the NRA’s message through the linking of gun ownership with protection . . . against male violence.”\(^{212}\)

Florida legislators overwhelmingly supported the law, or were cognizant their constituents did, which is evidenced by its virtually uncontested passage.\(^{213}\) Congressman Dennis Baxley (R-Ocala) stated that the law made sense because requiring a duty to retreat was “a good way to get shot in the back,” and the new law would deter criminals

\(^{208}\) Id. § 776.032(2).

\(^{209}\) Id. § 776.032(3). The legislator clearly intended to deter frivolous lawsuits.

\(^{210}\) Alabama Attorney General stated that criminals do not have an obligation to run, so neither should citizens. Bobo, supra note 47, at 364.


\(^{212}\) See Dressler, supra note 26, at 1483 (quoting Suk, supra note 29, at 266-67) (“A woman is walking down the street and is attacked by a rapist who tries to drag her into an alley. Under prior Florida law, the woman had a legal ‘duty to retreat . . . ’ Today, that woman has no obligation to retreat. If she chooses, she may stand her ground and fight.”) (emphasis added).

\(^{213}\) See supra note 173-74 and accompanying text.
who knew they faced deadly force. Florida's governor described the law as a good, common-sense, anti-crime issue.

Critics of the Stand Your Ground law claimed it devalued life and would lead to rampant violence. These critics primarily consisted of the Brady Campaign, a prominent anti-gun-violence organization and certain prosecutors and law enforcement officials. The Brady Campaign described the law as a shoot-first law and strongly opposed the law's establishment of the right to defend oneself anywhere one has a legal right to be and the right to absolute immunity from civil suits. The Brady Campaign criticized the Stand Your Ground law for allegedly placing innocent bystanders at risk by exposing them to inexperienced gun carriers and then depriving these victims of any legal remedy. Prosecutors criticized the law, contending it benefits unintended beneficiaries because the defense could be raised in a gang shootout.

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215 Gomez, supra note 214.

216 See infra notes 217-20 and accompanying text.


219 *Id.* However, under prior Florida law innocent bystanders could be at risk because self-defense was a defense to transferred intent crimes. See supra note 108 and accompanying text. Therefore, the law did not necessarily place bystanders in greater risk, but merely deprived them of the ability to sue an individual if the individual’s actions were legally justified.

Since the enactment of the Stand Your Ground law, courts have clarified two major issues, while a third remains unaddressed. First, the Florida Supreme Court resolved the issue of whether the law should apply retroactively. In Smiley v. State, the defendant had been charged with first-degree murder for shooting an occupant of his cab on November 6, 2004. Prior to his trial, the defendant filed a motion to permit the use of jury instructions using the language of the newly enacted Stand Your Ground law—eliminating the duty to retreat as a prerequisite for justifiable homicide. The Florida Supreme Court held that the Florida Constitution prohibited Stand Your Ground from applying retroactively. Therefore, prior law would apply to cases that arose prior to October 1, 2005, even if prosecuted after this date.

The second issue clarified by the judiciary was a procedural aspect of the civil and criminal immunity granted by section 776.032. In Dennis v. Florida, the Florida Supreme Court considered “whether a trial court should conduct a pretrial evidentiary hearing and resolve issues of fact when ruling on a motion to dismiss asserting immunity from criminal prosecution.” A certified conflict existed on the issue between the First District Court of Appeal and the Fourth District Court of Appeal. The Florida Supreme Court held that the statute entitled a

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221 See infra notes 222-39 and accompanying text.
222 Smiley v. State, 966 So. 2d 330, 336 (Fla. 2007).
223 Id. at 332.
224 Id. The trial court granted his motion finding that the law applied retroactively. Id. The court of appeals reversed finding that FLA. STAT. § 776.013 (2005) did not apply to conduct occurring prior to the effective date of the law which was October 1, 2005. Smiley, 966 So. 2d at 332-33.
225 Smiley, 966 So. 2d at 336 (“Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.”).
226 Id. at 337.
227 See Dennis v. State, 51 So. 3d 456, 458 (Fla. 2010).
228 Id.
229 Id.; Dennis v. State, 17 So. 3d 305, 306 (Fla. Dist. Ct. App. 2009) (holding that the existence of disputed issues of material fact required a denial of a defendant’s motion to dismiss asserting immunity under FLA. STAT. § 776.032); Peterson v. State, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008) (holding that the existence of disputed issues of material fact did not justify denial of a defendant’s motion to dismiss asserting immunity under section FLA. STAT. § 776.032).
defendant to a pretrial hearing, not merely an affirmative defense to conviction at trial.\textsuperscript{230}

A currently unaddressed, but serious, potential problem is the interplay between the Stand Your Ground law and the departure from the warrant requirement of a no-knock-and-announce police entry.\textsuperscript{231} Although unannounced police entries are constitutionally permitted, Florida law upholds the reasonable belief presumption when a homeowner uses force against an officer who violates the Florida knock-and-announce requirement.\textsuperscript{232}

Under Florida law, a police officer must announce his authority before entering a building to search or to arrest a person.\textsuperscript{233} The Florida Supreme Court has declared no-knock warrants illegal unless expressly provided for by statute, because of the propensity for violence that can result.\textsuperscript{234} However, there are exceptions, including exigent circumstances.\textsuperscript{235} "The exigent circumstances exception to the knock-and-announce requirement asks only if the officers on the scene have a reasonable belief, under the totality of the circumstances, that one of the

\begin{footnotesize}
\begin{enumerate}
\item[Dennis], 51 So. 3d at 462-63.
\item See G. Todd Butler, Note, Recipe for Disaster: Analyzing the Interplay Between the Castle Doctrine and the Knock-and-Announce Rule After Hudson v. Michigan, 27 Miss. C. L. Rev. 435, 450 (2007-2008) (pointing out that critics of Stand Your Ground insist it encourages residents to be trigger happy, and residents may be further confused about the law since it is often referred to as the shoot first and ask questions later law).
\item See FLA. STAT. § 776.013(2)(d) (2010) (stating the presumption does not apply if the intruder is a law enforcement officer who entered in the performance of his official duties and "identified himself . . . in accordance with any applicable law"); Butler, supra note 231, at 450.
\item FLA. STAT. § 901.19 (2010) (applying to arrest warrants); FLA. STAT. § 933.09 (2010) (applying to search warrants).
\item State v. Bamber, 630 So. 2d 1048, 1050-51 (Fla. 1994).
\item Jones v. State, 440 So. 2d 570, 572 (Fla. 1983); see also Wike v. State, 596 So. 2d 1020, 1024 (Fla. 1992) (noting "[f]actors which indicate exigent circumstances include: (1) the gravity or violent nature of the offence with which the suspect is to be charged; (2) a reasonable belief that the suspect is armed; (3) probable cause to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; [and] (5) a likelihood that delay could cause the escape of the suspect or the destruction of essential evidence, or jeopardize the safety of officers or the public").
\end{enumerate}
\end{footnotesize}
exceptions exists. Therefore, if an officer had a reasonable belief that exigent circumstances existed, the officer would not be violating a law by entering a dwelling without announcing his presence. If critics of the law are correct in their contention that Stand Your Ground will lead individuals to shoot first, an unannounced police entry could have tragic results. Even if the presumptions would theoretically apply, a homeowner is unlikely to escape unscathed after firing at armed police officers.

E. Incidents

The difficulty in analyzing incidents affected by the law is that the law's intent is to shield individuals who meet the requirements of the law from criminal prosecution or civil liability. Because there is no relevant tracking system, much of the information comes from the media. A few recent incidents reported in the media will be analyzed to highlight the impact of the Stand Your Ground law.

In 2006, a prostitute in New Port Ritchey, Florida, Jacqueline Galas, shot and killed her seventy-two-year-old client, Frank Labiento, after he threatened her with a gun. The shooting occurred inside Mr.


See supra notes 233-36 and accompanying text.

Butler, supra note 231, at 451.

See, e.g., Dimitri Epstein, Comment, Cops or Robbers? How Georgia's Defense of Habitation Statute Applies to No-Knock Raids by Police, 26 GA. ST. U. L. REV. 585, 585 (2010) ("Late in the fall of 2006, the city of Atlanta exploded in outrage when Kathryn Johnston, a ninety-two-year old woman, died in a shoot-out with a police narcotics team. The police used a 'no-knock' search warrant to break into Johnston's home unannounced. Unfortunately for everyone involved, Ms. Johnston kept an old revolver for self-defense . . . . Probably thinking she was being robbed, Johnston managed to fire once before the police overwhelmed her with a 'volley of thirty-nine' shots, five or six of which proved fatal.") (internal citations omitted).

Weaver, supra note 5, at 423.

See id. at 424-25.

See infra notes 243-82 and accompanying text.

Liptak, supra note 217; David Sommer, Prosecutors Drop Murder Charge Against Prostitute, TAMPA TRIB., July 27, 2006, at 15.
Labiento's home, after he told Ms. Galas he was going to kill her.\textsuperscript{244} Ms. Galas stated she did not attempt to run after grabbing Mr. Labiento's gun because he had access to other guns.\textsuperscript{245} However, although technically Ms. Galas was in a public place because she was not in her own home, after the enactment of the Stand Your Ground law, she did not have a duty to retreat.\textsuperscript{246} Consequently, her failure to flee was not determinative.\textsuperscript{247} Prosecutors determined Ms. Galas acted in self-defense.\textsuperscript{248} A criticism of this case was that Ms. Galas should not have been entitled to immunity under the Stand Your Ground law because as a prostitute she was engaging in \textit{unlawful activity}.\textsuperscript{249} However, Ms. Galas was not engaged in prostitution at the time she shot Mr. Labiento.\textsuperscript{250} The law does not expressly define \textit{unlawful activity};\textsuperscript{251} however, if this case had gone to trial the State would have had the burden to show beyond a reasonable doubt that Ms. Galas was not acting lawfully when she shot Mr. Labiento.\textsuperscript{252}

In 2006, in Fort Myers, Florida, Todd Rasmussen was not charged for the shooting and death of Michael Franzinni.\textsuperscript{253} Mr. Franzinni was the son of Mr. Rasmussen’s neighbor, Gladys Franzinni.\textsuperscript{254} According to Mr. Franzinni’s wife and mother, he was outside his mother’s house investigating because he believed Mr. Rasmussen’s son, Cory, had been disturbing Gladys Franzinni’s prop-

\textsuperscript{244} Sommer, \textit{supra} note 243. This was corroborated by a suicide note found in Mr. Labiento’s home stating he was going to kill Ms. Galas and then himself. \textit{Id.}

\textsuperscript{245} \textit{Id.} “Two [additional] guns were found in the home.” \textit{Id.}

\textsuperscript{246} FLA. STAT. § 776.013(3) (2010).

\textsuperscript{247} See Sommer, \textit{supra} note 243.

\textsuperscript{248} \textit{Id.} The reasonable belief and necessity presumptions would not apply because Ms. Galas was located in Mr. Labiento’s house. See FLA. STAT. § 776.013(2)(a). Therefore, the prosecution had to find that she had a reasonable belief that force was necessary to prevent imminent death or great bodily harm in determining that immunity should apply under the Stand Your Ground law. See \textit{id.} § 776.013(3).

\textsuperscript{249} See Weaver, \textit{supra} note 5, at 427.

\textsuperscript{250} Sommer, \textit{supra} note 243.

\textsuperscript{251} See FLA. STAT. § 776.013.

\textsuperscript{252} See Stieh v. State, 67 So. 3d 275, 278 (Fla. Dist. Ct. App. 2011) (explaining that it is the State’s burden to overcome a theory of self-defense and prove the defendant was not acting lawfully when using deadly force against the victim).

\textsuperscript{253} Sam Cook, \textit{Stand Your Ground Law Intimidates Prosecutors}, NEWS-PRESS, Aug. 6, 2006, at 1.

\textsuperscript{254} \textit{Id.}
Mr. Rasmussen claimed he came outside his home to find his son Cory holding a knife and facing a masked man holding an object. Mr. Rasmussen yelled a warning and then shot the masked man. The prosecution found Mr. Rasmussen had a reasonable belief his son would be injured, justifying the use of deadly force. Mr. Rasmussen’s actions are closer to the type of unnecessary violence critics of the Stand Your Ground law claim it encourages, and this incident is an example of prosecutors being less likely to charge individuals because the law requires probable cause that the force was unlawful before making an arrest.

A jury acquitted forty-four-year-old Norman Borden of two counts of first-degree murder for shooting fourteen times into a vehicle. However, by that time Mr. Borden had already spent eight months of his life in jail. On October 8, 2006, Mr. Borden was walking his four dogs after 2:00 a.m. in a West Palm Beach, Florida, neighborhood with heavy gang activity. Mr. Borden engaged in an oral confrontation with two young men, who drove off, picked up a third man, a known gang member, and then drove at Mr. Borden armed with baseball bats. Mr. Borden claimed it was a life or death situation, and he never imagined he would be sent to jail for his actions. The fact that Mr. Borden did not have a duty to retreat from his attackers likely contributed to his acquittal. Additionally, this case highlights the importance of Stand Your Ground immunity. Because the Florida Supreme Court did not determine until after this case that individuals are

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255 Id.; Weaver, supra note 5, at 413.
256 Cook, supra note 253.
257 Weaver, supra note 5, at 414.
258 Id.
259 See Fla. Stat. § 776.032 (2010) (granting immunity from arrest unless there is probable cause of unlawful force); Cook, supra 253 (arguing that the prosecutor was “intimidated by Stand Your Ground”).
260 Nancy L. Othón, Free but in Fear of Reprisal: Man Acquitted of Murder, but Living Under Threat, S. Fla. Sun-Sentinel, July 1, 2007, at 1A.
261 Id.
262 See id.
263 Id.
264 Id.
265 See id.
entitled to a pretrial hearing regarding statutory immunity, Mr. Borden sat in jail for eight months before his verdict. During that time his house was set on fire, presumably by angry gang members, and the State euthanized his four dogs.

In 2010, a jury found Timothy McTigue not guilty of second-degree murder for the shooting death of a man following a fistfight that led to both men falling into twelve feet of water around a boat dock. In 2007, in Riviera Beach, Mr. McTigue shot the decedent in the head as the decedent was getting out of the water. The prosecution argued that Mr. McTigue could not have held a reasonable fear of imminent death or bodily injury because the victim was retreating. This case shows that Stand Your Ground does not necessarily lead to radically different outcomes than would have been reached under prior Florida law. Arguably, it would have been difficult for Mr. McTigue to retreat while he was in the water. If he could not have retreated, then under the old law, as here, acquitting Mr. McTigue would have required a determination that he held a reasonable belief that deadly force was necessary to prevent imminent death or great bodily harm. Mr. McTigue was not aided by any of Stand Your Ground’s protections: (1) the reasonable belief and necessity presumptions (he was not in his home), (2) the abrogation of the duty to retreat (he could not have retreated), or (3) criminal immunity (he was still prosecuted).

In 2007, sixty-one-year-old David Heckman was charged with aggravated battery after shooting his girlfriend’s thirty-six-year-old ex-boyfriend, Robert Carroll, in the leg. Mr. Carroll and Mr. Heckman had a verbal altercation, which ended in Mr. Carroll vandalizing Mr.

266 Dennis v. State, 51 So. 3d 456, 458 (Fla. 2010).
267 Othón, supra note 260.
268 Id.
269 Susan Spencer-Wendel, Jury Acquits Man for Fatal Shot, PALM BEACH POST, May 22, 2010, at 1B.
270 Id.
271 Id.
272 See infra notes 273-74 and accompanying text.
273 See supra Part III.D.1.
274 See FLA. STAT. § 776.013 (2010).
Heckman's truck located in his garage. However, at the time Mr. Heckman shot Mr. Carroll, he had retreated to his vehicle parked in Heckman's driveway. The court reasoned that "a person is immune from criminal prosecution for the use of deadly force against another person he knew had unlawfully and forcibly entered his dwelling or was in the process of such entry." Mr. Heckman argued he was immune because Mr. Caroll threatened him, then unlawfully entered his garage and vandalized his vehicle. The fact that Mr. Heckman's garage was part of his dwelling was not in dispute. However, the conclusive presumptions did not apply because, when Mr. Heckman shot Mr. Caroll, he was not inside the garage, or attempting to get inside the garage. Therefore, Mr. Heckman was not entitled to immunity from prosecution. This is an important case because it established the temporal parameters when the conclusive presumptions protect actions taken against intruders into the residence, dwelling, or vehicle.

In summary, the majority of these incidents occurred outside the home, suggesting that the elimination of the duty to retreat likely had the biggest impact on self-defense law. Unfortunately, there have been instances such as Mr. Rasmussen shooting and killing Mr. Franzinni that support the argument that the law encourages individuals to resort to retaliatory violence instead of seeking other alternatives such as police intervention. Lastly, courts did not fully recognize the protection of criminal immunity until the Dennis case where the Florida Supreme Court determined that a defendant was entitled to a pretrial determination regarding his assertion of immunity.

276 Id. at 1005.
277 Id.
278 Id. at 1006.
279 Id.
280 Id.
281 Id.
282 See id. ("[T]he facts before the court at the hearing on the motion to dismiss did not establish that Heckman was entitled to immunity under section 776.032 for the use of force permitted under sections 776.013.").
283 See supra notes 244-52, 260-68 and accompanying text.
284 See supra notes 253-59 and accompanying text.
285 See supra notes 227-30 and accompanying text.
V. Florida: A Trendsetter for National Gun Policy

A. Concealed Carry and Stand Your Ground

Although the Stand Your Ground law does not specifically reference guns, it has been labeled a "gun law". The label is logical, because the law deals with deadly force, which in Florida includes the use of a firearm. Further, the NRA’s sponsorship solidifies the law’s implication of gun policy. Because Florida has lenient concealed-carry laws, a person who is put in a Stand Your Ground position is likely to have a gun; if more people carry guns, more people have the opportunity to shoot in self-defense.

Florida has been a trendsetter in national gun policy, both with its enactment of a shall-issue concealed-carry law in 1987 and its Stand Your Ground law in 2005. In 1986, only nine states had shall-issue statutes, requiring the administrative body in charge of granting concealed-carry permits to issue the permit if the applicant satisfies objective requirements. Following Florida’s lead, the number now stands

287 Id.; Fla. Stat. § 776.06 (2010).
288 Catalfamo, supra note 286, at 537-38; see supra notes 211-12 and accompanying text (showing NRA support).
290 Some municipalities have gone even farther in arming their citizens. See David B. Kopel, Lawyers, Guns, and Burglars, 43 Ariz. L. Rev. 345, 357 (2001). For example, in Kennesaw, Georgia, a law enacted in 1982 requires every residence to have a gun. Id. The law has exceptions for, among other things, conscientious dissenters and individuals with criminal records. Id. Within seven months, residential burglaries declined by eighty-nine percent and remained at this decreased level for the next five years. Id.
292 John R. Lott, Jr. & David B. Mustard, Crime, Deterrence, and Right-To-Carry Concealed Handguns, 26 J. Legal Stud. 1, 4 (1997). This change in the law was driven by the desire of citizens to effectively protect their safety. See id.
at thirty-six.\footnote{See infra note 307 and accompanying text. In Florida, this progression was a movement away from racist policies, as gun regulations had been used to prohibit only African Americans from owning guns. See Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring) ("The statute [prohibiting possession of an unlicensed firearm] was never intended to be applied to the white population and in practice has never been so applied. . . . [T]here has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention to the Constitution and non-enforceable if contested.").} Similarly, since Florida passed its Stand Your Ground law in 2005, numerous states have expanded their self-defense laws.\footnote{Weaver, supra note 5, at 397 (listing twenty-three states enacting similar legislation within three years and noting that legislation was pending in other states); see, e.g., Ala. Code § 13A-3-23 (2006); Alaska Stat. § 09.65.330 (2010); Alaska Stat. § 11.81.335, .340, .350 (2010); Ariz. Rev. Stat. Ann. § 13-418 (2010); Ga. Code Ann. § 16-3-23.1 (2011); Ind. Code § 35-41-3-2 (2004 & Supp. 2011); Kan. Stat. Ann. 21-5222 (2011); Ky. Rev. Stat. Ann. § 503.070, .080 (LexisNexis 2008); Mich. Comp. Laws § 780.972 (2007); Miss. Code Ann. § 97-3-15 (2011); N.D. Cent. Code § 12.1-05-07 (1997 & Supp. 2011); Okla. Stat. tit. 21, § 1289.25 (Supp. 2011); S.C. Code Ann. § 16-11-440 (Supp. 2011); Tenn. Code Ann. § 39-11-611, -622 (2010); Tex. Penal Code Ann. § 9.31, .32 (West 2011). This trend towards codifying self-defense, including the Castle Doctrine, can be seen as a criticism of the judiciary considering the Castle Doctrine already existed in every jurisdiction. See supra note 53 and accompanying text.}

Strikingly similar criticisms arose against Florida’s concealed-carry law when it was enacted in 1987 as emerged against the Stand Your Ground Law in 2005.\footnote{Michelle Jaffe, Comment, Up in Arms Over Florida’s “Stand Your Ground” Law, 30 Nova L. Rev. 155, 179 (2005) (stating that critics of both laws warned of rampant violence).} Critics dramatically predicted that Florida would disappear in a cloud of gun smoke; the result of leniently issuing concealed-carry permits.\footnote{See id.} Remarkably, Florida’s rate of violent crime decreased, despite the number of permits steadily increasing.\footnote{Id.} Critics were likely surprised, as Florida appeared to be the prime location for a concealed-carry disaster, due to its traditionally high-crime level and tense compilation of diverse ethnic groups.\footnote{Johnson, supra note 291, at 752 (noting Florida defied the hypothesis that if there are more guns, there will be more violence).}
While this does not establish a causal link, "it shows that the increased availability of deadly force does not in and of itself automatically result in an increased use of deadly force."\(^2\)

Supporters of each law focused on the importance of protecting law-abiding citizens and the deterrent effect on criminals of knowing a person may be armed.\(^3\)

B. National Debate on Gun Policy

Gun rights are deeply rooted in America's history and tradition.\(^3\) In District of Columbia v. Heller and McDonald v. City of Chicago, the United States Supreme Court held that federal and state governments could not ban handguns in the home because individuals' right to defend themselves in the home was constitutionally protected by the Second Amendment.\(^3\)

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\(^2\) Catalfamo, supra note 286, at 540. As of July 31, 2011, there were 836,111 concealed weapons permits registered in Florida. Number of Licensees by Type, FLA. DEP'T AGRIC. & CONSUMER SERVICES DIVISION LICENSING, http://licgweb.doacs.state.fl.us/stats/licensetypecount.html (last visited Feb. 4, 2012).


\(^3\) See, e.g., Steven G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 TEX. L. REV. 7, 50 (2008) (discussing that in 1868, twenty-two state constitutions "explicitly guaranteed the right of the people to keep and bear arms. . . . [T]welve states . . . explicitly provided, '[T]he people have a right to bear arms for the defence of themselves and the State.'" (alteration in original)).

Although the Constitution prohibits the government from banning handguns in the home, the states apply different regulations to possession of a handgun in a public place. Illinois and Wisconsin rarely if ever approve concealed-carry permits. Vermont and Alaska allow the broadest right to carry a gun; they do not require a permit to carry concealed weapons. Every other state regulates the possession of concealed handguns. Thirty-six states are shall-issue states, meaning, if an applicant meets objective, predetermined requirements, the authorized administrative body shall issue a concealed-carry permit to the individual. Eleven states are may issue concealed-carry states, meaning permit applicants must demonstrate good cause for their need.

304 Kelly, supra note 300, at 390.
305 Id.
of the permit and the administrative body possesses discretion in granting the permit. This unlimited discretion is often abused through biased and arbitrary decisions. New York City presents a paradigm illustration of abuse of this discretion. In New York City, there have been several instances of politically powerful individuals obtaining permits such as gun control advocates: Laurence Rockefeller, Arthur Ochs, and William F. Buckley listing their good cause as carrying large sums of money and personal property. Alternatively, the less wealthy and politically powerless citizens of New York, such as taxi drivers, were denied permits, resulting in taxi drivers breaking the law that would not protect them from a dangerous risk of robbery. Placing unlimited discretion in the hands of the administrative bodies issuing gun permits can result in class discrimination, when wealthy gun-control advocates can petition for a law that prevents poorer residents from arming themselves in self-defense, while the wealthy carry guns at their leisure.


309 See Cramer & Kopel, supra note 300, at 684.

310 Id.

311 Id.

312 Id. at 685.

313 See id. ("Class discrimination pervades the permit application and approval process. New York City taxi drivers, although greatly at risk of robbery, are denied gun permits because they carry less than $2000 in cash. Many taxi drivers carry weapons anyway. As the courts have ruled, ordinary citizens and storeowners in the city may not receive carry permits because they have no greater need for protection than anyone else in the city."). In Los Angeles over a nine-month period in 1992, the city issued five permits. Id. at 683. Three were to government officials and two to private attorneys. Id. However, a jeweler was denied a permit despite routinely carrying large amounts of jewelry, being the victim of a burglary, passing a defensive gun class, and receiving death threats, documented by the police, from a criminal he helped apprehend. Id. In Florida, when cities used discretion permitting gun permits,
There are well over two hundred million firearms owned by private individuals in the United States. The majority of gun owners keep a gun for self-protection. Annually approximately thirty thousand people die from gun related incidents including homicides, suicides, and accidents. However, the frequency of defensive use of a firearm is heavily disputed. Neither gun control nor gun rights advocates can compromise on an objective estimate. One study estimated gun owners used a gun in a defensive action as many as 2.5 million times a year, with armed homeowners confronting burglars up to half a million times a year.

Alternatively, a government survey from the same period estimated the number was fewer than one hundred thousand times per year. However, even if the very conservative estimate of approximately one hundred thousand times a year were true, that potentially could have saved three times the number of people who die each year from gun related injuries. Further, there is no accurate estimate of the number of crimes that do not occur, due to the criminal’s fear that the potential victim is armed.

this discretion denied African Americans the privilege of carrying a gun for self-protection. See id. at 681. The inherent discrimination involved when discretion is permitted in granting gun permits is another component of the national movement toward petitioning the legislatures to enact shall-issue laws which require only that objective criteria be satisfied. Id. at 685.

315 Kelly, supra note 300, at 571-72.
316 Rostron, supra note 314, at 349. Interestingly, more individuals die from suicides than homicides. Philip J. Cook et al., Gun Control After Heller: Threats and Sideshows From a Social Welfare Perspective, 56 UCLA L. Rev. 1041, 1048 (2009).
317 Rostron, supra note 314, at 350.
318 See id.
320 Rostron, supra note 314, at 350.
321 See id.
322 In England, where handguns are strictly regulated, 59% of burglaries are “hot burglaries,” meaning that the residents are home at the time of the crime. John R. Lott, Jr. & John E. Whitley, Safe-Storage Gun Laws: Accidental Deaths, Suicides, and Crime, 44 J.L. & Econ. 659, 660-61 (2001). On the other hand, in America, only 13% of burglaries are “hot burglaries.” Id. at 661; See also Kopel, supra note 290, at 345 (quoting an Arkansas burglar who stated, “So we drove down the road, and I was
The fact that almost every state permits concealed possession of a handgun, at least in some instances, strongly undermines any argument that this lenient gun control policy is exclusively the result of heavy lobbying by gun rights groups.\textsuperscript{323} Public polls have shown approximately seventy-five percent of Americans believe they have a constitutional right to keep and bear arms.\textsuperscript{324} Further, according to a 2001 study by the National Opinion Research Center, a mere eleven percent support a ban on handguns.\textsuperscript{325} This public support of the individual right to bear arms likely contributed to the recent explosion of Stand Your Ground legislation.\textsuperscript{326} 

The justification that law-abiding citizens should be able to stand their ground to protect themselves in places they have a right to be also supports permitting individuals to possess a weapon outside their home.\textsuperscript{327} \textit{State v. Hamden} is an example of the absurdity of confining possession of guns for purposes of self-defense to the home.\textsuperscript{328} Mr. Hamden was convicted of carrying a concealed weapon, which is prohibited in Wisconsin, because he kept a handgun under the front counter of his family-owned store.\textsuperscript{329} Mr. Hamden's store was located in a high-crime area.\textsuperscript{330} In six years, his store had been robbed four times, three of which were successful and had resulted in two fatalities.\textsuperscript{331} During one of the robberies, the robber held a gun to Mr. Hamdan's head and pulled the trigger, but the gun did not fire.\textsuperscript{332} In light of these

\begin{itemize}
  \item lookin' for a house that looked like if there was somebody at home that it'd be somebody that didn't carry a gun or didn't have no weapons in the house, so they couldn't use them.
  \item Additionally, a burglar confronting an armed homeowner statistically is only able to disarm the homeowner about one percent of the time. \textit{Id.} at 358.
  \item See Adam Winkler, Heller's Catch 22, 56 UCLA L. REV. 1551, 1553 (2009).
  \item Id. at 1576.
  \item Id. at 1577.
  \item See Adam Benforado, Quick on the Draw: Implicit Bias and the Second Amendment, 89 OR. L. REV. 1, 17 (2010) (noting that there is a correlation between public perceptions on the right to own a gun and the appropriate time to use a gun in self-defense).
  \item See infra notes 328-34 and accompanying text.
  \item See generally State v. Hamdan, 665 N.W.2d 785 (Wis. 2003).
  \item Id. at 789-90.
  \item Id. at 791.
  \item Id.
  \item Id.
\end{itemize}
facts, the Supreme Court of Wisconsin found the prohibition on concealed-carry weapons unconstitutional as applied to Mr. Hamdan.\textsuperscript{333} This case seemingly requires victim brutalization before the law permits victims to legally arm themselves, instead of allowing them to take preventative measures to ensure that the harm never occurs.\textsuperscript{334}

VI. Conclusion: Bright-Line Rules are More Appropriate for Self-Defense Laws than Amorphous Judicially Created Doctrines

Although Florida’s Stand Your Ground law does not provide perfect solutions, it improved the law in Florida for three reasons.\textsuperscript{335} First, it clarified the confines of self-defense by establishing bright-line rules which are important for individuals who may need to act in their own self-protection.\textsuperscript{336} Second, self-defense laws are designed to protect innocent individuals who have resorted to violence only for their own self-protection.\textsuperscript{337} Permitting self-defense is designed to communicate to individuals that protecting themselves when unlawfully attacked is not just allowed, it is the correct action to take, which is why actions taken in self-defense are considered justified and morally superior to defenses that are merely excused.\textsuperscript{338} Therefore, elected representatives who are responsive to the concerns of their constituents and aware of the violence those constituents face should define self-defense laws.\textsuperscript{339} Lastly, the law is consistent with the policy underlying the American criminal justice system—it is better for a guilty person to go free than an innocent person to go to prison.\textsuperscript{340}

\textsuperscript{333} Id. at 811-12.
\textsuperscript{334} Id. at 808.
\textsuperscript{335} See infra notes 337-56 and accompanying text.
\textsuperscript{336} See Catalfamo, supra note 286, at 526-27 (stating that the bright-line abrogation of a duty to retreat and the protection afforded by the irrebuttable presumptions are important protections for Floridians, necessitated by the violent crime rate in Florida).
\textsuperscript{338} See supra note 25 and accompanying text.
\textsuperscript{339} See supra note 213-14 and accompanying text.
\textsuperscript{340} See Kelly, supra note 301, at 577. The counter to this argument is there is a stronger public policy for protecting human life than permitting individuals to resort to the defensive use of force. See supra notes 47-48 and accompanying text. Under this rationale, it is preferable to allow the police and criminal justice system to prosecute
Stand Your Ground implemented a more coherent standard for self-defense by eliminating the duty to retreat.\textsuperscript{341} The benefits of imposing a duty to retreat are questionable, evidenced by the fact that only a minority of states impose a legal duty to retreat.\textsuperscript{342} Further, it relies on two implausible inferences—that individuals will understand they have a duty to retreat under the law, and they will rationally analyze the feasibility of retreat in the face of attack.\textsuperscript{343} Florida’s lenient policy in granting gun permits acknowledges the reality of the violence facing Floridians in their daily lives.\textsuperscript{344} In light of the legislature’s recognition of the importance of enabling individuals to protect themselves, it defies common sense for the judiciary to undermine this protection by imposing a legal duty to retreat, giving the unsavory choice of running for one’s life or standing one’s ground and facing criminal conviction.\textsuperscript{345}

Florida’s Stand Your Ground law sparked a national movement of other states enacting similar laws.\textsuperscript{346} The movement towards codifying formerly common law issues such as the Castle Doctrine and no duty to retreat can be seen as highly critical of the judiciary, for every jurisdiction already recognized the Castle Doctrine.\textsuperscript{347} However, if this change was to protect the citizens of these states, then it can be ap-

\textsuperscript{341} See supra text accompanying note 187.
\textsuperscript{342} See supra note 47 and accompanying text.
\textsuperscript{343} See supra note 46 and accompanying text.
\textsuperscript{344} These dangers include a thriving drug trade, which contributes to Florida’s status as the second most violent state in the country, and Miami’s status as the third most violent city in the country. See Catalfamo, supra note 286, at 536.
\textsuperscript{345} See supra note 74 and accompanying text.
\textsuperscript{346} See supra note 294 and accompanying text.
\textsuperscript{347} See supra note 45-46 and accompanying text.
plauded for clarifying self-defense in changing times.\textsuperscript{348} The court system is slower to accept change, evidenced by the adherence of Florida and other minority jurisdictions to a duty to retreat that originated in a drastically different time period, when individuals exposed themselves to a different kind of violence by retreating from an attacker.\textsuperscript{349}

Lastly, critics of the law are probably right—Stand Your Ground may offer protection to less than savory individuals, such as a gang member shooting another gang member after being attacked.\textsuperscript{350} It may even encourage individuals to shoot their attackers.\textsuperscript{351} Nevertheless, the American criminal justice system operates on the proposition that it is better for the guilty to go free than the innocent to be punished.\textsuperscript{352} Stand Your Ground adheres to this philosophy.\textsuperscript{353} A drug dealer asserting self-defense and receiving immunity is no different than a drug dealer who has his Fourth Amendment rights violated and therefore the charges dropped when the criminal evidence is excluded. However, this is merely a secondary effect of the law. The true purpose of Stand Your Ground is to place the protection of the law where it should lie, behind law-abiding citizens.\textsuperscript{354} There will never be a perfect law; and therefore, if a law must err it should err on the side of protecting innocent persons, those citizens the law is designed to protect.

\textsuperscript{348} See supra note 336 and accompanying text.

\textsuperscript{349} See Catalfamo, supra note 286, at 538-39 (explaining that, due to urbanization, individuals are exposed to violence in a much closer proximity than when living situations were previously more rural).

\textsuperscript{350} See supra note 220 and accompanying text.

\textsuperscript{351} See supra text accompanying note 284.

\textsuperscript{352} Kelly, supra note 300, at 577 ("The idea that society prefers to release the guilty than imprison the innocent is at the heart of the operation of our criminal courts.")

\textsuperscript{353} See supra text accompanying note 340.

\textsuperscript{354} See supra note 43 and accompanying text.