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# How to Get Away with Murder: Criminal and Civil Immunity Provisions in "Stand Your Ground" Legislation

Jennifer Ann Randolph

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## I. Introduction

At approximately seven p.m. on February 26, 2012, seventeen-year old Trayvon Martin was shot and killed in an Orlando-area neighborhood by neighborhood watch leader George Zimmerman.[1] While the events that triggered the shooting are clouded in controversy, it remains uncontested that Martin was unarmed and on his return from the local convenience store.[2] Though Zimmerman admitted to firing the shot that killed Martin, he asserted that it was done in self-defense.[3] Zimmerman was neither immediately arrested nor charged after the incident.[4] In the months that followed, the case gained national attention[5] and placed Florida's "Stand Your Ground" law under scrutiny. In particular, the initial decision by police not to arrest Zimmerman sparked protest from both the public[6] and the Martin family.[7] Sanford Police Chief Bill Lee

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[1] Julia Dahl, *The Trayvon Martin Case Exposes the Realities of a New Generation of Self-Defense Laws*, CBSNEWS (Mar. 15, 2012), http://www.cbsnews.com/8301-504083_162-57398005-504083/the-trayvon-martin-case-exposes-the-realities-of-a-new-generation-of-self-defense-laws/.

[2] *Id.* The facts surrounding the incident are not completely clear. Zimmerman called 911 to report a "real suspicious black guy" in the neighborhood. Though the 911 operator told Zimmerman not to chase after Martin, Zimmerman followed the seventeen-year-old and an altercation ensued. Zimmerman states that Martin knocked him to the ground with a punch to the nose, smashed his head into the ground, and attempted to take his gun. On April 11, 2012, Zimmerman was ultimately charged with second-degree murder and a lesser offense of manslaughter. *See The Travvon Martin Case: A Timeline*, THE WEEK (Jul. 17, 2012), http://theweek.com/article/index/226211/the-trayvon-martin-case-a-timeline [hereinafter *Timeline*]. Interestingly, Zimmerman chose not to assert immunity under Florida law, but, instead, to rely on the affirmative defense of self-defense. Seni Tienabeso & Matt Guttman, *George Zimmerman's Decision Leads to Summer Trial*, ABCNEWS (Apr. 30, 2013), http://abcnews.go.com/US/george-zimmerman-waives-stand-ground-hearing-heads-trial/story?id=19074241. Following a jury trial, Zimmerman was acquitted. Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 13, 2013, at A1, *available at* http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?pagewanted=all&_r=0.

[3] Dahl, *supra* note 1.

[4] *Id.*

[5] In April of 2012 30% of Americans indicated they were following the Trayvon Martin case more than any other story. *Timeline*, *supra* note 3.

[6] *See* Patrik Jonsson, *Trayvon Martin Case Reveals Confusion Over How Stand Your Ground Works*. THE CHRISTIAN SCI. MONITOR (Apr. 11, 2012), http://www.csmonitor.com/USA/Justice/2012/0411/Trayvon-Martin-case-reveals-confusion-over-how-Stand-Your-Ground-works.

[7] *See Timeline*, *supra* note 3.

stated in a press conference on March 12, 2012, "[i]n this case Mr. Zimmerman has made the statement of self-defense . . . .Until we can establish probable cause to dispute that, we don't have the grounds to arrest him."[8] This statement reflects the implications of an immunity provision passed in 2005 as a part of Florida's "Stand Your Ground Law."[9] Since 2005, upwards of 20 states have passed similar "Stand Your Ground" statutes containing provisions for criminal immunity, civil immunity, or both for persons "justified" in using force.[10]

This Comment does not begin with the story of Trayvon Martin to incite discussion on the outcome of the case, or to proffer an opinion regarding the veracity of Zimmerman's defense, but to serve as an instructive starting point demonstrating the implications of one type of immunity now granted to many defendants asserting a claim of self-defense. The goal of this Comment is to explore the various types of immunity granted by recent "Stand Your Ground" laws, to highlight the problematic aspects of these provisions, and to recommend change for the legislation. Part II of this article provides a background to self-defense law and examples of how previous immunity provisions functioned. Next, the article focuses on the new "Stand Your Ground" laws and how the addition of civil and criminal immunity changed traditional self-

[8] *See* Dahl, *supra* note 1. The police chief later stepped down following a "vote of no-confidence from the city." Cora Currier, *The 24 States That Have Sweeping Self-Defense Laws Just Like Florida's*, PROPUBLICA (Mar. 22, 2012), http://www.propublica.org/article/the-23-states-that-have-sweeping-self-defense-laws-just-like-floridas.

[9] *See* FLA. STAT. § 776.032 (West 2013).

[10] *See* Wyatt Holliday, Comment, *"The Answer to Criminal Aggression is Retaliation:" Stand Your Ground Laws and the Liberalization of Self-Defense*, 43 U. TOL. L. REV. 407, 407 (2012); P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground*, 35 S.U. L. REV. 1, 2 (2007); *see, e.g.*, ALA. CODE § 13A-3-23(d) (2012); ALASKA STAT. ANN. § 09.65.330 (West 2012); GA. CODE ANN. § 16-3-24.2 (West 2013); IDAHO CODE ANN. § 6-808 (West 2012); KAN. STAT. ANN. § 21-5231 (West 2012); KY. REV. STAT. ANN. § 503.085 (West 2012); LA. REV. STAT. ANN. § 9:2800.19 (2006); MICH. COMP. LAWS ANN. § 600.2922b (West 2012); MISS. CODE. ANN. § 97-3-15(5)(b) (West 2012); MO. ANN. STAT. § 563.074 (West 2012); N.H. REV. STAT. ANN. § 627:1-a (2012); N.C. GEN. STAT. ANN. § 14-51.2(e) (West 2012); N.D. CENT. CODE ANN. § 12.1-05-07.2 (West 2011); OHIO REV. CODE ANN. § 2307.60(2)(B)(c) (West 2011); OKLA. STAT. ANN. tit. 21, § 1289.25 (West 2012); 42 PA. CONS. STAT. ANN. § 8340.2 (West 2012); S.C. CODE ANN. § 16-11-450 (2006); TENN. CODE ANN. § 39-11-622 (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (West 2012); W. VA. CODE ANN. § 55-7-22(d) (West 2012); WIS. STAT. ANN. § 895.62(2) (West 2012); WYO. STAT. ANN. § 6-1-204 (West 2012). Though additional states have amended their self-defense statutes to reflect traditional aspects of "Stand Your Ground" legislation, the previous list reflects those that have added some form of immunity provision since the enactment of the Florida statute in 2005. The specific aspects of these state laws will be discussed in the sections that follow.

defense procedures and law. Part IV focuses on laws granting criminal immunity and highlights problematic aspects of their implementation. Part V focuses on statutes granting civil immunity and their possible implications. Then, Part VI makes recommendations for change or amendment to these statutes. Finally, Part VII concludes.

## II. Self-Defense and Immunity Provisions Before 2005

A typical "Stand Your Ground" law is a doctrine of self-defense that allows a person to meet force, including deadly force, with corresponding force.[11] These laws traditionally eliminate any existing duty to retreat and provide for some form of criminal or tort immunity.[12] These laws are premised on, and justified by, the idea that a law-abiding citizen should be permitted 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."[13] This section looks at traditional self-defense law and immunity provisions, while the subsequent sections detail how immunity provisions in "Stand Your Ground" laws have altered the "traditional" both substantively and procedurally. Substantively, the "Stand Your Ground" laws have expanded state self-defense law by both removing the duty to retreat, in those states that retain it[14] and adding a presumption of reasonable force when the force is used in the home or car.[15] Procedurally, the new "Stand Your Ground" laws generally prohibit arrest without probable

[11] *See generally* Andrea A. Amoa, Note and Comment, *Texas Issues a Formidable License to Kill: A Critical Analysis of the Joe Horn Shootings and the Castle Doctrine*, 33 T. MARSHALL L. REV. 293, 297–98 (2008) (describing Texas' "Stand Your Ground" law); Jason W. Bobo, Comment, *Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground*, 38 CUMB. L. REV. 339, 361–63 (2008) (describing Alabama's "Stand Your Ground" law); Wyatt Holliday, Comment, *"The Answer to Criminal Aggression is Retaliation:" Stand-Your Ground Laws and the Liberalization of Self-Defense*, 43 U. TOL. L. REV. 407, 425–28, 431–33 (2012) (describing Ohio's and Wisconsin's "Stand Your Ground" laws); Judith Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & POL'Y 617, 618 n.3 (2006) (describing Florida's "Stand Your Ground" law).

[12] *See, e.g.*, FLA. STAT. § 776.032 (West 2012).

[13] *See* Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010) (quoting the preamble to § 776.032 of the Florida statutes); David Kopel, *Florida's New Self Defense Law*, VOLOKH CONSPIRACY (May 19, 2005, 11:24 AM), http://www.volokh.com/posts/1116516262.shtml.

[14] *See, e.g.*, FLA. STAT. ANN. § 776.012 (West 2012). *See generally* text accompanying notes 116–122.

[15] *See, e.g.*, FLA. STAT. ANN. § 776.013 (West 2012). *See generally* text accompanying notes 116–122.

cause that unlawful force was used,[16] permit pre-trial immunity hearings for persons asserting self-defense,[17] and prevent remedies in the civil courts when a person asserts statutory immunity.[18]

A. Self-Defense: Substance, Procedure, and Theory

"Every state in the United States recognizes a defense for the use of force, including deadly force, in self-protection."[19] In 1806, one of the first self-defense cases was considered by an American court.[20] In *Commonwealth v. Selfridge*, the defendant, Selfridge, was charged with manslaughter for the death of Charles Austin, a young Harvard student.[21] In his jury instruction, Judge Parker articulated the basic concept of self-defense, "[w]hen . . . there is reasonable ground to believe that there is a design to destroy his life . . . then killing the assailant will be excusable . . . although it should afterwards appear that no felony was intended . . . ."[22] Judge Parker went on to proffer a hypothetical in which the defendant ("A") is faced with an opponent/victim waving a gun.[23] In the hypothetical, the defendant kills the victim only to later find out that the gun contained blanks instead of bullets.[24] Judge Parker questioned, "Will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol?"[25] Though both the instruction and the hypothetical offered by Judge Parker have

[16] *See, e.g.*, FLA. STAT. ANN. § 776.032 (West 2012).
[17] *See, e.g.*, Peterson v. State, 983 So. 2d 27, 29–30 (Fla. Dist. Ct. App. 2008).
[18] *See, e.g.*, IDAHO CODE ANN. § 6-808 (West 2012); TENN. CODE ANN. § 39-11-622 (West 2012); TEX. CIV. PRAC. & REM. CODE. ANN. § 83.001 (West 2012).
[19] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 223 (5th ed. 2009).
[20] Ross, *supra* note 10, at 6.
[21] *Id.* Selfridge, a lawyer and aspiring politician, had squabbled with the victim's father, Benjamin Austin, over the posting of slanderous comments about him in the local newspaper. *Id.* Following these comments, the situation intensified and Selfridge armed himself. *Id.* Selfridge was met with the younger Austin on the street and in possession of a cane; an altercation ensued resulting in the death of Charles Austin by the gun of Selfridge. *Id.*
[22] Richard Singer, *The Resurgence of Mens Rea: II-Honest But Unreasonable Mistake of Fact in Self-Defense*, 28 B.C. L. REV. 459, 477 (1987).
[23] *Id.*
[24] *Id.*
[25] *Id.*

been criticized as "off-point"[26] in the context of the *Selfridge* fact-pattern, the ideas represented by this decision remain a part of American self-defense law.[27]

Traditionally, a person was justified in his or her use of force if he or she reasonably believed that force was necessary to prevent the imminent use of unlawful force against him or her by another.[28] With this standard, a person need not experience actual harm so long as he possessed a reasonable belief that such harm was imminent.[29] Deadly force was permitted only in situations where the actor had a reasonable belief that he was facing the imminent use of unlawful *deadly* force.[30] In both instances the defense was qualified by the requirement that the person asserting the defense be a "non-aggressor" in the altercation that gave rise to the use of force.[31]

Generally, a person who claims self-defense raises an affirmative defense, arguing that the use of force was justified, in either a criminal or civil proceeding.[32] For the most part, there is no substantive difference between the assertion of self-defense in a criminal matter and a civil or tort matter; therefore, the previous discussion reflects the construct of the defense in either

[26] Singer opines that because Selfridge's indictment was for manslaughter, not murder, and his shot was unlikely to have been the result of a "mistake" as to the amount of force necessary, the fact-pattern of *Selfridge* is not ideal for a discussion of self-defense. *See id.*

[27] *See* State v. Light, 664 S.E.2d 465, 469 (S.C. 2008) (holding that a defendant was entitled to an instruction of self-defense when he was approached with a firearm); Koritta v. State, 438 S.E.2d 68, 69–70 (Ga. 1994) (holding that the defendant was entitled to a self-defense instruction in an altercation involving a gun).

[28] DRESSLER, *supra* note 19, at 223.

[29] *See* Lydia Zbrzenj, Note, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 F. COASTAL. L. REV. 231, 233 (2012).

[30] DRESSLER, *supra* note 19, at 223 (emphasis in original).

[31] *Id.* at 226 (defining aggressor as "one who threatens unlawfully to commit a battery upon another or who provokes a physical conflict by words or actions calculated to bring about an assault").

[32] *See, e.g.*, NEB. REV. STAT. ANN. § 28-1416 (West 2012). This statute exemplifies this statement. In subsection (1) of the statute it provides that "In any prosecution based on conduct which is justifiable under sections 28-1406 to 28-1416, justification is an affirmative defense." *Id.* at § 28-1416(1). In subsection (2) of the statute, it acknowledges the same range of sections and provides that they serve as an affirmative defense to a civil action as well. *Id.* at § 28-1416(2). Within the range of applicable sections is the justification for the use of force. *See id.* at § 28-1409.

situation.[33] The most critical procedural difference is in the burden placed upon both the plaintiff/prosecutor and the defendant in either situation.[34] In a criminal matter, the prosecution bears the burden of proving the defendant's guilt beyond a reasonable doubt.[35] States differ, however, on the burden of proof that is placed on the defendant with respect to an affirmative defense.[36] Comparatively, in a civil matter, the burden of both pleading and proving self-defense is on the defendant who seeks to justify his or her actions.[37] This must be done by a preponderance of the evidence.[38] No matter where the burden lies in various states, however, the ultimate decision traditionally rested in the hands of the judge or jury deciding the matter at trial.[39]

Traditionally, the recognition of self-defense as an affirmative defense rested on the premise that certain actions are "justified" by their circumstances.[40] "Justification" defenses typically provide protection for actions that are considered warranted by the situation.[41] For example, a driver of a fire engine may speed en route to an emergency, in violation of local

[33] Caroline Forell, Symposium, *Who is the Reasonable Person? What's Reasonable?: Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1403 (2010); *see also* 33 AM. JUR. PROOF OF FACTS 2D *Privileged Use of Force in Self-Defense* § 1 (2012) [hereinafter *Privileged Use of Force*] ("There are few, if any, substantive distinctions between civil and criminal law with regard to the prerequisites to justification of a claim of self-defense, and, with the exception of the rule of evidence which gives to a person accused of a crime the benefit of a reasonable doubt the law of self-defense is the same in both criminal and civil cases."); *supra* text accompanying notes 19–31 (describing the substance of self-defense law).

[34] *See Privileged Use of Force*, *supra* note 33, at § 1.

[35] *See id.* at § 7; Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 458 (1989) ("In the criminal trial setting, the presumption of innocence is given vitality primarily through the requirement that the government prove the defendant's guilt beyond a reasonable doubt.").

[36] *See Privileged Use of Force*, *supra* note 33, at § 7. In some states, the defendant is required to prove that he acted in self-defense "either by a preponderance of the evidence, by the greater weight of the evidence, by convincing evidence, by proof to the satisfaction of the jury, or by proof raising a reasonable doubt." *Id.* Other states leave the burden on the prosecutor to prove, beyond a reasonable doubt, that the defendant was not acting in self-defense. *Id.* States may also require that the defendant produce evidence that he or she acted in self-defense and leave the burden of persuasion on the prosecution. *Id.*

[37] *Id.* at § 8.

[38] *Id.*

[39] Jean K. Gilles Phillips & Elizabeth Cateforis, *Self-Defense, What's a Jury Got To Do With It?,* 57 U. KAN. L. REV. 1143, 1153 (2009). This is one aspect of self-defense law that is altered significantly by the new legislation; s*ee infra* Part III.

[40] *See* Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 388–89 (2005); Zbrzenj, *supra* note 22, at 234.

[41] Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1900 (1984).

traffic laws; however, the driver's behavior would be considered warranted because the risk of harm associated with the fire is greater than the traffic risk created by the truck's speed.[42] Members of society would not only accept the driver's actions, but they would hope that drivers in that same position would take the same action.[43] By contrast, defenses such as insanity are considered "excuse" defenses.[44] "Excuse" defenses relieve the individual actor of blame for their actions; here the same actions would not be excused for other persons.[45] For example, an employee who has extreme mental and emotional issues, flies into a fit of rage, and hits a co-worker may be wholly or partially excused from liability because of his or her diminished mental state.[46] The same strike by any other person, however, would not receive protection.[47]

This categorization not only draws distinction by title, it reflects a distinction in moral principles as well.[48] "[T]o say that an action is justified is to say . . . that though the action is of a type that is usually wrong, in these circumstances it was not wrong. To say that an action is excused, by contrast, is to say that it was indeed wrong . . . but the agent is not blameworthy."[49] Taking this one step further, one scholar opines that the policy justifying self-defense is the very same which underlies the creation of the crimes it serves as a defense to, i.e. offenses against the person such as murder, battery or rape.[50] Specifically, it is the societal interest in life and bodily integrity that is paramount to the justification of self-defense and to the creation of crimes which

[42] *Id.* at 1899.
[43] *Id.*
[44] Baron, *supra* note 40, at 388–89 (noting also that "some defenses are difficult to classify").
[45] Greenawalt, *supra* note 41, at 1900.
[46] *Id.* at 1899–1900.
[47] *Id.* at 1900.
[48] Baron, *supra* note 40, at 389. Baron acknowledges that most persons would prefer to have an action deemed justified versus excused. *Id.*
[49] *See id.* at 388–90.
[50] Janine Young Kim, *Rule and Exception* in *Criminal Law (Or, Are Criminal Defenses Necessary?),* 82 TUL. L. REV. 247, 278 (2007).

intend to prohibit harmful use of force.[51] This same respect for human life is diminished under new "Stand Your Ground" laws that permit complete immunity from criminal or civil action.

B. Self-Defense: Deadly Force and the Duty to Retreat

Recognizing the value of human life, English common law embraced a duty to retreat "as far as he conveniently or safely can" when in the face of deadly force.[52] This duty reflected a historical reluctance to legitimize the right of self-defense when it involved defensive killing.[53] An exception to the duty to retreat existed, however, when a man was attacked in his own home.[54] Reflecting the conviction that "a man's home is his castle," this exception became known as the Castle Doctrine.[55] Therefore, a man faced with deadly force in his own home had no duty to retreat to safety before responding with force, including deadly force.[56]

Beginning in the nineteenth century, there was a dramatic movement in the United States to abandon the duty to retreat in the face of deadly force.[57] Resentment towards the duty to retreat grew as a result of the view that to require such a duty was to require cowardice.[58] Thus, a majority of modern American self-defense statutes utilize a "no retreat" rule that permits a non-aggressor to utilize deadly force in the face of an unlawful deadly attack, even if retreat to safety is possible.[59] The minority of states that maintain the duty to retreat in the face of deadly force,

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[51] *Id.*
[52] *See* Bobo, *supra* note 11, at 362; Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 528 (2010) (citing WILLIAM BLACKSTONE, 4 COMMENTARIES 423).
[53] *See* Levin, *supra* note 52, at 528.
[54] *Id.* at 530.
[55] *Id.*
[56] *Id.*
[57] Levin, *supra* note 52, at 529.
[58] Bobo, *supra* note 11, at 343; *see also* Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504, 507 (2007) ("The American ideals of bravery and honor suited themselves to frontier life in a way that the English duty to retreat could not.").
[59] *See* Bobo, *supra* note 52, at 343; DRESSLER, *supra* note 19, at 229.

however, continue to embrace the English common law Castle Doctrine exception.[60] The Model Penal Code, for example, states 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."[61] The Castle Doctrine acknowledges the idea that the home is a sanctuary from which a person should not be forced to flee in the face of a threat serious bodily injury or death.[62]

Abrogation of the duty to retreat became evident first in the state supreme courts.[63] In *Erwin v. State,* for example, the Ohio Supreme Court held that a "true man" should not be required to retreat from an "assailant, who . . . maliciously seeks to take his life."[64] Similarly, in *Runyan v. State* the Indiana Supreme Court found that the "American mind" weighed against imposing a duty to retreat.[65] The Supreme Court followed suit, essentially rejecting the duty to retreat in the 1921 case *Brown v. United States*.[66] In *Brown,* the defendant was convicted of the murder of Hermis, a man who was reportedly attacking the defendant with a knife at the time that he fired the fatal shot.[67] Though it was requested by the defense, the lower court refused to give a jury instruction that retreat was unnecessary if the defendant reasonably feared for his

[60] *Id.* at 531; *see also* 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."); State v. Middleham, 17 N.W. 446, 448 (Iowa 1883) (stating that there is no duty to retreat in one's home).
[61] MODEL PENAL CODE § 3.04(2)(b)(ii)(1) (Official Draft 1985).
[62] *See* Zbrzenj, *supra* note 29, at 238–39.
[63] Bobo, *supra* note 11, at 344; *see, e.g.*, Runyan v. State, 57 Ind. 80 (1877); Erwin v. State, 29 Ohio St. 186 (Ohio 1876).
[64] *Erwin*, 29 Ohio St. at 199. In *Erwin*, the defendant and his son-in-law were in a dispute over the possession of a storage shed that was located in-between their two homes. The day that the homicide took place, Erwin was in the shed and his son-in-law approached him with an ax in an apparently threatening manner. Erwin responded with a single shot that resulted in the death of his son-in-law. *Id.* at 192–93.
[65] *Runyan*, 57 Ind. at 84. Runyan was convicted of manslaughter of Charles Pressnal. The deceased hit him two or three times before Runyan pulled a pistol out of his pocket and shot him. *Id* at 81.
[66] 256 U.S. 335 (1921); *see also* Beard v. United States, 158 U.S. 550, 563–64 (1895) (holding that there is no duty to retreat when a person is on the premises of their dwelling and faced with deadly force).
[67] *Brown*, 256 U.S. at 341–42.

life.[68] Instead, the court instructed the jury that the defendant had a duty to retreat.[69] The Supreme Court granted certiorari[70] and Justice Holmes, delivering the opinion of the Court, stated:

> Many respectable writers agree 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 that if he kills him he has not exceeded the bounds of lawful self-defense . . . Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, 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.[71]

Justice Holmes' opinion not only gives credence to the abolition of the duty to retreat in the face of deadly force in American jurisdictions, but it also highlights the beginnings of the ideas underlying "Stand Your Ground" legislation.[72] The use of the term "immunity" in this opinion, however, does not reflect its use in the new legislation.[73]

C. Immunity: Public Officials and Self-Defense

Immunity, as defined by Black's Law Dictionary, is "any exemption from a duty, liability or service of process."[74] Traditionally, immunity for an individual defendant has been based

[68] *Id.* at 342.
[69] *Id.*
[70] *Id.* at 341.
[71] *Id.* at 343. (emphasis added). It is interesting to highlight within this description the use of "stand his ground" and "immunity."
[72] *See generally* Christine Cantalfamo, Note, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504, 509 (2007) (noting that an "increased understanding of human nature and the complex moral measurements required by the duty to retreat" lead to the privilege of non-retreat and that this realization was evident in the Holmes opinion). The *Brown* decision serves as persuasive authority for those states dealing with issues of the duty to retreat in self-defense law. *See* Bobo, *supra* note 11, at 351. It follows that it also serves some persuasive authority for the "Stand Your Ground" laws.
[73] *See, e.g.*, Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010) (holding that the Florida law entitled a defendant to a pretrial hearing regarding immunity from prosecution for lawful use of force, not merely an affirmative defense of self-defense at trial).
[74] BLACK'S LAW DICTIONARY 817 (9th ed. 2009).

upon his or her status as a public official.[75] The recent "Stand Your Ground" legislation, however, grants immunity to defendants who are justified in their use of force.[76] To distinguish between the concept of an affirmative defense, like self-defense, and the concept of "immunity" it is helpful to examine the conceptual difference between a defense from liability and a defense from suit.[77] Affirmative defenses generally come in the form of defenses from liability, i.e. a defense that admits to the elements that comprise the claim but desires to "justify, excuse, or mitigate the commission of the act."[78] By contrast, immunity, like that typically granted public officials, is designed to operate as a defense from suit before the merits of a case are reached.[79]

It is interesting to note that public officials, such as police officers and prosecutors, are often afforded a "qualified," but not complete, immunity for their actions.[80] The doctrine of qualified immunity grants protection to public officials from "liability for civil damages insofar

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[75] *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367, 378 (1951) (noting that legislators are privileged and immune from arrest or civil process while performing legislative duty); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53 (2005) (discussing absolute and qualified prosecutorial immunity); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (permitting qualified immunity to shield government officials from actions under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). As noted by the Supreme Court in *Pearson v. Callahan*, doctrines such as "qualified immunity" are intended to protect public officers from distraction, harassment, and liability while requiring them to remain accountable for the irresponsible exercise of power. 555 U.S. 223, 231 (2009); *see also* Arizona v. Gant, 556 U.S. 332, 350 (2009) (recognizing that the doctrine of qualified immunity can shield officers form liability).

[76] *See, e.g.*, ALA. CODE § 13A-3-23 (2012); ALASKA STAT. ANN. § 09.65.330 (West 2012); GA. CODE ANN. § 16-3-24.2 (West 2012); IDAHO CODE ANN. § 6-808 (West 2012); KAN. STAT. ANN. § 21-5231 (West 2012); KY. REV. STAT. ANN. § 503.085 (West 2012); LA. REV. STAT. ANN. § 9:2800.19 (2006); MICH. COMP. LAWS ANN. § 600.2922b (West 2012); MISS. CODE. ANN. § 97-3-15(5)(b) (West 2012); MO. ANN. STAT. § 563.074 (West 2012); N.H. REV. STAT. ANN. § 627:1-a (2012); N.C. GEN. STAT. ANN. § 14-51.2(e) (West 2012); N.D. CENT. CODE ANN. § 12.1-05-07.2 (West 2011); OHIO REV. CODE ANN. § 2307.60(2)(B)(c) (West 2011); OKLA. STAT. ANN. tit. 21, § 1289.25 (West 2012); 42 PA. CONS. STAT. ANN. § 8340.2 (West 2012); S.C. CODE ANN. § 16-11-450 (2006); TENN. CODE ANN. § 39-11-622 (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (West 2012); W. VA. CODE ANN. § 55-7-22(d) (West 2012); WIS. STAT. ANN. § 895.62(2) (West 2012); WYO. STAT. ANN. § 6-1-204 (West 2012).

[77] Qualified immunity, for example, is intended to operate before the merits of the case are reached. Harlow v. Fitzgerald, 457 U.S. 803, 818 (1982) (acknowledging that the purpose of qualified immunity is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment"). Affirmative defenses, by contrast, are generally used to justify or excuse certain conduct. *See supra* text accompanying notes 40–44.

[78] People v. Pickering, 276 P.3d 553, 556 (Colo. 2011).

[79] Maia R. Albrecht, Comment, *Defining Qualified Immunity: When is the Law "Clearly Established?",* 40 WASHBURN L.J. 311, 318 (2001).

[80] *See* Harlow v. Fitzgerald, 451 U.S. 800, 818 (1982).

as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[81] The doctrine exists to balance the public's desire to hold officials accountable for their actions and the officials' desire to be shielded from liability when they perform their duties in a reasonable manner.[82] Qualified immunity acts as immunity from suit, not a defense to liability.[83]

Though immunity provisions contained in, or related to, self-defense laws are relatively new, they are not a completely novel concept. Prior to the outbreak of "Stand Your Ground" legislation featuring immunity provisions or statutes in 2005, a Colorado statute similarly granted immunity to persons defending their home.[84] Enacted in 1985, Colorado statute section 18-1-704.5 provides immunity from both civil and criminal prosecution to those utilizing force, including deadly force, in the face of an unlawful intruder.[85] The statute's purpose, as evident in its text, is to recognize the citizens' "right to expect absolute safety within their own homes."[86] This justification bears striking similarity to that for the Castle Doctrine.[87] The Supreme Court of Colorado clarified, however, that this immunity was provided only when there is a known unlawful entry into the home.[88] This requirement for unlawful entry makes the Colorado statute slightly more restrictive than the Castle Doctrine which provides a defense for the use of force in one's home qualified only by the requirement that the individual is not the initial aggressor.[89]

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[81] *See id.*
[82] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009).
[83] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).
[84] COLO. REV. STAT. ANN. § 18-1-704.5 (West 2012).
[85] *Id.*
[86] *Id.*
[87] *See supra* text accompanying notes 55–62.
[88] People v. McNeese, 892 P.2d 304, 313 (Colo. 1995).
[89] *See, e.g.*, MODEL PENAL CODE § 3.04(2)(b)(ii)(1) (Official Draft 1985).

In 1987, the Colorado Supreme Court found that the language of the statute provided for more than just an affirmative defense to liability.[90] The court held that the statute created the need for a pretrial determination of a defendant's immunity from prosecution.[91] In rendering their decision, the court looked at both the plain language of the statute, as well as the definition of immunity provided by Black's Law Dictionary, and determined that the statute rendered any proceeding against an immune party improper.[92] Procedurally, this required a pre-trial hearing at which the defendant was required to prove, by a preponderance of the evidence, that he or she was entitled to immunity under the statute.[93] The pre-trial hearing was to be held contemporaneous with, or immediately following, the preliminary hearing.[94] Specifically, this required the defendant to prove:

> (1) Another person made an unlawful entry into the defendant's dwelling; (2) the defendant had a reasonable belief that such other person had committed a crime in the dwelling in addition to the unvented entry, or was commiting [sic] or [intending] to commit a crime against a person or property in addition to the unvented entry; (3) the defendant reasonably believed that such other person might use physical force, no matter [how] slight, against any occupant of the dwelling; (4) the defendant used force against the person who actually made the unlawful entry into the dwelling.[95]

[90] People v. Guenther, 740 P.2d 971, 978 (Colo. 1987).
[91] *See id.*
[92] *Id.* at 975
[93] *Id.* at 978.
[94] *Id.*at 979 n.5.
[95] *Guenther*, 740 P.2d at 981; *see also* Robert Christian Rutledge, *Vigilant or Vigilante? Procedure and Rationale for Immunity in Defense of Habitation and Defense of Property Under the Official Code of Georgia Annotated §§ 16-3-23, -24, -24.1, and-24.2*, 59 MERCER L. REV. 629, 652 (2008).

A defendant availing themselves to the pre-trial immunity proceeding is not later precluded from the assertion of self-defense as an affirmative defense at trial.[96] Further, the decision by the court at the pre-trial is not considered a "final decision" subject to later appeal.[97]

While the Colorado courts interpreted their statute to provide for a pretrial determination of immunity, other courts interpreting similar language prior to 2005 declined to find the creation of an independent grant of immunity.[98] Like Justice Holmes use of "immunity" in the *Brown* decision,[99] other states have interpreted their statutes to provide for nothing more than the traditional affirmative defense.[100] In Indiana, for example, the self-defense statute provided that no person would be placed in *legal jeopardy* for "protecting himself or his family by reasonable means necessary"[101] The Indiana Supreme Court rejected the contention that this statute required a pretrial hearing to evaluate the legitimacy of a self-defense claim before subjecting a person to the "legal jeopardy" of a trial, holding instead that the language was a mere reflection of public policy of the state.[102] Similarly, in Arizona, a statute originally enacted in 1970 stated, "[n]o person in this state shall be subject to civil liability for engaging in conduct otherwise justified pursuant to the provisions of this chapter."[103] The statute was challenged in *Pfeil v. Smith*, in which the defendant argued that her acquittal for justified conduct in a criminal charge was sufficient, under section 13-413 of the Arizona Code, to acquit her of subsequent civil

[96] *See* Wood v. People, 255 P.3d 1136, 1141 (Colo. 2011); Montanez v. State, 24 So.3d 799, 801 n.2 (Fla. Dist. Ct. App. 2010 (noting that defendant would still be permitted to assert self-defense even though he was denied immunity).
[97] *Id.*
[98] *See, e.g.*, Loza v. State, 325 N.E.2d 173, 176 (Ind. 1975); Pfeil v. Smith, 900 P.2d 12, 14 (Ariz. Ct. App. 1995).
[99] *See supra* text accompanying notes 69–71.
[100] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-413 (2012).
[101] *See* Loza v. State, 325 N.E.2d 173, 176 (Ind. 1975).
[102] *Id.* The statute at issue in *Loza* has since been amended; however, the new legislation contains similar language. *See* IND. CODE ANN. § 35-41-3-2(c) (West 2012) ("No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.").
[103] ARIZ. REV. STAT. ANN. § 13-413 (2012).

charges filed.[104] The court, however, held that the statute did nothing more than to allow a person to assert the affirmative defense of self-defense in a civil case.[105]

## III. The Change in Self-Defense and the Addition of Immunity

### A. Florida: Where it all began

The movement towards broader self-defense legislation and immunity provisions began in Florida in 2005.[106] Conceived of by former National Rifle Association (NRA) President Marion P. Hammer, Florida's Protection of Persons Bill passed unanimously in the Senate and by overwhelming majority in the House of Representatives.[107] It was promptly signed into law by Governor Jeb Bush on April 26, 2005[108] and became effective October 1, 2005.[109] Prior to 2005, self-defense law in Florida combined statutory and common law and encompassed a duty to retreat.[110] Florida's self-defense statute 776.012 permitted the use of force if the defendant reasonably believed they faced imminent death or great bodily harm.[111] Criminal prosecution prior to the new legislation permitted a person charged with a crime involving force, including homicide, to raise an affirmative defense of self-defense, but it did not provide for a pre-trial determination of that defense.[112] A prima facie case of self-defense under the old self-defense statute consisted of: (1) a reasonable belief (2) that deadly force was necessary to prevent imminent death (3) to himself or herself (4) or another (5) or to prevent the imminent

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[104] Pfeil v. Smith, 900 P.2d 12, 14 (Ariz. Ct. App. 1995).
[105] *Id.* at 15.
[106] Ross, *supra* note 10, at 18.
[107] *See* Daniel Michael, *Recent Development: Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 199; Manuel Roig-Franzia, *Florida Gun Law to Expand Leeway for Self-Defense*, WASH. POST, Apr. 26, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/04/25/AR2005042501553.html.
[108] Zachary Weaver, Note, *"Stand Your Ground" Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 395.
[109] *See* Michael, *supra* note 107, at 200.
[110] Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999).
[111] Hernandez v. State, 842 So. 2d 1049, 1051 (Fla. Dist. Ct. App. 4th Dist. 2003) ("Section 776.012, Florida Statutes (1997), permits the use of deadly force against another, 'only if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.' Whether a person was justified in using deadly force is a question of fact for the jury to decide if the facts are disputed.").
[112] *See generally Weiand*, 732 So. 2d at 1049 (articulating Florida self-defense law in 1999).

commission of a felony.[113] Once a defendant proved a prima facie case of self-defense, the burden shifted at trial to the state to prove, beyond a reasonable doubt, that the defendant did not act in self-defense.[114] The jury was left with the ultimate decision, to determine whether the defendant subjectively held a belief and whether such a belief was objectively reasonable.[115]

The 2005 "Stand Your Ground" law substantially amended Florida's pre-existing statutes by eliminating the duty to retreat,[116] establishing a presumption that force was used reasonably when faced with an unlawful intruder in the home or occupied vehicle,[117] and expanding the right of an individual to use force, including deadly force, without the possibility of criminal or civil consequences.[118] With respect to this last aspect, immunity, the law stated: "A person who uses force as permitted in § 776.012, § 776.013, or § 776.031 is justified in using such force and is immune from criminal prosecution and civil action . . . ."[119] It further defined the term criminal prosecution to include "arresting, detaining in custody, and charging or prosecuting the defendant."[120]

Most provocatively, the new law prohibits arrest until there is probable cause to support the belief that the use of force was unlawful.[121] In describing the dramatic change to self-defense law, the Florida Supreme Court in *Dennis v. State* stated:

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[113] FLA. STAT. ANN. § 776.012 (2004).
[114] Rasley v. State, 878 So. 2d 473, 476 (Fla. Dist. Ct. App. 2004).
[115] Quaggin v. State, 752 So.2d 19, 23 (Fla. Dist. Ct. App. 2000).
[116] *See* FLA. STAT. ANN. § 776.012 (West 2012).
[117] *See* FLA. STAT. ANN. § 776.013 (West 2012).
[118] FLA. STAT. ANN. § 776.032(1) (West 2012).
[119] *Id; see also id.* at § 776.012 (Use of force in defense of person); *Id.* at § 776.013 (Home protection; use of deadly force; presumption of fear of death or great bodily harm); *Id.* at § 776.031 (Use of force in defense of others).
[120] FLA. STAT. ANN. § 776.032 (West 2012).
[121] FLA STAT. ANN. § 776.032(2) (West 2012) ("A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used is unlawful). Thus, ruling out self-defense becomes part of the statutory requirement for a law enforcement officer to sign a complaint. *See* Bartlett v. State, 993 So. 2d 157, 159–60 (Fla. Dist. Ct. App. 2009).

> While Florida law has long recognized that a defendant may argue as an affirmative defense at trial that his or her use of force was legally justified, section 776.032 contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial . . . The statute does not merely provide that a defendant cannot be convicted as a result of legally justified force.[122]

The Florida legislature was the first to pass a comprehensive update of its self-defense law pursuant to NRA lobbying, but they were most certainly not the last.[123]

B. The Followers

Due to the success of the legislation in Florida, the NRA increased its efforts to have similar legislation passed across the country.[124] Since 2005, more than half of the states have enacted or considered similar legislation to Florida.[125] This Comment specifically focuses on those containing provisions granting the accused immunity from civil and/or criminal liability for justified use of force.

1. Criminal and Civil Immunity: Florida and its Followers

At least five states have enacted statutes which include immunity provisions having the same language as Florida, including: Alabama, Oklahoma, Kansas, Kentucky, and South Carolina.[126] North Carolina enacted a statute containing substantially similar language to Florida's legislation; however, it does not contain a section specifically prohibiting an officer

[122] Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010).
[123] Ross, *supra* note 10, at 16–17.
[124] Michelle Jaffe, *Up in Arms Over Florida's New "Stand Your Ground" Law*, 30 NOVA L. REV. 155, 178 (2005–2006) ("Because the law passed in Florida so emphatically, the NRA plans to ride their 'big tailwind' and get similar laws passed across the nation."). NRA Executive Vice President Wayne LaPierre stated that this was the "first step of a multi-state strategy." Roig-Franzia, *supra* note 107, at A1. He stated further, "We start with the red and move to the blue." Michelle Cottle, *Shoot First, Regret Legislation Later*, TIME, May 2005, at 80, *available at* http://www.time.com/time/magazine/article/0,9171,1056283-1,00.html.
[125] *See* Ross, *supra* note 10, at 2.
[126] *See* ALA. CODE § 13A-3-23(d)-(e) (2012); KAN. STAT. ANN. § 21-5231 (West 2012); KY. REV. STAT. ANN. § 503.085 (West 2012); N.C. GEN. STAT. ANN. § 14-51.2(e) (West 2011); OKLA. STAT. ANN. tit. 21, § 1289.25 (West 2012); S.C. CODE ANN. § 16-11-450 (2006).

from arresting an individual without probable cause that the force used was unlawful.[127] These statutes broadly immunize a defendant from both criminal and civil liability.[128] Other states have adopted statutes with different language, though their effects will likely be similar.[129] For example, the statute enacted in Georgia provides that a person "shall be immune from criminal prosecution" for lawful use of force, but it does not provide the same immunity from civil liability.[130]

Not all of these statutes have been interpreted by their respective state courts; however, the supreme courts of at least three states have acknowledged that the statute provides for a pre-trial immunity hearing.[131] For example, the Florida Supreme Court in *Dennis v. State* held that the "plain language of section 776.032 grants defendants a substantive right to assert immunity from prosecution and to avoid being subjected to a trial."[132] This right, though similar to the pretrial immunity determination granted to residents of Colorado,[133] is potentially more encompassing as it applies to self-defense claims as well as defenses of habitation.[134] This pre-trial determination grants immunity to a defendant that is substantially similar to that provided public officials because it reflects the notion that any further procedure against an "immune" party would be improper.[135] Interestingly, Kansas has addressed the state's immunity provision under a petition for writ of habeas corpus.[136] In *McCracken v. Kohl*, the defendant alleged that

[127] N.C. GEN. STAT. § 14-51.2(e) (2011).,
[128] *See, e.g.*, ALA. CODE § 13A-3-23(d)-(e) (2012); KAN. STAT. ANN. § 21-5231 (West 2012); KY. REV. STAT. ANN. § 503.085 (West 2012); OKLA. STAT. ANN. tit. 21, § 1289.25 (West 2012).
[129] *See* ALASKA STAT. ANN. § 09.65.330 (West 2012) (stating that a person is "not liable for the death of or injury to" a person against whom they have utilized lawful force); GA. CODE ANN. § 16-3-24.2 (West 2012) (immunizing a defendant from criminal prosecution for force used in self-defense and defense of habitation).
[130] *See* GA. CODE ANN. § 16-3-24.2 (West 2012).
[131] *See* Fair v. State, 664 S.E.2d 227, 230 (Ga. 2008); Rodgers v. Commonwealth, 285 S.W.3d 740, 755 (Ky. 2009); Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010).
[132] *Dennis*, 51 So.3d at 462.
[133] *See supra* text accompanying notes 90–97.
[134] *See* FLA. STAT. ANN. § 776.032 (West 2012).
[135] *See supra* text accompanying notes 74–83.
[136] McCracken v. Kohl, 191 P.3d 313, 313 (Kan. 2008)

he was immune from the underlying battery prosecution and, thus, was unlawfully detained.[137] Though the court rejected the defendant's argument, finding that his use of force was unjustified, the defendant's argument furthers the notion that this new construct of immunity is one more akin to a defense to suit than a defense of liability.[138]

C. Civil Immunity

Since 2005, approximately thirteen states have enacted statutes providing for civil immunity for those who utilize force lawfully.[139] Though the language of these statutes is not entirely consistent, most of these statutes exist as stand-alone grants of immunity from civil action.[140] Idaho, for example, entitles their statute section 6-808 "Civil immunity for self-defense."[141] Similarly, Tennessee entitles their statute "Use of force; civil immunity; costs and fees."[142] Texas entitles their section 83.001 simply "Civil Immunity."[143] These titles seem to reflect the notion that they provide some form of immunity greater than the affirmative defense traditionally offered defendants faced with claims of civil liability. Unfortunately, judicial interpretation of the function of these statutes is limited. Although it seems safe to assume that they function to prevent the assertion of claims against a defendant justified in his/her use of

[137] *Id.*
[138] *Id.* at 319–20; *see also supra* text accompanying notes 74–83.
[139] IDAHO CODE ANN. § 6-808 (West 2012); LA. REV. STAT. ANN. § 9:2800.19 (2012); MICH. COMP. LAWS ANN. § 600.2922b (West 2012); MISS. CODE ANN. § 97-3-15(5)(b) (West 2012); MO. ANN. STAT. § 563.074 (West 2012); N.H. REV. STAT. ANN. § 627:1-a (2012); N.D. CENT. CODE § 12.1-05-07.2 (West 2011); OHIO REV. CODE ANN. § 2307.60(2)(B)(c) (West 2011); 42 PA. CONS. STAT. ANN. § 8340.2 (West 2012); TENN. CODE. ANN. § 39-11-622 (West 2012); TEX. CIV. PRAC. & REM. CODE. ANN. § 83.001 (West 2012); W. VA. CODE ANN. § 55-7-22(d) (West 2012); WIS. STAT. ANN. § 895.62(2) (West 2012); WYO. STAT. ANN. § 6-1-204 (West 2012). At the time of this writing, proposed legislation in New Hampshire seeks to remove the civil immunity provision from the state statute. H.B. 135, 163rd Leg., Sess. of the General Court (N.H. 2013).
[140] *See, e.g.*, IDAHO CODE ANN. § 6-808 (West 2012); TENN. CODE ANN. § 39-11-622 (West 2012); TEX. CIV. PRAC. & REM. CODE. ANN. § 83.001 (West 2012).
[141] IDAHO CODE ANN. § 6-808 (West 2012).
[142] TENN. CODE ANN. § 39-11-622 (West 2012).
[143] TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (West 2012).

force the same way that immunity in the criminal setting protects a defendant from arrest, detention, charging, and prosecution[144] this has yet to be conclusively decided by the courts.

## IV. Problematic Aspects of Immunity in the Criminal Context

The states providing for immunity from criminal prosecution generally include arresting, detaining, charging, and prosecuting in the definition of prosecution.[145] Such a broad definition necessarily implicates the actions of government actors in all phases of the criminal justice process. This section examines the problematic aspects of the law with respect to each aspect of the "prosecution" from which a person becomes immune if they use force lawfully.

### A. Problems for Law Enforcement

The Florida statute, and those similar, includes "arrest" and "detaining in custody" in the definition of prosecution from which a defendant is immune.[146] The statutes go further to specifically prohibit law enforcement from initiating an arrest until probable cause is established that force was not used lawfully, i.e. in self-defense, defense of others, or defense of home.[147] While probable cause is the constitutional standard by which police effectuate a lawful arrest,[148] the law now requires that law enforcement obtain not only probable cause that a crime has occurred, but probable cause that refutes the person's probable affirmative defense.[149] Therefore, a law enforcement officer, in the earliest stages of criminal prosecution, is tasked with

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[144] *See* FLA. STAT. ANN. § 776.032(1).
[145] *Id.*
[146] FLA. STAT. ANN. § 776.032(1) (West 2012). The Oklahoma statute, however, includes only charging and prosecuting in the definition of "criminal prosecution." OKLA. STAT. ANN. tit. 21 § 1289.25F (West 2012). Interestingly, it does include the same requirement that a law enforcement agency refrain from arrest until it determines that probable cause exists to prove the force used was unlawful. *See id.* at § 1289.25G.
[147] FLA. STAT. ANN. § 776.032(2) (West 2012).
[148] *See* U.S. CONST. amend. IV (requiring that "no Warrants shall issue, but upon probable cause"); Beck v. Ohio, 379 U.S. 89, 91 (1964) (stating that, in the absence of a search warrant, "whether [an] arrest [is] constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officer[] had probable cause to make it").
[149] FLA. STAT. ANN. § 776.032 (West 2012) (Immunity from criminal prosecution and civil action for justifiable use of force). *See also* FLA. STAT. ANN. § 776.012 (West 2012) (use of force in defense of person).

evaluating the affirmative defense of the accused on scene if they desire to arrest the individual.[150]

1. The Potential for Inconsistency and Abuse

Due to the lack of legislative clarity regarding the application of the immunity statute, there is a great potential for inconsistent application of, and possible abuse of, this statute by law enforcement.[151] Notably, the law received significant opposition from the law enforcement community prior to its original passage in Florida.[152] Several urban police chiefs spoke out against the law calling it "unnecessary and dangerous" and publicly opposing its passage.[153]

With respect to its application, no statute provides clear instructions as to the required procedures. Section two of the Florida self-defense law,[154] for example, permits law enforcement to use "standard investigative procedures" to determine the existence of probable cause;[155] however, it does not clearly establish what those procedures entail for law enforcement agencies across the state.[156] The Eleventh Circuit in *Reagan v. Mallory* recognized this lack of clarity stating, "[u]nder Florida law, law enforcement officers have a duty to assess the validity of this defense, but they are provided minimal, if any, guidance on how to make this

[150] *See* Elizabeth B. Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to "Get Away with Murder,"* 34 AM. J. TRIAL ADVOC. 105, 130 (2010).
[151] *Id.* at 119.
[152] *See* Abby Goodnough, *Florida Expands Right to Use Deadly Force in Self-Defense*, N.Y. TIMES, Apr. 27, 2005, at A18, *available at*, http://www.nytimes.com/2005/04/27/national/27shoot.html?_r=0.
[153] *Id.*
[154] FLA STAT. § 776.032(2) (West 2012). In the Alabama, Oklahoma, Kansas, Kentucky, and South Carolina statutes this same language is reflected in the following subsections: ALA. CODE § 13A-3-23(e) (2012); OKLA. STAT. ANN. tit. 21, § 1289.25G (West 2012); KAN. STAT. ANN. § 21-5231(b) (West 2012); KY. REV. STAT. ANN. § 503.085(2) (West 2012); S.C. CODE ANN. § 16-11-450(B) (West 2006).
[155] FLA STAT. ANN. § 776.032(2) (West 2012).
[156] FLA STAT. ANN. § 776.032(2) (West 2012).; *see also* Patricia Wallace, *Stand Your Ground: New Challenges for Forensic Psychologists,* 2006 THE FORENSIC EXAMINER 37, 39 (noting that law enforcement agencies are trained to handle crime scenes but not necessarily trained to evaluate reasonableness with respect to reasonable use of force and deadly force).

assessment."[157] While it may be true that law enforcement agencies receive training in arrest procedures, the statute now requires them to evaluate more than just the existence of a crime.[158] They are charged with both understanding the self-defense law *and* evaluating whether there is probable cause to believe that such a defense would fail.[159] Law enforcement officers are not trained in this type of legal analysis.[160]

Complicating the decision further is the requirement that the officer prove a negative.[161] The statute requires that police officers ascertain probable cause that "the force that was used is unlawful."[162] Therefore, not only must an officer have an understanding of the reasonableness and proportionality requirements that render use of force "unlawful" but they must have evidence supporting the *absence* of lawful use of force before they arrest. Without probable cause proving that negative, law enforcement is prohibited from arresting.[163]

Inconsistency is already evidenced by the incongruent treatment of factually similar cases in the state of Florida. While there is no relevant tracking system of law enforcement decision-making in self-defense cases,[164] much of the information demonstrating the effects of immunity from arrest can be deduced from the media. Incidents that took place after the enactment of the

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[157] Reagan v. Mallory, 429 Fed. App'x 918, 920 (11th Cir. 2011). The circuit court reversed the district court finding that a reasonable officer could not have thought there was probable cause to establish a crime of aggravated assault and granted the officer qualified immunity. *Id.* at 922.
[158] *See* FLA STAT. ANN. § 776.032(2) (West 2012); *see also* Wallace, *supra* note 156, at 39.
[159] *See* FLA STAT. ANN. § 776.032 (West 2012).
[160] STEVEN JANSEN & M. ELAINE NUGENT-BORAKOVE, EXPANSIONS TO THE CASTLE DOCTRINE: IMPLICATIONS FOR POLICY AND PRACTICE 9 (2007), *available at* http://www.ndaa.org/pdf/Castle%20Doctrine.pdf (noting that the attitude of a law enforcement officer might affect their performance).
[161] *See id.*; Weaver, *supra* note 108, at 419.
[162] *See* FLA STAT. ANN. § 776.032 (West 2012).
[163] *Id*. at § 776.032(2). In Alabama, this prohibition led to a claim of false imprisonment against a law enforcement officer who detained a man alleging that he utilized force in self-defense. Skinner v. Bevans, No. 2110147, 2012 WL 6634422, at *6 (Ala. Civ. App. Dec. 21, 2012). The court assumed the defendant's arrest to have "been the result of an investigation that determined there was probable cause to believe" that the force used was unlawful. *Id.*
[164] Lydia Zbrzenj, Note, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 F. COASTAL. L. REV. 231, 262 (2012). The State of Florida seems to acknowledge the absence of this data. Florida proposed legislation that would require that law enforcement officers "collect, process, maintain, and disseminate information and data on all incidents concerning the alleged justifiable use of force" in the state; the bill died in the Senate in May of 2013. H.B. 331, 115th Leg., Regular Sess. (Fla. 2013).

"Stand Your Ground" law, provide some insight as to the impact of placing an immunity decision on law enforcement. The case that has gained the most significant media attention is the aforementioned Trayvon Martin case. Seventeen-year old Trayvon Martin was fatally shot while returning from the neighborhood convenience store.[165] Martin was unarmed.[166] George Zimmerman, a neighborhood watch leader, stated that he shot the boy in self-defense, and he was not immediately arrested.[167] The local police chief reported that the delayed arrest was a result of the absence of probable cause to believe that Zimmerman had used the force unlawfully under the Florida law.[168]

Comparing Zimmerman's situation to the plight of Jimmy Ray Hair demonstrates the consequences of inconsistent application of the law.[169] In *Hair v. State*, Hair and the victim, Charles Harper, were engaged in a verbal argument at a nightclub.[170] As in the Trayvon Martin case, and many self-defense cases for that matter, the facts that follow are somewhat disputed.[171] Hair asserted that Harper reached into the vehicle, and the two began to struggle.[172] Hair then pulled out his gun and fired a shot at Harper.[173] The police not only arrested Harper, but he sat for two years in jail awaiting a trial on a charge of first degree murder before eventually being granted immunity under Florida statute 776.032.[174]

This lack of clarity could even lead to abuse, whether intentional or unintentional, by law enforcement.[175] Officers draw their own subjective conclusions from a situation. If, for

[165] Dahl, *supra* note 1.
[166] *Id.*
[167] *Timeline*, *supra* note 2.
[168] Dahl, *supra* note 1.
[169] *See*, *e.g.*, Hair v. State, 17 So. 3d 804, 804 (Fla. Dist. Ct. App. 2009).
[170] *Id.* at 806.
[171] *Id.* at 805; *see also* Megale, *supra* note 150, at 105.
[172] *Hair*, 17 So. 3d at 805.
[173] *Id.*
[174] Megale, *supra* note 150, at 105.
[175] *See id.*

example, an officer feels that the individual "victim" in an altercation where the Castle Doctrine or self-defense is invoked "deserved" what was coming to him, the officer may decline to arrest or to thoroughly investigate the incident.[176] Normally, an officer would be required to arrest if probable cause exists that the crime occurred, regardless of their subjective assessment of the situation, and the existence of a victim would likely permit them to effectuate that arrest.[177] With immunity, however, a single officer has the ability to decline to arrest, and this decision could potentially be influenced by his or her own subjective assessment of the situation.[178] By contrast, if the issue of self-defense were to reach trial, the persuasiveness of the perpetrators claim of self-defense would be assessed by a jury[179] comprised of a cross-section of the community.[180] Thus, permitting a *single* officer to render a decision regarding a potential defendant's immunity detracts from the benefits of both the multiplicity and the diversity of the decision-maker that is embodied in jury trials.[181]

This possibility for abuse is highlighted in a story reported in Clearwater, Florida.[182] Kenneth Allen, a retired police officer, and his neighbor, Jason Rosenbloom argued on prior

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[176] *See id.*

[177] *See* Devenpeck v. Alford, 543 U.S. 146, 152 (2004) ("[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed."); United States v. Watson, 423 U.S. 411, 418 (1976); Brinegar v. United States, 338 U.S. 160, 175 (1949).

[178] Trish Oberweis & Michael Musheno, *Policing Identities: Cop Decision-Making and the Constitution of Citizens*, 24 LAW & SOC. INQUIRY 897, 903 (1999) ("In viewing police stories from the perspective of identity, we suggest that what police think ought to be done and what they do in particular situations depends, in part, on who is involved.").

[179] This assumes the right is not waived and that the crime at issue is of sufficient gravity to trigger the right. *See* Stephan A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373, 376 (2012) (describing the exceptions to the constitutional requirement for a trial by jury in criminal cases).

[180] Taylor v. Louisiana, 419 U.S. 522, 528 (1975) ("Selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial.")

[181] *Id*. at 530 ("purpose of a jury is to guard against the exercise of arbitrary power"); Williams v. Florida, 399 U.S. 78, 100 (1970) (noting that the "essential feature of a jury obviously lies . . . in the community participation and shared responsibility that results from that group's determination of guilt or innocence"); Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[182] Ashlee Clark, *Neighbor: Shooting in Defense of Himself*, TAMPA BAY TIMES (Jun. 7, 2006), http://www.sptimes.com/2006/06/07/Northpinellas/Neighbor__Shooting_in.shtml.

occasions due to Rosenbloom's failure to follow local codes.[183] On the day of the incident, Allen heard loud music coming from Rosenbloom's house,[184] Rosenbloom came to his door and began threatening to make Allen's life miserable.[185] Allen closed the door and got a pistol from nearby.[186] Rosenbloom refused to leave and began to rush into the house.[187] Allen fired a shot.[188] Police never arrested Allen who claimed that he was trying to stop a potential "home invasion," and to "keep his house safe."[189] Among the possible foundations for the decision not to arrest may be the fact Allen was a retired police officer. This type of inconsistency and abuse is severely problematic.

2. Law Enforcement as the Prosecutor, Judge, and Jury

In granting immunity from arrest and detention, Florida statute section 776.032, and those with similar language, make law enforcement personnel the initial arbiter in deciding whether a person is exercising a valid self-defense claim.[190] If a prosecutor decides not to pursue the cases in which police decline to investigate, law enforcement officers become the ultimate decision-makers regarding whether or not a case is adjudicated.[191] This effectively removes the determination of the perpetrator's innocence or guilt from the court.[192] This was recognized by the Eleventh Circuit in *Reagan v. Mallory,* evaluating Florida's self-defense law.[193] The court stated that by defining criminal prosecution so broadly, the statute "allows for an immunity

[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] Clark, *supra* note 182.
[188] *Id.*
[189] *Id.*
[190] *See* FLA. STAT. ANN. § 776.032 (West 2012); *see also* Megale, *supra* note 150, at 118–20.
[191] *See* Megale, *supra* note 150, at 118–20.
[192] *See id.*
[193] Reagan v. Mallory, 429 Fed. App'x 918 (11th Cir. 2011).

determination at any stage of the proceeding."[194] Therefore, a decision by law enforcement at the earliest stage of the proceedings bars potentially meritorious claims from evaluation by an objective judge or jury.

Most concerning is the fact that law enforcement must make this decision without the benefit of the same extent of evidence normally presented to the trier of fact. In many of the situations in which law enforcement officers must now apply the standard, all of the necessary evidence is in the hands of the defendant.[195] In the Trayvon Martin case, for example, the victim against whom the force was used was no longer available to give his account of the altercation.[196] The only remaining evidence with which law enforcement could establish probable cause would need to come from the very person asserting the defense, Zimmerman. It is highly unlikely that Zimmerman would say or do anything to undermine his own asserted self-defense, and his Fifth Amendment protection against self-incrimination would allow him to remain silent.[197] Therefore, arrest needed to wait. In fact, Zimmerman's assertion of self-defense was enough to prevent the police from arresting him for several months.[198] Even if witnesses were available to deliver their interpretation of the altercation, the police would then be required to assess the reliability of an individual's testimony or recounting of the events, a role typically left to the jury or the trier of fact.[199]

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[194] *Id.*
[195] *Id.*
[196] *See supra* text accompanying notes 2–4.
[197] *See* B. Michael Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 S. CAL. L. REV. 597, 597 (1970) (noting that the Fifth Amendment prohibits compelling a defendant to act as a witness against himself).
[198] Though the incident occurred in February of 2012, Zimmerman was not charged with a crime until April of that year. *Timeline*, *supra* note 2; *see also* text accompanying notes 1–8.
[199] *See* Elaine D. Ingulli, *Trial by Jury: Reflections on Witness Credibility, Expert Testimony, and Recantation*, 20 VAL. U. L. REV. 145, 145 (1986) (acknowledging that in a trial by jury, the jury is the sole judge of witness credibility).

Further, during the time between the incident and the arrest, assuming the two are not contemporaneous because the police cannot establish the requisite probable cause, the defendant would be permitted to live amongst the general population.[200] This seems contrary to the purported goal of the legislation to allow "*law-abiding* people to protect themselves."[201] This potentially places a law-breaking citizen in the position to threaten the life or body of another law-abiding citizen. It also provides the defendant with an opportunity for escape. The purpose of arrest, and subsequent detention, of an individual, is not only to prevent harm to the community, but to assure that they are made available for later proceedings.[202] The possibility for escape is exemplified in the Trayvon Martin case. George Zimmeman's whereabouts in the weeks following the incident were reportedly unknown.[203] The attorney representing Martin's parents expressed concern that even if the State of Florida decided to file charges against Zimmerman, he would be unavailable to face them.[204] He stated, "[w]e're concerned that he might be a flight risk, that nobody knows where he's at."[205] While police indicated that they were in contact with Zimmerman, there was speculation that Zimmerman had left the jurisdiction

[200] *See* FLA STAT. ANN. § 776.032(2) (West 2012).
[201] *See* Dennis v. State, 51 So.3d 456, 462 (Fla. 2010) (emphasis added).
[202] *See* 18 U.S.C. § 3141(e) (2008) (permitting a judicial officer to release a defendant on bail "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.").
[203] Peter Grier, *Suddenly Missing George Zimmerman Appears to Have Fled Florida*, ALASKA DISPATCH (Apr. 11, 2012), http://www.alaskadispatch.com/print/article/suddenly-missing-george-zimmerman-appears-have-fled-florida; *Where is George Zimmerman?*, CBSNEWS (Apr. 11, 2012), http://www.cbsnews.com/8301-505263_162-57412307/where-is-george-zimmerman-/ [hereinafter *Where is George Zimmerman?*].
[204] Grier, *supra* note 203.
[205] *Id.*

of Florida.[206] Zimmerman was eventually charged and taken into custody on April 11, 2012, and he was ultimately acquitted on July 13, 2013.[207]

B. Problems for Prosecutors and Judges

The states granting immunity in the criminal context not only provide immunization from arrest but also from charging and prosecution.[208] This necessarily implicates and alters the role of prosecutors and judges in the criminal justice process.[209] Because prosecutorial decisions are not subject to review by the court, however, it would be difficult to identify precisely how a defendant's assertion of self-defense affected prosecutorial decision-making prior to the enactment of such legislation.[210] After its enactment, one prosecutor stated that "the real impact [of the law] has been that it's making filing decisions for prosecutors. It's causing cases to not be filed at all or to be filed with reduced charges."[211] While this statement is difficult to substantiate because statistics on the number of self-defense claims made are unavailable,[212] it demonstrates at the very least that some prosecutors are concerned with the law's effect on charging decisions. In Duval County, Florida, the State Attorney indicates that the law has influenced the office's decision to charge or reduce charges in a handful of cases.[213] Specifically, he cited his office's decision not to charge electronics store owner Doug Freeman in

[206] *Where is George Zimmerman?*, *supra* note 203. Notably, Zimmerman's attorneys had discontinued representation "in large part because he was hiding and had stopped responding to their calls." Grier, *supra* note 203. Though his former attorneys indicated that they did not believe that Zimmerman intended to flee the country, they had no knowledge of his actual whereabouts. *Id.*
[207] Matt Gutman, Candace Smith, & Pierre Thomas, *George Zimmerman Charged with 2nd Degree Murder in Trayvon Martin's Death*, ABCWorldNews (Apr. 11, 2012), http://abcnews.go.com/US/george-zimmerman-charged-murder-trayvon-martin-killing/story?id=16115469; Alvarez & Buckley, *supra* note 2.
[208] *See, e.g.*, FLA. STAT. ANN. § 776.032(1) (West 2012).
[209] *See* Weaver, *supra* note 108, at 406–07.
[210] *See* William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1327 (1993).
[211] J. Taylor Rushing, *Deadly-Force Law Has an Effect, but Florida Hasn't Become the Wild West*, FLA. TIMES-UNION, July 10, 2006, *available at* http://jacksonville.com/tu-online/stories/071006/met_22294481.shtml.
[212] Weaver, *supra* note 108, at 407.
[213] *See id.*

the shooting of an unarmed man, Vince Hudson, in May of 2006.[214] State Attorney Harry Shorstein, though publicly siding with the wounded individual, declined to prosecute stating that he did not believe he could get a conviction.[215] Similarly, Florida State Attorney Andy Slater cited the "Stand Your Ground" law, as well as conflicting witness testimony, as the reasons he offered a defendant that stabbed a man at a party a particular plea agreement.[216]

With the imposition of pre-trial hearings on immunity, judges are also given an additional task in the criminal justice process. [217] For example, the Florida Supreme Court in *Dennis v. State* adopted the pretrial immunity procedure articulated by the First District Court of Appeals in *Peterson*.[218] The *Peterson* court largely followed the Colorado court in *People .v Guenther* and held that the defendant raising an immunity claim has the burden of establishing the factual prerequisites by a preponderance of the evidence.[219] Therefore, a judge hearing a case in which the defendant asserts immunity under the "Stand Your Ground" legislation must evaluate the defendant's immunity claim utilizing a preponderance of the evidence standard, prior to trial. These additional hearings also constitute an addition to the judge's caseload that would not otherwise exist in a jurisdiction in which a defendant is permitted to only assert an affirmative defense of self-defense.[220] By requiring additional hearings,[221] these legislative hearings may undermine judicial economy.

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[214] *See* Dana Treen, *Shorstein Sides with Man Shot in Store; He says he didn't think he could get a conviction against the shop owner who fired, thinking he was about to be robbed*, FLA. TIMES-UNION, Jun. 21, 2006, *available at http://jacksonville.com/tu-online/stories/062106/met_22160331.shtml.*
[215] *See id*.
[216] *See* Missy Diaz, *Teenager Takes Plea Deal in Stabbing Case*, FLA. SUN-SENTINEL, Sept. 29, 2007, at 1B, *available at* http://articles.sun-sentinel.com/2007-09-29/news/0709290006_1_plea-deal-slater-teenager.
[217] *See, e.g.*, Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010) (holding that § 776.032 entitles a defendant to a pretrial determination of immunity). It should be noted that not all "Stand Your Ground" statutes have thus far been interpreted to permit a pretrial determination of immunity.
[218] *Id.*
[219] Peterson v. State, 983 So. 2d 27, 29–30 (Fla. Dist. Ct. App. 2008).
[220] *Dennis*, 51 So. 3d at 462 (noting that Florida law not recognizes that a defendant may argue something more than affirmative defense).
[221] *See id.*

## V. The Problematic Aspects of Immunity in the Civil Context

An increasingly large number of states have established provisions to allow for a defendant's immunity from civil liability if force is used lawfully.[222] Though there is not yet substantial judicial interpretation, a careful analysis reveals a number of potential problems.

Specifically, the laws do not distinguish between liability for injury to the unlawful aggressor and liability for injury to a third party.[223] In fact, North Dakota is among the minority of these states that permits immunity from civil liability but recognizes an exception for "other persons . . . at risk of injury due to negligence or recklessness during use of force, then civil immunity would not apply to such third persons."[224] In statutes that do not carve out this particular exception, a person justified in utilizing force may not be held liable for injuries that result to a third-party.[225] Such a situation was exemplified in Miami-Dade County, Florida in 2006.[226] As a nine-year old girl sat outside her home playing with her dolls, she was shot in the crossfire between two men, both of whom asserted a claim of self-defense.[227] If both are successful in a claim of immunity, this eliminates any legal remedy, either civil or criminal, for the innocent girl.[228] Under the Florida statute, a deadly defense may be justified, even if it was executed negligently or recklessly.[229]

Though criminal and civil self-defense cases involving the same defendant are rare, the availability of a civil remedy has afforded some individuals or their families a remedy when the

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[222] *See supra* text accompanying notes 139–144.
[223] *See* JANSEN, *supra* note 175, at 7.
[224] N.D. CENT. CODE ANN. § 12.1-05-07.2 (West 2011).
[225] *See* JANSEN, *supra* note 175, at 6.
[226] *See id.*
[227] *Id.*
[228] *Id.*
[229] *Id.* At the time of this writing, Florida has proposed legislation providing that "immunity does not apply to injuries to children and bystanders who are not affiliated with an over act." H.B. 123, 115th Leg., Regular Sess. (Fla. 2013); *see also* S.B. 362, 115th Leg., Regular Sess. (Fla. 2013) (reflecting the same exclusion for children and bystanders).

criminal justice system did not.[230] Perhaps the most famous example of this is in the self-defense context is the case of Bernhard Goetz.[231] In *Goetz*, Bernhard Goetz boarded a subway train at Fourteenth Street in Manhattan and sat down in the same car as four youths.[232] In his possession was an unlicensed .38 caliber pistol.[233] One of the youths approached Goetz and stated "give me five dollars."[234] None of the juveniles displayed a weapon.[235] Goetz responded by firing four shots at each of the four boys.[236] One youth was struck in the chest, another in the back, the third in his left side, and the fourth was initially unscathed.[237] Goetz then turned to the fourth youth and stated, "you seem to be all right, here's another."[238] He fired a fifth bullet at the fourth youth, severing his spinal cord.[239] Goetz fled immediately following the incident.[240] However, nine days later Goetz surrendered himself to police.[241] Goetz was eventually indicted for attempted murder, assault, reckless endangerment, and criminal possession of a weapon.[242] Goetz argued that his actions were justified as self-defense.[243] New York self-defense law at the time of the incident provided that the use of force was justified when a person "believed deadly force was necessary to avert the imminent use of deadly force or the commission" of an enumerated felony and, if the District Attorney did not prove beyond a reasonable doubt that he

[230] *See Forell*, *supra* note 33, at 1406.
[231] *Id.* at 1407.
[232] People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).
[233] *Id.* at 43
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.* at 43, 44.
[238] *Goetz*, 497 N.E.2d at 44.
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.* at 45. There were a series of indictments and dismissals before these charges were solidified. *Id.*
[243] *Id.* at 46–47 (discussing New York self-defense law).

or she did not have such beliefs, the jury would determine if a reasonable person *could* have had such beliefs."[244]

On June 16, 1986, a jury acquitted Goetz of attempted murder, assault, and reckless endangerment.[245] He was convicted only of one count of illegal weapons possession, a relatively minor felony for which he could face a maximum of seven years confinement.[246] Despite this acquittal, Goetz was later subject to civil suit.[247] Darryl Cabey, the fourth youth who suffered from a severed spinal cord as a result of the shooting, filed a $50 million civil suit in the Bronx Supreme Court alleging that the shots taken at his back were made "deliberately, willfully, and with malice."[248] Cabey prevailed in this later civil suit in 1996, receiving a $43 million judgment in his favor.[249] With the enactment of provisions providing civil immunity, however, such civil suits may no longer be filed. This would result in the denial of a remedy to a person who might otherwise be granted damages.

## VI. Recommendations: The Need for Change or Clarification

The most effective avenue for change is to advocate for administrative change or amendments to the existing laws to promote uniformity and to reduce the problematic application highlighted in the previous sections.[250] The following details those recommendations.

### A. Florida Legislature Should Remove "Arrest" and "Detaining in Custody" from the Definition of Criminal Prosecution: Legislative Recommendation

[244] *Id.* at 52.
[245] LILLIAN B. RUBIN, QUIET RAGE: BERNIE GOETZ IN A TIME OF MADNESS 257 (1986). The media attention surrounding this event largely exalted Goetz as a hero who had thwarted a mugging. *Id.* at 7. Even before Goetz had turned himself in as the gunman, there was a media "love affair" with him. *Id.* at 9.
[246] *Id.* at 257. Goetz was ultimately sentenced to six months confinement, $5,000 fine, and five years of probation. *Id.* at 262.
[247] *See Forell*, *supra* note 33, at 1407.
[248] RUBIN, *supra* note 245, at 189.
[249] Jonathan Markowitz, *Bernhard Goetz and the Politics of Fear, in* VIOLENCE AND THE BODY: RACE, GENDER, AND THE STATE 209 (Arturo J. Aldama ed., 2003).
[250] *See supra* Part IV and V.

The legislature should remove the immunity decision from the purview of the law enforcement decision-making by eliminating "arrest" and "detaining in custody" from the definition of criminal prosecution in the statute. These are the areas in which the greatest potential implementation problems exist.[251] Overall, the calculation of reasonable force should not be within the scope and duties of law enforcement. Law enforcement training in arrest procedures does not provide the necessary foundation for the complex legal analysis associated with assessing an individual's unlawful use of force.[252] Further, placing this responsibility on the shoulders of law enforcement makes them the initial, and possibly final, decision-maker though they are not equipped with the same volume of evidence that may be available later in the prosecution. This aspect of the immunity provision also runs the risk of allowing the subjective beliefs of an officer to prevent the prosecution of a guilty party.

With these removed, criminal prosecution would include charging and prosecuting the defendant.[253] This would place the decision largely in the hand of the prosecutor and reduce the discretion of law enforcement in arrest decisions to the more common requirement of probable cause that the crime has occurred. Allowing "charging" and "prosecution" to remain included in the definition of "criminal prosecution" does not carry the same inherent problems created by the inclusion of "arrest" and "detention." Providing immunity to criminal defendants simply adds to the considerations a prosecutor may need to make in deciding whether to charge or what crime to charge a particular defendant with.

The only other impact is the addition of a requirement for pre-trial determinations of immunity, if the court interprets the statute to function like the courts in *Dennis v. State* and

[251] *See supra* Part IV.A.
[252] *See* Wallace, *supra* note 156, at 39.
[253] FLA. STAT. ANN. § 776.032(1) (West 2012).

*People v. Guenther*.[254] Though such proceedings alter the common notion of self-defense as an affirmative defense asserted at trial, they seem to function like additional pre-trial summary judgment proceedings with likely insubstantial effect. This amendment would still allow the statute to further the legislative goal in enactment, elimination of the fear of prosecution, because charges could be dismissed prior to trial and the assertion of an affirmative defense. In this way, the defendant would not be subject to complete criminal prosecution.

B. Alternatively, the State Should Require Law Enforcement to Report Investigative Procedures Regarding Self-Defense Claims: Administrative Recommendation

Law enforcement should be required to report the assertion of self-defense claims in order for an adequate assessment of the effects of these laws to be conducted, particularly the effects of the provision of immunity from arrest.[255] Requiring law enforcement to track the manner in which they investigate and to log the cases that they decline to arrest would provide greater clarity regarding the effects of the law. Based upon the data collected, it may be possible to create a uniform procedure for assessing probable cause in self-defense claims. In order to create such a standard, law enforcement officers should be required to report all instances in which they decline to arrest based upon their evaluation of probable cause in a case of self-defense. This reporting should be done to their own agency. This data would then be compiled across the state and evaluated to examine the various practices of law enforcement and their differing interpretations of what the law requires of them. From this compilation the administration would need to create usable standard for law enforcement officers investigating assertions of self-defense.

In conjunction with a usable standard, all law enforcement officers should be required to undergo additional training regarding the new self-defense law. This training would provide

[254] Dennis v. State, 51 So. 3d 456 (Fla. 2010); People v. Guenther, 740 P.2d 971 (Colo. 1987).
[255] *See supra* text accompanying notes 164–165.

greater knowledge of the intricacies of the "Stand Your Ground" law to allow proper implementation. At the moment, the confusion surrounding the law makes it difficult for anyone to properly understand the situations in which the use of force is, in fact, considered lawful and justified. Due to the enhanced role of law enforcement officers under these statutes, their understanding of the law is imperative.

Further, prosecutors may also be required to report the cases in which they decline to charge or reduce charges based primarily upon the existence of the "Stand Your Ground" law. This would permit a more thorough understanding of the actual effects that the law has on prosecutorial decision-making.[256]

## VII. Conclusion

As evidenced by highly-publicized cases such as that of Trayvon Martin, the inclusion of immunity from criminal and civil liability in recent legislation has significant and potentially dangerous consequences. Particularly, the expansion of the role of law enforcement in many recent statutes provides both for inconsistent application of the statute and unwelcome results in its implementation. While our criminal justice system seeks to promote justice, statutes making law enforcement the initial arbiter of a person's guilt thwart that end by preventing a case from reaching its factual merits. Based upon this assessment, law enforcement should be required to engage in uniform procedures or the law should be amended to remove law enforcement discretion in arrest. All states considering similar legislation must refrain from including "immunity from arrest" in the statute's construction.