Nova Law Review

Volume 30, *Issue* 1 2005 *Article* 6

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I. INTRODUCTION

The suburban accountant heard scratching noises at his front door.[1] In fear, he grabbed his .40-caliber handgun, opened the door, and shot the sixteen-year-old in the back.[2] He told police he thought the teenager was armed.[3] In actuality, the teenager and his friend were trying to tie fishing

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1. Deana Poole, *Gun Bill Could Mean: Shoot First, Ask Later*, PALM BCH. POST, Mar. 23, 2005, at 1A.
2. *Id.*
3. *Id.*

line to door knockers as a prank.[4] The accountant pled guilty to a charge of manslaughter, "was sentenced to spend [fifty-two] weekends in the Palm Beach County Jail and [ten] years of probation."[5] He "said he thinks about the [teenager's] death every day and regrets his action."[6] This occurred in October of 2003.[7] Had it occurred after October 1, 2005, the case would not have been prosecuted.[8] The reason: a new law that purports to codify Florida's castle doctrine, but which critics say enshrines "shoot first, ask questions later" into Florida law instead.[9]

On October 1, 2005, people in Florida gained the right to stand their ground.[10] On that day, Florida's new law goes into effect, designed to protect persons and property, authorizing the use of force including deadly force against an intruder or attacker in a dwelling, creating a presumption that a reasonable fear of death or great bodily harm exists under certain circumstances, and providing immunity from criminal prosecution or civil liability for using deadly force.[11] No longer do those in Florida have to retreat "to the wall" before meeting "force with force."[12] The prospect of this looming change has ignited gun-control advocates and gun advocates alike.[13] Will Florida become a modern Wild West, replete with ubiquitous gunfights played out by local Wyatt Earps and Wild Bill Hickoks, all in the name of self-defense? Some say yes.[14] Others say it is "no different from what most other states allow."[15]

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4. *Id.*

5. *Id.*

6. *Shoot It Down Florida Bill Aims in Wrong Direction*, DAYTONA NEWS-J., Mar. 25, 2005, at 04A [hereinafter *Shoot It Down*].

7. Poole, *supra* note 1.

8. *Shoot It Down*, *supra* note 6; Mary Ellen Klas, *New State Law Ads Target Tourists*, MIAMI HERALD, Sept. 23, 2005, at 8B.

9. *Shoot It Down*, *supra* note 6.

10. *See* Act effective Oct. 1, 2005, ch. 2005–27, 2005 Fla. Laws 1, *available at* http://election.dos.state.fl.us/laws/05laws/ch_2005-027.pdf.

11. *See id.* The new provision passed unanimously in the Florida Senate and 94-20 in the Florida House of Representatives. A. Barton Hinkle, Editorial, *To Some, It's No Fair Fighting Back*, RICH. TIMES DISPATCH, Apr. 29, 2005, at A15. It is variously called the "No Retreat" and "Stand Your Ground" law. James L. Rosica, *'No Retreat' Gives Right to Defend Self*, TALLAHASSEE DEMOCRAT, May 12, 2005, at A1.

12. *Id.* The phrase "retreat to the wall" describes the law in a minority of jurisdictions that continue to adhere to the common law doctrine that precludes the defendant's right to claim self-defense until he or she has "retreated to the wall." 40 AM. JUR. 2D *Homicide* § 164 (1999).

13. *See* Hinkle, *supra* note 11.

14. *Id.*

15. David Royse, *Florida Law to Let People Meet Force with Force*, CHI. SUN-TIMES, Apr. 6, 2005, at 44.

This paper examines Florida's new law. Part II briefly discusses the theory behind justified homicide and the development of the doctrine of self-defense. Part III follows the origins of the American doctrine of the duty to retreat when faced with life-threatening force, as well as the eventual split between states that require retreat and states that permit a person to stand their ground. Part IV traces Florida law as the state developed exceptions to the general duty to retreat, and then discusses the new law. Finally, Part V analyzes the vastly different reactions to the new law, compares the outcry to Florida's concealed carry law, and then analyzes whether the new law warrants such turmoil.

II. JUSTIFIED HOMICIDE

A. *The Theory*

"A justified act is one that 'the law does not condemn, or even welcomes.'"[16] While excuse defenses apply to specific defendants because they exculpate these individuals for their criminal conduct due to underlying disabilities and disorders, justification defenses exonerate those "who perform ordinarily criminal conduct in special circumstances that render their behavior socially acceptable."[17] Morally, justifications and excuses are not equal.[18] Being justified is preferable to being excused, since a person who is justified commits an act that, in the eyes of society, was not wrong.[19] Conversely, a person who is merely excused does commit a wrongful act; however, the actor is not blameworthy due to underlying circumstances.[20]

Even if accepted, does the concept of justification mean the action was right? One argument contends that "justified conduct is right rather than merely permissible."[21] If so, then the precepts of the criminal law prescribe actions that are ideal; that is, no alternative is superior.[22] Conversely, others argue that the criminal law provides minimal standards, meaning it is possible to surpass the standards justification defenses set.[23] An example is when one who could act pursuant to the precepts of a justification defense never-

16. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 483 (3d ed. 2003) (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 206 (3d ed. 2001)).
17. ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 3 (1998).
18. Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 389 (2005).
19. *Id.*
20. *Id.* at 389–90.
21. SCHOPP, *supra* note 17, at 16.
22. *Id.* at 16–17.
23. *Id.* at 17.

theless refrains from acting.[24] Yet another argument separates the "best conduct" from the "morally obligatory conduct."[25]

Self-defense is a justification defense.[26] It encompasses a complex area of law and of social morality that requires a complex theory of explanation.[27] Any offered theory must also account for four widely accepted limitations on the use of defensive force: 1) "[f]orce may be used only against an *unlawful aggressor*;" 2) "[t]he use of force must be strictly *necessary*;" 3) "[t]he amount of force must be *proportional* to the force being threatened;" and 4) "[t]he attack must be *imminent*."[28] Thus, the theories behind self-defense and, more generally, justification defenses are complicated and unsettled.

B. *The Development of the Doctrine of Self-Defense*

There is generally no dispute that deadly force may be used in self-defense to protect oneself from death or serious bodily injury, and that the act is justifiable in certain situations.[29] Yet, this was not always the case.[30] Indeed, the doctrine of self-defense did not exist in medieval law, but slowly evolved as a modern doctrine.[31] "From the beginning of the jurisdiction of the king's courts over crime to the reign of Edward I. homicide could be justified only . . . in cases where the homicide was committed in execution of the law."[32] In all other cases, in other words, "homicide by misadventure," the defendant was not justified.[33] Instead, he was convicted, his chattels were forfeited, and he was required to get the king's pardon.[34] Since the chancellor signed the pardon in the king's name, obtaining a pardon became

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24. *Id.*
25. *Id.*
26. SCHOPP, *supra* note 17, at 55.
27. *Id.* at 61.
28. Whitley Kaufman, *Is There a "Right" to Self-Defense?*, 23 CRIM. JUST. ETHICS 20, 20–21 (2004).
29. Re'em Segev, *Fairness, Responsibility and Self-Defense*, 45 SANTA CLARA L. REV. 383, 383–84 (2005). Less universally accepted is the moral justification for the use of defensive force. Kaufman, *supra* note 28, at 20. "[O]ne's choice of a foundational principle for self-defense will determine one's conception of the scope and limits of permissible self-defense, a matter that is continually in controversy." *Id.* However, it has been argued that legal justification should remain distinct from moral justification. Baron, *supra* note 18, at 400.
30. Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 567 (1902).
31. *Id.*
32. *Id.* at 567–68.
33. *Id.* at 568.
34. *Id.* at 569.

a mere formality, and the chancellor soon dispensed of such formality in the name of equity.[35] Additionally, the statute 24 Henry VIII. c. 5 was enacted and interpreted "as providing for acquittal without formal pardon."[36] This combination of statutory change and common law court decisions transformed the previously equitable defense into a legal one.[37]

Thus, two incarnations of self-defense exist at common law: justifiable self-defense and excusable self-defense.[38] The distinction was once clearly recognized, but became blurred as various courts offered different interpretations.[39] Indeed, "traditional common law excused some of these defendants under the doctrine of *se defendendo*, [which] has proven difficult to explain and justify."[40] An important aspect of justifiable self-defense is that the innocent victim who is attacked must have a "reasonable and honest belief [that there is] imminent danger of death or grave bodily harm."[41] Even if some use of force may have been justified under the circumstances, the fact-finder may determine that the use of force was unreasonable.[42] If so, "the defendant will not prevail."[43] What constitutes a reasonable belief remains ambiguous.[44]

Generally, there are three standards of what constitutes "reasonable."[45] The majority view objectively examines "what a 'reasonable person' or 'person of ordinary firmness' would have done in the defendant's situation."[46] A few jurisdictions use a completely subjective standard of reasonableness, thereby focusing solely on the defendant's perception and foregoing the reasonable person analysis.[47] A third approach declines to expressly state

35. Beale, *supra* note 30, at 570.

36. *Id.* at 571 (citations omitted).

37. *Id.*

38. Monique M. Gousie, Comment, *From Self-Defense to Coercion:* McMaugh v. State*—Use of Battered Woman's Syndrome to Defend Wife's Involvement in Third-Party Murder*, 28 NEW ENG. L. REV. 453, 455 (1993).

39. *See* Erwin v. State, 29 Ohio St. 186, 194 (1876) (discussing the evolution of justifiable and excusable self-defense).

40. SCHOPP, *supra* note 17, at 88.

41. Gousie, *supra* note 38, at 455.

42. Seth D. DuCharme, Note, *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 FORDHAM L. REV. 2515, 2520 (2002).

43. *Id.*

44. John F. Wagner, Jr., Annotation, *Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self-Defense Claim, that Physical Force Is Necessary—Modern Cases*, 73 A.L.R.4th 993, 996–97 (1989).

45. *Id.* at 997.

46. *Id.*

47. *Id.*

whether an objective or subjective approach should be used, and holds "that the determination of the defendant's reasonableness in using physical force is for the jury as within its province as the trier of fact."[48] Thus, the law of self-defense remains far from clear. Further complicating the matter is the so-called duty to retreat.

III. THE ENGLISH RETREAT TO THE WALL WHILE THE AMERICANS STAND THEIR GROUND

A. *The American Aversion to Retreating*

The duty to retreat derives from traditional English common law, which sought to produce a "society of civility" and retain control of quarrels between individuals.[49] In a threatening situation, one who sought to claim justifiable homicide had to prove both that he had retreated "to the wall" and that the homicide was necessary "in order to prevent his own death or serious [bodily] injury."[50] Indeed, so palpable was the fear that the right to defend oneself would mutate into the right to murder that the one accused of a homicide bore the burden of proving his innocence.[51]

In the United States of America, the traditional English duty to retreat survived in only a minority of states.[52] Americans rejected such English cowardice just as they rejected English rule; thus, a majority of Americans gained the right to stand their ground and defend themselves as their fledgling country gained its independence from England.[53]

A product of legal discourse, the no duty to retreat mentality spread westward.[54] In 1876 Ohio, the "true man" ethic emerged when James W. Erwin claimed self-defense after killing his son-in-law during a dispute over who had possession of a shed located between their homes.[55] "[T]he deceased [son-in-law], with an ax on his shoulder, approached [Erwin] in a

48. *Id.*

49. RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 4–5 (1991).

50. *Id.* at 3–4.

51. *Id.* at 3.

52. *Id.* at 5.

53. *Id.*

54. BROWN, *supra* note 49, at 8. Mr. Brown traces the spread of this mentality particularly through case analysis revealing Ohio's "true man" ethic, Indiana's "American mind" theory, and Minnesota's "wild and unsettled wilderness" analysis. *See generally* BROWN, *supra* note 49. This article's analysis similarly follows this historical journey, but includes an extended case analysis, including pertinent facts of the case, as well as relevant language of the courts.

55. *Id.*

threatening manner."[56] Erwin warned him not to enter and, when the son-in-law ignored the warning and approached, fatally shot him.[57] After he was convicted of murder in the second degree, Erwin appealed his conviction.[58] On appeal, Erwin claimed that the lower court erred in instructing the jury as to the law of self-defense.[59] More specifically, Erwin argued that the court should not have followed the doctrine of "retreating to the wall."[60] The Supreme Court of Ohio held that:

> [t]he law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.[61]

Thus, the court rejected the concept of a duty to retreat and instead focused on the necessity of the act in question; that is, whether the defendant, a non-aggressor who was attacked, acted "with the necessity of taking life to save his own upon him."[62]

In *Runyan v. State*,[63] the Supreme Court of Indiana focused on what it called the "American mind."[64] John Runyan was convicted of manslaughter and appealed his conviction, alleging erroneous jury instructions.[65] Apparently, Runyan had traveled to cast his vote in the presidential election.[66] He had an altercation with a man named John Spell, who used threatening lan-

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56. Erwin v. State, 29 Ohio St. 186, 193 (1876).
57. *Id.*
58. *See id.* at 188.
59. *Id.* at 192.
60. *Id.* at 193–94.
61. *Erwin*, 29 Ohio St. at 199–200.
62. *Id.* at 200. In the case, the Attorney General argued that the rule that should be adopted should be one that "is best calculated to protect and preserve human life." *Id.* The court did not reject this rationale, but instead reasoned that the adopted rule was one that was most likely to "prevent the occurrence of occasions for taking life," since the rule lets the "would-be robber, murderer, ravisher, and such like, know that their lives are, in a measure, in the hands of their intended victims." *Id.*
63. 57 Ind. 80 (1877).
64. *Id.* at 84.
65. *Id.* at 80, 82. The relevant portion of the instructions was: "before a man can take life in self-defence, he must have been closely pressed by his assailant, and must have retreated as far as he safely or conveniently could, in good faith, with the honest intent to avoid the violence of the assault." *Id.* at 83.
66. *Id.* at 81.

guage.[67] Later that day, Runyan borrowed an acquaintance's pistol so he could defend himself in case he was attacked.[68] At night, Runyan traveled with some friends to get election news.[69] As he leaned against the side of a building, an assistant marshal of the town began to argue with him.[70] The assistant marshal then tried to push Henry Ray, Runyan's brother-in-law, out of the crowd.[71] As he turned away, Charles Pressnal rushed at Runyan and hit him a few times.[72] Runyan then drew a pistol from his coat pocket and shot Pressnal, who was mortally wounded and later died.[73]

The court held that "when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable."[74] In so holding, the court noted that "[t]he defendant was already standing practically against a wall."[75] The question of most import to the court was: "[D]id the defendant have reason to believe, and did he in fact believe, that what he did was necessary for the safety of his own life or to protect him from great bodily harm?"[76] Thus, these American courts used the age-old imagery of the defendant retreating to the wall not as a requisite to establish self-defense, but seemingly rather as a justification as to why the defendant needed to use deadly force at all.

In Minnesota, "the wild and unsettled wilderness" of the location in which the defendant lived, along with the introduction of firearms, was used to establish that the trial court's charge upon the subject of escape or retreat was reversible error.[77] In *State v. Gardner*,[78] the defendant testified that he used his gun only to save his own life.[79] The Supreme Court of Minnesota acknowledged that the case presented some of the peculiarities of "frontier life."[80] Further, the court reasoned that "[t]he doctrine of 'retreat to the wall' had its origin before the general introduction of guns. Justice demands that

67. *Runyan*, 57 Ind. at 81.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Runyan*, 57 Ind. at 80–81.
73. *Id.*
74. *Id.* at 84.
75. *Id.*
76. *Id.* at 85.
77. State v. Gardner, 104 N.W. 971, 975–76 (Minn. 1905).
78. *Id.* at 971.
79. *Id.* at 972.
80. *Id.* at 973.

its application have due regard to the present general use and to the type of firearms."[81] In doing so, the court continued the mostly western theme of no duty to retreat.

B. *Some States Still Demand Retreat*

While the majority of the states embraced the no retreat philosophies of the "true man,"[82] the "American mind,"[83] and the "wild and unsettled wilderness,"[84] a minority of states still required a duty to retreat.[85] Those states rejected the "hip-pocket ethics of the Southwest" and chose to uphold the "peaceful though often distasteful method of withdrawing to a place of safety."[86]

This adherence to the duty to retreat philosophy continues today in some states.[87] The *Model Penal Code* sides with these states and requires the actor using deadly force to believe such force is "necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."[88] Additionally, the *Model Penal Code* includes a duty to retreat; that is, the actor is not justified in using deadly force if

> the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by comply-

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81. *Id.* at 975. The court went on to discuss instances when requiring retreat would make "good sense." *Gardner*, 104 N.W. at 975. Drawing a distinction between firearms and a hand-to-hand encounter with fists, clubs, or knives, the court stated that "[w]hat might be a reasonable chance for escape in the one situation might in the other be certain death. Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction." *Id.*

82. Erwin v. State, 29 Ohio St. 186, 199 (1876). The *Erwin* decision exemplified the reasoning of the group of states that required no duty to retreat, but claimed they still followed English law. Beale, *supra* note 30, at 576. Those states utilized the English distinction between excusable and justifiable homicide and reasoned their cases in that manner. *Id.*

83. Runyan v. State, 57 Ind. 80, 84 (1877). The *Runyan* decision typified the rationale of the other group of states that required no duty to retreat before using deadly force. Beale, *supra* note 30, at 576. Those states reasoned that the "conditions of the new country require[d] a different rule" than the English authority. *Id.*

84. *Gardner*, 104 N.W. at 975.

85. BROWN, *supra* note 49, at 5.

86. Beale, *supra* note 30, at 580.

87. *See* Douglas A. Orr, Weiand v. State, *and Battered Spouse Syndrome: The Toothless Tigress Can Now Roar*, 2 FLA. COASTAL L.J. 125, 125 (2000).

88. MODEL PENAL CODE & COMMENTARIES § 3.04(2)(b) (Official Draft and Revised Comments 1985).

> ing with a demand that he abstain from any action that he has no duty to take.[89]

Thus, the states continue to disagree about what constitutes justifiable use of deadly force in the name of self-defense.

C. *The Position of the United States Supreme Court*

With the states split on the issue of whether a defendant had a duty to retreat before claiming self-defense, the question came before the United States Supreme Court.[90] From 1893 to 1896, the Court, which today is most remembered for its *Plessy v. Ferguson*[91] decision, decided various cases involving self-defense.[92] Although they received little scholarly attention, an examination of these early Supreme Court self-defense cases may foster a better understanding of the hotly contested issues involved.[93]

First, in *Beard v. United States*,[94] the Court heard the case of the three Jones brothers involved in an angry dispute with their uncle, Beard, over a cow.[95] The cow had been given to Edward, one of the brothers, after his mother's death.[96] However, Beard took possession of the cow as a condition to allowing Edward to live with him.[97] Edward left the Beard home a few years later, but returned with his brothers in an effort to reclaim the cow.[98] The Jones brothers took a shotgun with them, but the brothers were unsuccessful in their endeavor, as Beard prevented them from taking the cow and warned them not to return unless Edward's right to possess the cow was declared through legal proceedings.[99] The brothers, ignoring the warning, returned later that same day and again attempted to take the cow, but Mrs.

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89. § 3.04(2)(b)(ii).
90. *See* sources cited *infra* notes 94, 106, 121.
91. 163 U.S. 537 (1896).
92. David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293, 295 (2000). Kopel points out that the Court's *Plessy v. Ferguson* decision, "which claimed that state-imposed racial segregation was not intended to be insulting to blacks," sharply contrasts the self-defense string of cases "in which the Court stood up again and again for the rights of blacks, American Indians, and other outsiders." *Id.*
93. *Id.*
94. 158 U.S. 550 (1895).
95. *Id.* at 551.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Beard*, 158 U.S. at 551–52.

Beard prevented them from doing so this time.[100] Mr. Beard then returned from an errand, carrying a shotgun he normally took with him, and joined the group in his field, which was a distance from his dwelling.[101] During this dispute, Will Jones approached Mr. Beard in a threatening manner and, when Jones continued toward him despite Beard's warning him to stop, Beard hit him over the head with his gun.[102] Jones's skull was crushed, and he died.[103]

The Court, in reviewing the case, decided that the trial court erred in instructing the jury that Beard did not have the right to use self-defense if he could have retreated safely.[104] Indeed, the Court held that "[t]he defendant was where he had a right to be" such that if he:

> did not provoke the assault and had at the time reasonable grounds to believe and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.[105]

Thus, the United States Supreme Court seemed to endorse a no duty to retreat philosophy, at least when the defendant was on his own premises. However, a year later, the Court confused the issue.[106] In *Allen v. United States (Allen I),*[107] a fourteen-year-old adolescent killed an eighteen-year-old teenager named Henson.[108] The facts, which were disputed, established either that Henson and his two friends attacked Allen and his friend with sticks, intending to kill them, or that Allen attacked Henson and Henson's friends with a pistol.[109]

Following Allen's conviction, the Supreme Court eventually heard his case and reversed the conviction on the grounds that the jury had been erroneously instructed that one who claims self-defense "must be regarded as

100. *Id.* at 552.
101. *Id.*
102. *Id.* at 552–53.
103. *Id.* at 553.
104. *Beard*, 158 U.S. at 563–64.
105. *Id.* at 564.
106. *See* Allen v. United States (*Allen I*), 150 U.S. 551 (1893), *appeal after remand*, 157 U.S. 675 (1895), *appeal after remand*, 164 U.S. 492 (1896).
107. *Id.* at 551.
108. *Id.* at 552.
109. Allen v. United States (*Allen II*), 157 U.S. 675, 679 (1895).

exercising the deliberation of a judge," an instruction the Court believed substituted "abstract conceptions for the actual facts of the particular case as they appeared to the defendant at the time."[110]

The Supreme Court heard Allen's case again after he was convicted for the second time.[111] Again, the Court found reversible error,[112] this time because the jury instructions precluded a claim of self-defense if the sticks and clubs used were not "deadly weapons."[113] The Court reasoned that "when a fight is actually going on sticks and clubs may become weapons of a very deadly character."[114] Again, the Court reversed Allen's conviction.[115]

Finally, the Court heard Allen's case for a third time in 1896.[116] This time the Court affirmed the conviction.[117] In doing so, the Court upheld a jury instruction that included language suggesting the defendant must "use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can."[118] The Court distinguished prior cases in which it held the defendant had no duty to retreat, reasoning that those cases did not discuss a general duty to retreat instead of killing when attacked, because in the previous cases the defendants were upon their own property.[119] Still, the Court "blurred the bright-line 'no duty to retreat' rule enunciated in *Beard*."[120]

In 1921, the Supreme Court decided the case of *Brown v. United States*.[121] Brown was convicted of murder in the second degree and the appellate court upheld the conviction.[122] The Supreme Court re-examined the evidence, which showed that Hermes, the deceased, had assaulted Brown twice with a knife and made threatening comments.[123] As a result, Brown

110. *Allen I*, 150 U.S. at 551, 561.
111. *See Allen II*, 157 U.S. at 676.
112. *Id.* at 679.
113. *Id.*
114. *Id.*
115. *Id.* at 681.
116. Allen v. United States (*Allen III*), 164 U.S. 492 (1896).
117. *Id.* at 502.
118. *Id.* at 497, 502.
119. *Id.* at 498.
120. Kopel, *supra* note 92, at 315. This case also provides an interesting historical aside. At the trial level, the jurors were deadlocked, so the judge told them to "re-examine their opinions" such that those favoring conviction "should consider whether the pro-acquittal jurors might be right" and vice versa. *Id.* at 316. Today, judges give similar instructions to deadlocked juries, and such an instruction is termed an "Allen charge." *Id.*
121. 256 U.S. 335 (1921).
122. *Id.* at 341.
123. *Id.* at 342.

carried a pistol in his coat with him for protection.[124] When Hermes indeed came toward him with a knife, Brown retreated to where his coat was lying, retrieved his pistol, and fired four shots, killing Hermes who had been striking at him.[125] The essential jury instructions stated that the one assaulted is always under a duty to retreat so long as he can do so safely.[126]

The Supreme Court declined to trace the ancient origins of retreat, deeming it "useless" to trace the law back that far, since "[c]oncrete cases or illustrations stated in the early law in conditions very different from the present . . . have had a tendency to ossify into specific rules without much regard for reason."[127] Instead, the Court decided "the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt."[128] The decision of the Court had been that "if a man reasonably believes that he is in immediate danger of death or grievous bodily harm . . . he may stand his ground" and lawfully defend himself.[129] Stating that "[d]etached reflection cannot be demanded in the presence of an uplifted knife," the Court upheld the "no duty to retreat" concept.[130]

These Supreme Court cases epitomize the difficulty, not only of trying to rationalize the killing of a human being in the purported defense of another human being, but of fairly and justly trying the accused in a court of law. Understanding the decisions themselves may also prove challenging and controversial. The Supreme Court cases remain persuasive authority for state courts that must decide issues of the common law duty to retreat in relation to self-defense.[131] Some jurisdictions have embraced the concept of not retreating.[132] Others remain wary, continuing their historical dislike of an ideal that typifies the "ethics of the duelist."[133]

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124. *Id.*
125. *Id.*
126. *Brown*, 256 U.S. at 342.
127. *Id.* at 343.
128. *Id.*
129. *Id.* (citing Beard v. United States, 158 U.S. 550, 559 (1895)).
130. *Id.*
131. Kopel, *supra* note 92, at 325.
132. *See, e.g.*, State v. Renner, 912 S.W.2d 701, 703–04 (Tenn. 1995) (discussing the Tennessee judiciary's adoption of the common law "no duty to retreat" rule, followed by the Tennessee legislature's codification of the rule in 1989). Some states long supported the concept of "no duty to retreat." *See, e.g.*, People v. Toler, 9 P.3d 341, 347 (Colo. 2000) (holding that neither historical state common law nor modern statutory law requires a nonaggressor to "retreat to the wall").
133. Beale, *supra* note 30, at 577.

D. *The "Castle Doctrine" Exception*

Even in jurisdictions that follow the "retreat to the wall" doctrine, exceptions exist "such as the 'castle doctrine,' which allows a person in his own home to use deadly force in self-defense without first retreating even if a reasonably safe means of escape exists."[134] Therefore, regardless of whether a person is in a "duty to retreat" jurisdiction or a "stand your ground" jurisdiction, "the law imposes no duty to retreat upon one who, free from fault in bringing on a difficulty, is attacked at or in his or her own dwelling or home."[135] One explanation for why the "castle doctrine" abrogates the necessity requirement of self-defense while in one's own home is that "a person should not be required to face a possibly greater danger by retreating than he would if he remained inside the home."[136] Judge Cardozo expressed a second rationale when he stated that

> [i]t 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.[137]

The "castle doctrine," however, sometimes provides more confusion, especially when the relative status of the parties becomes involved.[138] Jurisdictions disagree about whether the doctrine should apply to cohabitants, invited guests, or both.[139] For example, what happens if both the attacker and the innocent victim live in the same home? Following the rationale of the "castle doctrine," both parties would have an equal right to defend themselves against an attack, so the party forced to act in self-defense would not receive the benefit of the "castle doctrine."[140]

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134. *Toler*, 9 P.3d at 347.

135. 40 AM. JUR. 2D *Homicide* § 167 (1999).

136. Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 9 (1999).

137. People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914).

138. Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 657 (2003).

139. *Id.* In the area of self-defense, the term "cohabitant" refers to one who has possessory rights over the property, a definition that differs from the non-self-defense meaning of "cohabitant," which generally refers to two people, who may or may not be married, living together. *Id.* at 669 n.57.

140. *See* Orr, *supra* note 87, at 129. For one jurisdiction's examination of the inherent problems in trying to determine the relative status of an aggressor and defendant, *see* State v. Glowacki, 630 N.W.2d 392 (Minn. 2001). That jurisdiction's inquiry led to the bright-line rule that "[t]here is no duty to retreat from one's own home when acting in self-defense in the

Perhaps exacerbating the confusion is the close—and often confused—relationship between the "castle doctrine," an exception to the necessity requirement of self-defense, and the use of deadly force in defense of premises, which may be understood as an exception to the proportionality requirement of self-defense, which requires that deadly force not be excessive in relation to the harm threatened.[141] The defense of premises doctrine provides that where an aggressor is making an unlawful, felonious, or violent entry into a dwelling or other premises, a defender who is lawfully in or around his dwelling or other premises, may use deadly force against that intruder.[142] The use of deadly force is permissible even when the defender has not been threatened with death or serious bodily injury.[143] Examples of laws that purport to allow the defense of premises are variously called "Shoot the Burglar," "Make My Day," and "Shoot the Carjacker" laws.[144]

The *Model Penal Code* incorporates a castle doctrine exception into its required duty to retreat.[145] It provides that an "actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be."[146] The *Model Penal Code* traces its decision for its admittedly minority stance in adopting a duty to retreat to its decision to place "a high value on the preservation of life," while reasoning that an actor who kills when he knows he can safely avoid such an action has no moral claim to exoneration.[147] As is the case with nearly all jurisdictions that adopted a duty

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home, regardless of whether the aggressor is a co-resident" and the conclusion that the key inquiry in such cases is into the reasonableness and level of use of force. *Id.* at 402.

141. Green, *supra* note 136, at 9. *But see* Thomas Katheder, Note, *Criminal Law—Lovers and Other Strangers: Or, When is a House a Castle?—Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants* (State v. Bobbitt, *Fla. 1982*), 11 FLA. ST. U. L. REV. 465, 470 (1983) (discussing that the "castle doctrine" is the resolution of the confusion and is the result of a merge between the duty to retreat and the defense of habitation).

142. Green, *supra* note 136, at 9. Note that there are cases where both doctrines would apply. *Id.* at 10. One example is where an "armed intruder enters a defender's home with the intent of committing murder or rape." *Id.* In such a case, both the "castle doctrine" and defense of premises doctrine apply. *Id.*

143. *Id.* at 2.

144. Green, *supra* note 136, at 4. The "Make My Day" moniker refers to Clint Eastwood's taunt to a thug in his role as Lt. "Dirty Harry" Callahan. Ted Gest, *'Make My Day' Laws—the Impact*, U.S. NEWS & WORLD REP., Apr. 20, 1987, at 12.

145. MODEL PENAL CODE & COMMENTARIES § 3.04(2)(b)(ii)(A) (Official Draft and Revised Comments 1985).

146. *Id.*

147. MODEL PENAL CODE & COMMENTARIES § 3.04 cmt. 4(c) (Official Draft and Revised Comments 1985).

to retreat, the *Model Penal Code* likewise requires an initial aggressor to "retreat regardless of where he is threatened."[148]

IV. FLORIDA

A. *The Old Law: Retreat*

Florida's self-defense law, before the new "Stand Your Ground" law was enacted, was a combination of statutory and common law.[149] A person was justified in the use of deadly force in self-defense "if he or she reasonably believe[d] that such force [was] necessary to prevent imminent death or great bodily harm."[150] While the statute said nothing about a duty to retreat, Florida common law established the duty to "retreat to the wall" when one is attacked in a place outside of one's home.[151] Indeed, it had long been acknowledged that "it 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."[152]

In *Wilson v. State*,[153] the Supreme Court of Florida addressed the issue of whether threats of violence by the deceased against the accused are admissible at trial.[154] In deciding that such threats are admissible where the identity of the aggressor is in doubt; that is, where no direct evidence establishes either the deceased or the accused as the assailant, the court stated it was

> not unmindful that one's home is the castle of defense for himself and his family, and that an assault upon it with an intent to injure him, or any of them, may be met in the same way as an assault upon himself, or any of them, and that he may meet the assailant at

148. *Id.*

149. Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999).

150. FLA. STAT. § 776.012 (2004).

151. Hedges v. State, 172 So. 2d 824, 827 (Fla. 1965), *overruled by Weiand*, 732 So. 2d 1044.

152. Danford v. State, 43 So. 593, 596 (Fla. 1907). In the case, Mr. Danford argued that the correct law was that a person had no duty to retreat so long as he was where he had a right to be, was not engaged in an "unlawful enterprise," and was not the aggressor in combat. *Id.* The deceased's brother had previously attempted to use a gun on Danford. *Id.* The court found that Danford took his gun, stood in his field, which was near the public road, and spoke first to the boys warning them to halt, then immediately advanced toward the fence and fired at them. *Id.* at 597. The court held that Danford was the aggressor, and therefore, was not able to claim self-defense. *See id.*

153. 11 So. 556 (Fla. 1892).

154. *Id.* at 558.

> the threshold, and use the necessary force for his and their protection against the threatened invasion and harm.[155]

Wilson, then, hinted at a potential Florida "castle doctrine." Later, in *Pell v. State*,[156] the Supreme Court of Florida declared that the duty to retreat must be qualified.[157] Specifically,

> if a person is not the aggressor in a difficulty, and is violently assaulted on his own premises, he is not obliged to retreat in order to avoid the difficulty, but may stand his ground and use such force as may appear to him as a cautious and prudent man to be necessary to save his life or to save himself from grievous bodily harm.[158]

"While *Pell* involved a trespasser,"[159] thirty-six years later, in *Hedges v. State*, the Supreme Court of Florida held that Hedges, who had killed her paramour, was entitled to a jury instruction that included the rule of no duty to retreat in one's own home.[160] In doing so, the court extended the application of the "castle doctrine" to include not only trespassing attackers, but also invitees.[161] Thus, Florida had apparently resolved one of the intricacies of the "castle doctrine;" namely, whether deadly force may be used justifiably against those invited onto the premises, as well as against mere intruders.[162] However, eighteen years later, the Supreme Court of Florida was confronted with another one of those intricacies when it heard *State v. Bobbitt*.[163] In that case, the issue was whether the "castle doctrine" extended to legal occupants of the same home.[164] In order to decide, the court had to settle a conflict between two district courts of appeal.[165] The First District Court of Appeal, the court of origin of the *Bobbitt* decision, held that the "castle doctrine" applied even where legal co-occupants are involved, while the Fourth District Court of Appeal held in *Conner v. State*[166] that the "castle doctrine" does not apply

155. *Id.* at 561 (citations omitted).
156. 122 So. 110 (Fla. 1929).
157. *Id.* at 116.
158. *Id.*
159. Hedges v. State, 172 So. 2d 824, 827 (Fla. 1965), *overruled by* Weiand v. State, 732 So. 2d 1044 (Fla. 1999).
160. *Id.* at 825, 827.
161. *See id.* at 827.
162. *See id.*
163. 415 So. 2d 724 (Fla. 1982), *overruled by Weiand*, 732 So. 2d 1044.
164. *Id.* at 724.
165. *Id.*
166. 361 So. 2d 774 (Fla. 4th Dist. Ct. App. 1978).

"where the assailant and the victim are both legal occupants of the same home."[167] The court ruled in favor of the Fourth District and distinguished *Hedges*, reasoning that since Hedges's paramour was merely an invitee, when he commenced his attack upon her he lost his invitee status and became, in effect, a trespasser, thereby making the "castle doctrine" applicable.[168] Conversely, in *Bobbitt*, both aggressor and victim were legal occupants of the same home, giving both equal rights to their "castle."[169] Thus, the distinction between when the "castle doctrine" applied and when the circumstances demanded an absolute duty to retreat appeared to depend upon whether the intruder was a cotenant or invitee.[170] Justice Overton strongly dissented.[171] Baffled that the majority's opinion entitled a woman who killed her paramour in her home to claim the benefit of the "castle doctrine" while simultaneously denying the benefit of the "castle doctrine" to a woman who killed her husband under similar circumstances, he proposed that the court adopt a modified "castle doctrine" when the assailant is an invitee, cotenant, or family member.[172] In an effort to acknowledge both the sanctity of human life and the sanctity of the home, the proposed instruction would impose a limited duty to retreat in such situations.[173]

The *Bobbitt* decision proved problematic. As Justice Overton stated, the decision "place[d] the wife in the same position as if the altercation had occurred in a public place."[174] The language of the majority opinion focused on the fact that both husband and wife had "equal rights to be in the 'castle' and neither had the legal right to eject the other."[175] A troubling hypothetical then arises. What would happen if, for example, a nineteen-year-old daughter, who lives with her father in his home, kills him in response to an unprovoked attack?[176] Based upon the *Bobbitt* decision, the daughter should not be able to claim the privilege of non-retreat, since the father had better rights to the property.[177] Such a result "contravenes the intent of the decision."[178]

167. *Bobbitt*, 415 So. 2d at 724.
168. *Id.* at 726.
169. *Id.*
170. *Id.* (Overton, J., dissenting).
171. *Id.*
172. *Bobbit*, 415 So. 2d at 728.
173. *Id.*
174. *Id.* at 727. Another commentator described an abused woman's justifiable right to defend herself from a physically abusive husband as being "no greater than that of anyone to defend themselves in a bar fight." Orr, *supra* note 87, at 125.
175. *Bobbitt*, 415 So. 2d at 726.
176. Alan Michael Grunspan, *The Florida Castle Doctrine*, FLA. B.J., Nov. 1983, at 644.
177. *Id.* at 644–45.
178. *Id.* at 645. The cohabitant exception to the "castle doctrine" has been challenged as being "based on rigid principles of property interests that have been mistakenly coupled with

Case law continued to shape Florida's "castle doctrine" exception to the duty to retreat. The castle itself was expanded in *Redondo v. State*.[179] In that case, the court revealed less sympathy for the life of the assailant when it held that the protected castle may include business or employment premises.[180] The Second District Court of Appeal tempered this approach when it combined the result of *Redondo* with the reasoning of *Bobbitt*.[181] In *Frazier v. State*,[182] the court agreed that the "castle doctrine" protects persons in their place of employment as they lawfully engage in their occupation.[183] However, the twist in that case was that the attacker was a co-worker.[184] Therefore, the court reasoned, both victim and assailant had an equal and lawful right to be in the place where their altercation occurred.[185] Frazier was not entitled to the benefit of the "castle doctrine" instruction.[186]

Florida courts declined to include automobiles under the "castle" umbrella.[187] In *Baker v. State*,[188] the defendant argued that he had no duty to retreat if he was attacked in his own automobile.[189] In refusing to further extend the "castle doctrine" exception to the duty to retreat, the court reasoned that the very mobility of the automobile should have provided the defendant with a means of retreat from a self-defense confrontation and that "to carve out the exception . . . could seem to virtually eliminate the retreat obli-

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requirements that originated in the common law defense of habitation." Carpenter, *supra* note 138, at 685. Carpenter identifies three legal assumptions that form the basis of this erroneous application:

> 1) some type of an intrusion is required in order for an occupant to stand ground at home and use deadly force; 2) the deadly cohabitant does in fact maintain the status of lawful possessor throughout the deadly attack; and 3) the deadly cohabitant's lawful possession usurps the sanctuary's importance to the innocent cohabitant.

Id.

179. 380 So. 2d 1107 (Fla. 3d Dist. Ct. App. 1980).

180. *Id.* at 1110–11. The court stated:

> In our view, business or employment premises should enjoy the same sanctity as a home for self defense purposes as in each instance the person attacked has a proprietary or near proprietary interest in the place where he is assaulted which is cloaked with a certain privacy protection; a person ought not be required, when attacked, to flee from such hallowed ground. Moreover, our normal solicitude for the life of the attacker is somewhat dampened when he chooses such historically protected premises on which to make his murderous assault.

Id.

181. Frazier v. State, 681 So. 2d 824, 825 (Fla. 2d Dist. Ct. App. 1996).

182. *Id.* at 824.

183. *Id.* at 825.

184. *Id.*

185. *Id.*

186. *Frazier*, 681 So. 2d at 825.

187. *See* Baker v. State, 506 So. 2d 1056, 1059 (Fla. 2d Dist. Ct. App. 1987).

188. *Id.* at 1056.

189. *Id.* at 1059.

gation."[190] Unwilling to eliminate the duty to retreat, Florida continued to wade through its convoluted "castle doctrine" until the Supreme Court of Florida heard the case of *Weiand v. State*.[191]

Kathleen Weiand shot and killed her husband during a violent argument in their apartment.[192] At trial, Weiand claimed self-defense and presented evidence of battered spouse syndrome.[193] A jury found Weiand guilty of second-degree murder.[194] The Supreme Court of Florida accepted the Second District Court of Appeal's certified question as to whether the court should recede from the *Bobbitt* decision.[195] In overruling *Bobbitt*, the court acknowledged it was joining a majority of jurisdictions that do not impose a duty to retreat from the home when a defendant uses deadly force in self-defense, so long as such force is necessary to prevent death or great bodily harm from a co-occupant.[196] The court reasoned that it would no longer rely on property law and possessory rights in determining when a duty to retreat exists, and that the decision represented sound public policy based upon known information about the victims of domestic violence.[197] In an attempt to curtail concerns that eliminating a duty to retreat might result in increased violence, the court chose Justice Overton's "middle ground" approach from *Bobbitt*.[198] Thus, there would no longer be a "duty to retreat from the residence before resorting to deadly force against a co-occupant or invitee if necessary to prevent death or great bodily harm, although there is a limited duty to retreat within the residence to the extent reasonably possible."[199]

And so, it appeared that *Weiand* had resolved Florida's confused and unsettled law regarding the duty to retreat and the "castle doctrine."[200] More recently, however, the issue of whether to extend the "castle doctrine" privi-

190. *Id.* In another automobile case, the defendant was in his car, with the motor running and no obstacle preventing him from exiting the parking lot. Reimel v. State, 532 So. 2d 16, 17 (Fla. 5th Dist. Ct. App. 1988). The court held that lethal self-defense was not established as a matter of law, since both a real necessity for taking a life and imminent danger, such that a reasonably prudent person would fear, are both required to establish justified self-defense. *Id.* at 18. Further, the defendant had a duty to retreat to the wall in order to avoid the necessity of taking another person's life. *Id.*

191. 732 So. 2d 1044 (Fla. 1999).

192. *Id.* at 1048.

193. *Id.*

194. *Id.* at 1049.

195. *Id.* at 1046–47.

196. *Weiand*, 732 So. 2d at 1051.

197. *Id.*

198. *Id.* at 1056 (citing State v. Bobbitt, 415 So. 2d 724, 728 (Fla. 1982) (Overton, J., dissenting)).

199. *Id.* at 1058.

200. Orr, *supra* note 87, at 125.

lege to include temporary visitors or guests came before the Third District Court of Appeal.[201] The court declined to extend the castle doctrine privilege that far, afraid that granting such an extension would provide visitors with "innumerable castles" wherever the visitors were permitted to visit, which would in turn "encourage the use of deadly force."[202] Such a scenario, the court believed, was not what the Supreme Court of Florida had in mind when it decided *Weiand* and thereby protected the value of human life.[203]

B. *The New Law: Stand Your Ground*

Although it appeared the judiciary had finally settled Florida's duty to retreat and "castle doctrine" laws, on October 1, 2005, its decisions became obsolete, because on that day, Florida's new "Stand Your Ground" law went into effect.[204] Premised upon the concept that law-abiding people should be able to "protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others," the common-law "castle doctrine" that "declares that a person's home is his or her castle," the "State Constitution [that] guarantees the right of the people to bear arms in defense of themselves," the ideal that "persons residing in or visiting this state have a right to expect to remain unmolested within their homes or vehicles," and that "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," the new legislative material creates two new sections of the *Florida Statutes* and amends two other sections.[205]

First, section 776.013 entitled "Home Protection; Use of Deadly Force; Presumption of Fear of Death or Great Bodily Harm" is newly created.[206] It establishes that:

> (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:

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201. State v. James, 867 So. 2d 414, 415 (Fla. 3d Dist. Ct. App. 2003).

202. *Id.* at 417.

203. *Id.* (citing *Bobbitt*, 415 So. 2d at 728 (Overton, J., dissenting)).

204. *See* Act effective Oct. 1, 2005, ch. 2005-27, 2005 Fla. Laws 1, *available at* http://election.dos.state.fl.us/laws/05laws/ch_2005-027.pdf.

205. Act effective Oct. 1, 2005, ch. 2005-27, pmbl., 2005 Fla. Laws 1, 1.

206. Act effective Oct. 1, 2005, ch. 2005-27, § 1, 2005 Fla. Laws 1, 1-2 (to be codified at FLA. STAT. § 776.013).

> (a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
>
> (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.[207]

There are certain situations in which the presumption will not apply. One such situation occurs if "[t]he person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle" and there is no "injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person."[208] Another situation where the presumption will not apply is where the "person[] sought to be removed is a child or grandchild, or is otherwise in the lawful custody . . . of the person against whom the defensive force is used."[209] A third situation where the presumption will not apply is where "[t]he person who uses defensive force is engaged in an unlawful activity."[210] Finally, the presumption does not apply if "[t]he person against whom the defensive force is used is a law enforcement officer . . . who enters a dwelling, residence, or vehicle in the performance of his . . . official duties."[211] However, the officer must have identified himself in the manner prescribed by law, or the person using force must have known or reasonably should have known that the person entering was a law enforcement officer.[212]

Additionally, the new section establishes:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he 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 another or to prevent the commission of a forcible felony.[213]

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207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. Act effective Oct. 1, 2005, ch. 2005–27, § 1, 2005 Fla. Laws 1, 1–2 (to be codified at FLA. STAT. § 776.013).
212. *Id.*
213. *Id.*

In addition, a person attempting to unlawfully enter another "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."[214]

Sections 776.012 and 776.031 of the *Florida Statutes* were amended.[215] The former, which establishes when the use of force is justified when used in defense of a person, now includes the phrase "and does not have a duty to retreat,"[216] while the latter, which establishes when the use of force is justified in defense of others, now includes the sentence: "A person does not have a duty to retreat if the person is in a place where he or she has a right to be."[217] Additionally, a person may use deadly force in defense of self under the circumstances described in the newly amended section 776.012.[218] Thus, the duty to retreat has been abrogated in Florida.

V. THE EFFECT

A. *The Reaction*

Even before the Florida House of Representatives passed the Florida Senate-approved bill, opinions on the new legislation emerged.[219] According to the bill's sponsor, Representative Dennis Baxley, R-Ocala, the bill's purpose is to give law-abiding citizens more rights, specifically the right to "meet force with force," since having a duty to retreat is "a good way to get shot in the back."[220] The bill's introduction followed an incident in North

214. *Id.* Interestingly, the definition of "dwelling" includes attached porches and essentially anything with a roof over it, including tents. Act effective Oct. 1, 2005, ch. 2005-27, § 1, 2005 Fla. Laws 1, 1-2 (to be codified at FLA. STAT. § 776.013). The definition of "residence" is "a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest." *Id.*

215. Act effective Oct. 1, 2005, ch. 2005-27, § 2, 2005 Fla. Laws 1, 3 (amending FLA. STAT. § 776.012 (2004)); Act effective Oct. 1, 2005, ch. 2005-27, § 3, 2005 Fla. Laws 1, 3 (amending FLA. STAT. § 776.031 (2004)).

216. Act effective Oct. 1, 2005, ch. 2005-27, § 2, 2005 Fla. Laws 1, 3 (amending FLA. STAT. § 776.012 (2004)).

217. Act effective Oct. 1, 2005, ch. 2005-27, § 3, 2005 Fla. Laws 1, 3 (amending FLA. STAT. § 776.031 (2004)).

218. Act effective Oct. 1, 2005, ch. 2005-27, § 2, 2005 Fla. Laws 1, 3 (amending FLA. STAT. § 776.012 (2004)). Additionally, a person who justifiably uses force "is immune from criminal prosecution and civil action." Act effective Oct. 1, 2005, ch. 2005-27, § 4, 2005 Fla. Laws 1, 3-4 (to be codified at FLA. STAT. § 776.032).

219. *See, e.g.*, Fred Grimm, *Legislature Goes Gangsta with "Kill Bill,"* MIAMI HERALD, Apr. 5, 2005, at B1; Royse, *supra* note 15.

220. Royse, *supra* note 15; Grimm, *supra* note 219.

Florida, where a seventy-seven-year-old man and his wife had been living in a mobile home beside their house, which Hurricane Ivan had damaged.[221] The man fired at a burglar, killing him.[222] Once the bill passed the Senate unanimously,[223] the uproar continued as "conservatives cheer[ed] and liberals recoil[ed]."[224]

Those who oppose the new law point out that Florida's law never required retreat if retreat would increase a person's chance of facing great bodily harm or death.[225] They voice concerns that the law is not age-specific or intent-specific, so many questions arise, such as whether a sixth-grader may justifiably retaliate against a bully or whether society can rely upon the judgment of a person who had been drinking in a bar and says he acted because he felt threatened.[226] They say it is a "virtual license for vigilante justice," and that it would make it difficult to prosecute homicides resulting from gang activity.[227]

Although the law does not mention guns, legislators appeared to believe that the underlying issue was people's feelings on gun control.[228] The fact that Marion Hammer, a National Rifle Association (NRA) lobbyist, pushed the bill through the legislature helps support this assumption.[229] Because the law passed in Florida so emphatically, the NRA plans to ride their "big tailwind" and get similar laws passed across the nation.[230]

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221. Rosica, *supra* note 11.

222. *Id.* Prosecutors did not file criminal charges against the North Florida man. *Id.*

223. *Id.*

224. Hinkle, *supra* note 11.

225. Stephen Majors, *Opinions Mixed on Gun Law*, BRADENTON HERALD, June 5, 2005, at 1C.

226. Shannon Colavecchio-Van Sickler, *Will Deadly Force Law Open Door to Abuses?*, ST. PETE. TIMES, Apr. 8, 2005, at 1A.

227. *Armed and Dangerous: NRA-Backed Gun Bill Deadly for Florida*, DAYTONA NEWS-J., Mar. 14, 2005, at 04A.

228. Stephen Majors, *House Divided Over Defense Bill*, BRADENTON HERALD, Apr. 5, 2005, at 2C.

229. Alan Gomez, *House Passes NRA-Backed Gun Proposal; Bush to Sign*, PALM BCH. POST, Apr. 6, 2005, at 1A; Manuel Roig-Franzia, *Fla. Gun Law to Expand Leeway for Self-Defense; NRA to Promote Idea in Other States*, WASH. POST, Apr. 26, 2005, at A01 (noting that Marion Hammer is a former NRA president).

230. Roig-Franzia, *supra* note 229.

B. *Concealed Carry Redux?*

In 1987, Florida became the first state to streamline the process of obtaining a permit to carry a concealed weapon.[231] The same arguments arose then that have arisen now; namely, that the state will become a modern Wild West.[232] Interestingly, in the subsequent years, the state's violent crime rate decreased even as the number of weapons permits increased.[233] The reason for the decline remains unclear, although some experts claim the explanation lies in tougher laws like the 10-20-life and three strikes laws, as well as tougher sentencing guidelines for violent felons.[234] Others credit the country's economic upswing and demographics for the nationwide decline in violent crime, which paralleled Florida's decreased rate.[235] Gun advocates say that the increased number of guns in private hands is the reason for the national decline in violent crime.[236] However, gun control advocates disagree.[237] They point out that Massachusetts has one of the lowest rates of violent crime in the nation and also has strict gun control laws.[238] Also, even though Florida's violent crime rate is decreasing, Florida remains one of the most violent states in the nation.[239] Thus, with this new law, the same lines appear to be drawn.[240] The question then becomes whether these positions are realistic.

While the question of whether statutes can deprive criminals of firearms has long been debated, "the relationship between the number of guns and the number of armed crimes" has received much recent attention.[241] One argument proclaims an inverse relationship between the number of people armed and the violent crime rate; that is, as the former increases, the latter decreases.[242] This argument relies on criminals being inherently logical.[243]

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231. Mark Schwed, *Who's Packing Heat in Florida?*, PALM BCH. POST, June 4, 2005, at 6D.

232. Jacqui Goddard, *Florida Boosts Gun Rights, Igniting a Debate*, CHRISTIAN SCI. MONITOR, May 10, 2005, at 2.

233. Schwed, *supra* note 231.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. Schwed, *supra* note 231.

239. *Id.* In 2000, Florida was second only to Arizona in the rankings for the most violent state in the country. *Id.* In 2003, Florida remained second, this time behind only South Carolina. Roig-Franzia, *supra* note 229.

240. Goddard, *supra* note 232.

241. JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 2 (2002).

242. *Id.*

243. *Id.*

Presumably, criminals "weigh the cost of committing a crime" and will hesitate before attempting to victimize an armed individual.[244] Following this theory, thirty-three states are now "permitting law-abiding citizens to carry concealed weapons."[245] Supporters of Florida's new law propound the same argument.[246]

One study supported responsible ownership of guns after examining Canadian self-defense and comparing it to American self-defense.[247] Another study refuted the commonly invoked image of people nobly defending their families at home when it found that defensive gun use more typically occurred outside of the home.[248] That study's results also suggested that hostile gun displays designed to frighten others inside the home may be more common than gun use in self-defense, with most hostile gun displays characterized as domestic violence directed against women.[249] Responding to fears that allowing defensive gun use may lead to vigilantism, another study determined that defensive gun use is more often used for self-protection rather than to punish criminals.[250] While homeowners may purchase guns for self-protection, the greater threat to those living in the home may come from other family members inside.[251]

Thus, the studies do not clearly link gun ownership and increased violent crime, and, similarly, they cannot definitively advocate for or against the concept of defensive gun use.

VI. CONCLUSION

Florida's new law specifically abrogates a duty to retreat.[252] Additionally, it provides immunity from civil and criminal prosecution, and creates a

244. *Id.*

245. *Id.*

246. *See* Colavecchio-Van Sickler, *supra* note 226.

247. Gary A. Mauser, *Armed Self-Defense: The Canadian Case*, 24 J. CRIM. JUST. 393, 404 (1996) (examining the frequency with which Canadians and Americans used firearms to protect against criminal violence and concluding that private ownership of firearms, coupled with moderate firearms regulations, is beneficial to society and may contribute significantly to public safety).

248. Deborah Azrael & David Hemenway, *'In the Safety of Your Own Home': Results from a National Survey on Gun Use at Home*, 50 SOC. SCI. & MED. 285, 289 (2000).

249. *Id.* at 290.

250. Tomislav Kovandzic et al., *Defensive Gun Use: Vengeful Vigilante Imagery Versus Reality: Results from the National Self-Defense Survey*, 26 J. CRIM. JUST. 251, 258 (1998).

251. Azrael & Hemenway, *supra* note 248, at 289.

252. *See* Act effective Oct. 1, 2005, ch. 2005–27, 2005 Fla. Laws 1, *available at* http://election.dos.state.fl.us/laws/05laws/ch_2005-027.pdf.

presumption of fear of death or great bodily injury.[253] Advocates of the new law laud it as a measure that provides the public with a means to better protect itself, as well as sends a message to criminals that the public will, with the full backing of this law, support anyone who chooses to stand his or her ground.[254] Opponents declare the new law "will return Florida to the days of the Wild West—all but giving [six] million registered gun owners a license to kill in what is already one of the most violent states in America."[255]

The battle over this new law resurrects past arguments regarding concealed carry laws,[256] and the continuing conflict over whether that law benefited or harmed Florida may foreshadow another chronic debate. The two laws appear irrevocably linked, since some claim the "Stand Your Ground" law will encourage more people to get concealed-carry permits, while others declare it will lead to a reduction in violent crime.[257] While it may be too soon to tell what effect the new law will have on the legal system,[258] it seems it is not too early for controversy and debate.

253. *See* Act effective Oct. 1, 2005, ch. 2005-27, § 4, 2005 Fla. Laws 1, 3-4 (to be codified at FLA. STAT. § 776.032); Act effective Oct. 1, 2005, ch. 2005-27, § 1, 2005 Fla. Laws 1, 1-3 (to be codified at FLA. STAT. § 776.013).
254. Colavecchio-Van Sickler, *supra* note 226.
255. Suzanne Goldenberg, *Florida Backs Right to Shoot*, GUARDIAN, Apr. 8, 2005, at 16.
256. *See* Goddard, *supra* note 232, at 3.
257. Majors, *supra* note 225.
258. *Id.*