Making Murder Legal: How Laws Expanding Self-Defense Allow Criminals to "Get Away with Murder"

Elizabeth B. Megale, Barry University
Making Murder Legal: How Laws Expanding Self-Defense Allow Criminals to "Get Away with Murder"±

Elizabeth B. Megale*

Don’t Dial 911 – Use .357⊥

I. INTRODUCTION

After two (2) years in jail awaiting trial on a charge of first-degree-murder, Jimmy Ray Hair was granted immunity under F.S. 776.032 and released from jail by Florida’s First District Court of Appeal.¹ On July 21, 2007 Hair shot and killed Charles Harper following a verbal argument at a nightclub earlier in the evening. Though the facts were somewhat disputed, Victim Harper apparently leaned into a vehicle in which Hair was seated on the passenger side and began to tussle with Hair. Victim Harper’s friend attempted to pull Harper back and away from the car, but Hair pulled out his gun and shot Victim Harper before he had fully retreated. Hair claimed the gun fired accidentally when he tried to hit Victim Harper with the gun.²

Hair’s attorney filed a motion to dismiss the charges pending against him, but the trial court denied the motion primarily because “there were disputed issues of fact which precluded granting of pretrial immunity.”³ On appeal, the First District held “that a motion to dismiss based on ‘Stand Your Ground’ immunity cannot be denied because of

± This article was presented at the New Scholars Workshop, Southeastern Association of Law Schools, 2009.
* Assistant Professor of Law, Barry University School of Law, Orlando, Florida. B.B.A., J.D. Mercer University. I want to thank in particular Professors Judith Koons and Patrick Tolan for their patience, guidance, and assistance during the process of writing this piece. I also want to express appreciation to my very helpful research assistant, Ana Cristina Torres, and to Barry University School of Law for its very generous support of my work.
⊥ The author saw this on a bumper sticker as she was driving down East Colonial Drive in Orlando, Florida on March 16, 2010. It typifies the mentality of Floridians five years after passage of the Stand Your Ground Laws in Florida that it is better to use a gun than call the police.
¹ Hair v. State, 17 So. 3d 804, 806 (Fla. 1st DCA 2009); see also Will Brown, Man Facing First Degree Murder Charge Freed, TALLAHASSEE DEMOCRAT, July 22, 2009.
² Id. at 805-06.
³ Id. at 805.
the existence of disputed issues of material fact.\textsuperscript{4} The Court further held that no
\textit{material} facts were in dispute in Mr. Hair’s case.\textsuperscript{5}

Based on the plain language of sections 776.032 and 776.013 of Florida
Statutes, Hair should have never even been arrested for shooting Harper.\textsuperscript{6} Section
776.013 establishes a presumption of reasonable fear of death or great bodily harm
when another is in the process of unlawfully and forcefully entering an occupied vehicle,
or has already done so. The undisputed facts showed Harper was forcefully and
unlawfully entering the occupied vehicle through the passenger window.\textsuperscript{7} The statute
makes no exception for retreat or attempted retreat.\textsuperscript{8} Additionally, section 776.032(2)
prohibits law enforcement from arresting a person for using force unless there is
probable cause that the party injured or killed had not unlawfully or forcefully entered
the occupied vehicle.\textsuperscript{9} In this case, no evidence at all indicated that Harper had lawfully
entered the vehicle, and in fact the undisputed evidence showed Harper initially
unlawfully and forcefully entered the vehicle through the passenger window.\textsuperscript{10}

In Hair’s case, law enforcement and the prosecution did not follow the law as
provided in sections 776.013 and 776.032 of the Florida Statutes. As a result Hair lost
two years of his life sitting in jail attempting to assert his right to immunity. On the other
hand, Victim Harper has lost his life entirely and his killer will not be held responsible for
the death because of Florida’s self-defense laws.

\textsuperscript{4} \textit{Id.} at 806. This ruling conflicts with the Fourth and Fifth Districts. \textit{See infra} note 22.
\textsuperscript{5} \textit{Hair}, 17 So. 3d at 805.
\textsuperscript{6} \textit{See infra} Part III for the full text of the statutes.
\textsuperscript{7} \textit{Hair}, 17 So. 3d at 805.
\textsuperscript{8} \textit{Id.} At 806; \textit{see also} FLA. STAT. § 776.013 (2005).
\textsuperscript{9} \textit{See infra} note 13 for the full text of the statute.
\textsuperscript{10} \textit{Hair}, 17 So. 3d at 805.
Although numerous problems exist with Stand Your Ground laws, this article focuses only on those grievous harms resulting from the combination of a presumption of reasonable fear and immunity. Read *in pari materia*, sections 776.013 and 776.032 of the Florida Statutes create an absolute and irrebuttable presumption that an individual who kills or harms another within that individual’s “castle” has acted in self-defense and cannot be prosecuted. The “presumption of reasonable fear” establishes an affirmative defense when a person has used “defensive force that is intended or likely to cause death or great bodily harm to another” who has invaded the person’s “castle.” The “castle” includes a dwelling, residence, or occupied vehicle. Alone, a presumption of reasonable fear is rebuttable because it establishes only an affirmative defense that the prosecution could attempt to overcome at trial. “Immunity,” on the other hand, creates a complete bar to criminal prosecution and civil action. Therefore,

11 New Stand Your Ground laws throughout the states generally encompass a broader castle doctrine as well as the elimination of the duty to retreat when outside one’s “castle.” Most states, however, do not combine immunity with any presumption of reasonable fear. For a more detailed discussion, see Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & Pol’y 617, n. 3 (2006).
12 Hereinafter referred to as the “Castle Doctrine.”
13 Hereinafter referred to as the “Immunity Statute.”
14 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:

(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.” F.L.A. STAT. §776.013.
15 Id.
16 People v. Guenther, 740 P.2d 971, 976 (Colo. 1987).
17 “(1) A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.
a person claiming to have acted in self-defense within the individual’s own castle cannot be arrested, detained in custody, charged, or prosecuted at all. Together, this combination of presumption of reasonable fear and immunity converts the presumption of reasonable fear from a rebuttable affirmative defense into an irrebuttable conclusion and absolute bar to prosecution.

This combination is first problematic because irrebuttable presumptions are nearly always unconstitutional. Second, the immunity statute essentially requires law enforcement to make determinations of immunity without providing any guidelines on how to make this decision. Third, once granted, there is no mechanism to withdraw immunity if it was improperly granted; in other words, if law enforcement decides a person is entitled to immunity, the statute does not provide a way for the prosecutor to review the case and withdraw that immunity if warranted. In fact, the prosecutor may not even receive notification of the incident since law enforcement would not sign a complaint if it granted immunity pursuant to the Immunity Statute. Finally, if a person who is entitled to immunity “slips through the cracks” and is actually charged, the statute provides no mechanism by way of which a defendant may assert immunity. This final problem has resulted in each Florida appellate district interpreting the law uniquely without any uniform application of the statute.

(2) 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 was unlawful.” FLA. STAT. § 776.032 (2005).

19 See Id.; Bartlett, 993 So. 2d at 158.
20 FLA. STAT. § 776.032; Bartlett, 993 So. 2d at 158.
21 Bartlett, 993 So. 2d at 158.
22 Id.
23 The First District has ruled that a “motion to dismiss based on “Stand Your Ground” immunity cannot be denied because of the existence of disputed issues of material fact.” Hair v. State, 17 So. 3d 804, 805 (Fla. Dist. Ct. App. 2009); Peterson v. State, 983 So. 2d 27 (Fla. Dist. Ct. App. 2008); the Fourth District has ruled that “a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact.” Dennis v.
Hence, even though the law is meant to prevent prosecution of a person acting in self-defense, a defendant who is not initially granted immunity by law enforcement or the prosecutor could spend years attempting to assert immunity. Moreover, the appellate courts’ interpretation of the Immunity Statute has been incorrect as the courts generally require a defendant to prove by a preponderance of the evidence an entitlement to immunity; in criminal matters, the prosecution bears the burden of proof, and this burden should not be shifted to the defendant at any time.

The purposes of this article are to show (1) how the pairing of the Immunity Statute with the presumption of reasonable fear codified at section 776.013 Florida Statutes creates an absolute and irrebuttable presumption of self-defense; (2) why this irrebuttable presumption is problematic; and (3) how the incorrect application of the law to actual cases results in inconsistent outcomes in factually similar cases. Additionally, this article identifies weaknesses in the statute that must be immediately corrected to ensure equal and fair application of the law throughout the State. This analysis should serve as a guide to other states considering similar legislation.

---

24 See Brown, supra note 1.
25 See Peterson, 983 So. 2d at 29, Gray 13 So. 3d at 115.
26 See Behanna v. State, 985 So. 2d 550, 555 (Fla. Dist. Ct. App. 2008) (holding “[w]hen the defense presents a prima facie case of self-defense, the State has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense”).
The analysis contained herein is important because numerous states have passed or are considering implementing statutes similar to the one passed in Florida. Although analyzing proposed language being considered in other states is beyond the scope of this article, it is the author’s sincere objective that the deliberative process in these sister states will benefit from exposing and examining in detail the flaws in the fabric of the Florida law. Therefore, while this article focuses narrowly, its application is much broader.

Below, Section II details a brief history of the evolution of the Castle Doctrine. Section III explains Florida’s Immunity Statute and its current Castle Doctrine including the presumption of reasonable fear, and it shows how the coupling of immunity and the presumption of reasonable fear creates an absolute bar to prosecution in Castle self-defense cases. It further exposes the conflict among the appellate courts in interpreting the Immunity Statute and the errors in the courts’ reasoning. Section IV offers solutions for lawful and just application of immunity in the context of self-defense. Section V concludes that the combination of immunity and the presumption of reasonable fear creates an irrebuttable and absolute presumption that an individual killing or harming within the castle has acted in self-defense. The lack of guidelines and procedural rules results in the inconsistent investigation and prosecution of criminal offenses throughout the State. Furthermore, the courts are reluctant to recognize this irrebuttable presumption and have created procedural blocks to the assertion of immunity even where a defendant should be immune from prosecution. Thus, the legislature should revisit the statute eliminating the presumption of reasonable fear, and the Florida
Supreme Court should establish rules of procedure for asserting immunity when a criminal case is initiated but a defendant is arguably entitled to immunity.

II. HISTORY/BACKGROUND: A BRIEF OVERVIEW OF THE EVOLUTION OF THE DUTY TO RETREAT AND CASTLE DOCTRINE.

Historically, English common law “favored a retreat ‘to the wall,’ out of concern that ‘the right to defend might be mistaken as the right to kill.’”\(^{27}\) This Duty to Retreat is grounded upon respect for the sanctity of human life.\(^{28}\) The only exception recognized at common law was known as the Castle Doctrine - the right to defend an attack in the home. The Castle Doctrine is rooted in the maxim that a “man’s home is his castle.”\(^{29}\) No one attacked in the home is required to retreat, but rather can use deadly force to defend against the attack.

The duty to retreat is the counterbalance to the castle doctrine, and demonstrates reverence for the sanctity of life. The duty to retreat protects individuals by requiring an actor to avoid an altercation “unless his back is to the wall.”\(^{30}\) This means if someone attacks a pedestrian on the street, the pedestrian has a duty to run away or otherwise avoid engaging with the attacker so long as it is reasonably safe to do so.

As the American rule of law developed, a number of states recognized and followed the common law requiring individuals to retreat in the face of danger unless that danger arose in the home.\(^{31}\) Some jurisdictions, however, began adopting the “Stand Your Ground” rule which permits an individual to defend against violence so long


\(^{28}\) See Koons, *supra* note 11, at 640.

\(^{29}\) See Catalfamo, *supra* note 25 at____

\(^{30}\) See Catalfamo, *supra* note 25 at____

\(^{31}\) See Catalfamo, *supra* note 25 at____
as the individual is lawfully present in that place.\textsuperscript{32} Philosophically speaking, the Stand
Your Ground rule is rooted in the concept that a person has the right to defend one’s
honor whereas the Duty to Retreat recognizes a reverence for life.\textsuperscript{33}

Prior to 2005, Florida broadly interpreted the Castle Doctrine to include not just
the home and surrounding curtilage, but also the workplace.\textsuperscript{34} Notably, Florida required
retreat where a controversy arose outside the castle or between two or more persons
lawfully present within the castle.\textsuperscript{35} Additionally, self-defense was an affirmative
defense an accused could assert in response to a criminal prosecution. Florida did not
grant immunity to purported acts of self-defense.

Some states, such as Colorado, did grant immunity to anyone acting in self-
defense in accordance with Colorado law.\textsuperscript{36} To claim immunity, however, a defendant’s
actions had to clearly reflect the defendant reasonably believed the use of force was
necessary.\textsuperscript{37} In other words, even in states with broad self-defense laws, individuals
claiming self-defense must still have held a reasonable belief that the use of force was
necessary.

After 2005, Florida became the first and only state to couple immunity with a
presumption of reasonable fear when a person acts in self-defense within the castle.\textsuperscript{38}

\begin{flushright}
\textsuperscript{32} See Catalfamo, \textit{supra} note 25 at_____. For a detailed listing of states and their doctrines, see Koons, \textit{supra} note 11 at 629, n. 41.
\textsuperscript{33} See Catalfamo, \textit{supra} note 25 at_____.
\textsuperscript{34} See Frazier v. State, 681 So. 2d 824, 825 (Fla. Dist. Ct. App. 1996) (agreeing that the castle doctrine is an
exception to the general duty to retreat and it "extends to protect persons in their place of employment while they are
lawfully engaged in their occupation"); Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999) (recognizing the Castle
Doctrine and the "duty to retreat emanate[] from common law, rather than from … statutes").
\textsuperscript{35} See Frazier, 681 So. 2d at 825; Weiand, 732 So. 2d at 1049.
\textsuperscript{37} People v. Guenther, 740 P.2d 971, 976 (Colo. 1987). In drafting its statute, the Colorado legislature initially
considered including "a presumption that a homeowner’s use of deadly force against an intruder was reasonable and
had redrafted the provision to state that the person shall not be prosecuted – shall be immune from prosecution." \textit{Id.}
(internal quotes omitted)
\textsuperscript{38} See Koons, \textit{supra} note 11, at 618, n.3.
A person claiming self-defense for a violent act occurring outside the castle is also entitled to immunity but is not entitled to a presumption of reasonable fear. In other words, a person claiming self-defense for an act occurring outside the castle would need to establish the reasonableness of the use of force prior to receiving immunity. A person’s violent act within the home, however, is presumed to result from a reasonable fear.

III. EVOLVING FROM THE DUTY TO RETREAT TO “STAND YOUR GROUND” – THREE MAJOR CHANGES ENCOMPASSED BY FLORIDA’S STATUTE AND THE PROBLEMS ASSOCIATED WITH EACH.

In 2005, the Florida legislature amended one statute and added two to (a) eliminate the duty to retreat; (b) expand the common law concept of “castle;” and (c) grant immunity to anyone claiming to act in self-defense, respectively.39 These changes introduced both immunity and a presumption, a unique development for these types of statutory schemes.40 This combination exponentially compounds the problems associated with “Stand Your Ground” laws, and states have historically declined to pass laws giving both immunity and recognizing presumptions for this reason.41

These laws are not only ripe for abuse by would-be criminals, but they also provide absolutely no guidance to law enforcement, prosecutors, defendants, or the courts on how to assert immunity or claim a presumption under the law. This lack of direction has caused each appellate district in Florida to interpret the law differently and has created confusion for law enforcement and the citizens of the State.

A. Shoot First, Ask Later: Eliminating the Duty to Retreat.

40 See Koons, supra, note 11 at 618, n.3.
41 Guenther, 740 P.2d at 976.
The National Rifle Association (NRA) has been fiercely lobbying state legislatures around the nation for broader gun and self-defense laws.\textsuperscript{42} In Florida, the NRA’s proposals saw nearly no opposition during the strong and quick lobby.\textsuperscript{43} One major change the legislature made was to amend section 776.012 abrogating the common law duty to retreat. Prior to 2005, an individual who felt threatened outside the home or workplace had a duty to retreat to the wall, and could only meet force with force where no safe means of escape was available.\textsuperscript{44} Today, section 776.012 provides a person is justified in the use of deadly force and does not have a duty to retreat if:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.\textsuperscript{45}

Known as the “Stand Your Ground” law, this statute is flawed because it places a greater power to possess and use a gun against another than it does on the most fundamental right of all: life itself. Under common law, an individual was required to retreat so long as retreat could be safely accomplished before resorting to physical force.\textsuperscript{46} By requiring retreat in the face of danger, the legislature clearly placed a higher value on life.\textsuperscript{47} Moreover, the law has never required a person to be placed in a more precarious position by retreating, and it has always recognized that where no safe method of retreat is available a person may meet force with force in defense of an

\begin{itemize}
\item \textsuperscript{42} Daniel Michael, \textit{Florida’s Protection of Persons Bill}, 43 HARV. J. ON LEGIS. 199 (2006).
\item \textsuperscript{43} Id.
\item \textsuperscript{44} See \textit{Frazier}, 681 So. 2d at 825; \textit{Weiand}, 732 So. 2d at 1049.
\item \textsuperscript{45} F.S.\textsuperscript{776.012}. Subsection (2) further provides a person does not have a duty to retreat “[u]nder those circumstances permitted pursuant to s. 776.013.” \textit{Id}. This provision and its implications will be more fully discussed in Section III (B) below.
\item \textsuperscript{46} See \textit{Frazier}, 681 So. 2d at 825; \textit{Weiand}, 732 So. 2d at 1049. Note the duty to retreat only applied when an individual was outside his home or workplace. Florida law has never required an individual to retreat from the “castle” which previously included both the home and the workplace.
\item \textsuperscript{47} See \textit{Catafalmo}, \textit{supra} note 25 at ____.
\end{itemize}
attack. Now, anytime one claims to perceive a threat, that individual would be justified in reacting violently rather than attempting to diffuse the situation by retreating. Thus, a higher value is placed on an individual’s right to carry and use a gun in the face of a perceived threat.

To illustrate, if two rival gang members cross paths on a public sidewalk where they both have a right to be, they each have a right to stand their ground. If one of the gang members perceives a threat, or claims to perceive a threat, from the other, that person is entitled to act in self-defense and use physical force against the other. Under the current statute, the person acting in self-defense does not need to prove any actual threat; moreover, that person is justified in injuring or even killing the other person. Most disturbing, the individual acting “in self defense” is not required to walk away, even if presented with a safe method of retreat.

Proponents of the “stand your ground” statute claim a person should have the right to “stand like a man” to avoid the humiliation of retreating in the face of a fight. This position neglects the most basic premise of civilized society: respect for life. The Founding Fathers, in creating the documents which define our rights in this country placed life above all other rights. The most “self-evident truth,” according to the signers of the Declaration of Independence, is that “all men … are endowed … with certain unalienable rights [including] life, liberty, and the pursuit of happiness. The

---

48 In signing the new bill, Governor Jeb Bush reinforced his supporting position by stating “to have to retreat to put yourself in a more precarious position defies common sense.” Michael, supra, note 41, at 200 n. 8.
50 See Catafalmo, supra note 25 at ___.
51 See Catafalmo, supra note 25 at ___.
52 “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.” The Declaration of Independence para. 2 (U.S. 1776).
53 Id. (emphasis added).
role of government, therefore, should be to protect life above any right to bear arms, and government should not be allowed to create laws jeopardizing the lives of others.

Overly-broad “Stand Your Ground” statutes place lives in danger because a person is permitted to harm or even kill another before considering whether an actual threat exists. Certainly, some situations would call for an individual to act in self-defense where safe retreat is not available, and this could result in the loss of another’s life. The common law provided for this reality by authorizing the use of physical force where no safe alternative is available. The benefit is that the duty to retreat makes a person think twice before using force against another, and in the long term acts to preserve peace and life.

B. Expanding the Concept of the “Castle.”

The second major change in the self-defense statutes adds section 776.013 to modify the common law definition of “castle” and also create a presumption of reasonable fear justifying the use of deadly force in one’s castle. Specifically, 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:

(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.

---

54 See Weiand, 732 So. 2d at 1049.
55 FLA. STAT. §776.013 (2005). Under common law, the “castle” was defined as one’s home. See Catafalmo, supra, note 25 at ____. Some jurisdictions, such as Florida, expanded the definition of “castle” to include curtilages, property, even the workplace. See Frazier, 681 So. 2d at 825; Weiand, 732 So. 2d at 1049.
Now in Florida the workplace is no longer considered part of the castle, but an occupied motor vehicle is considered one’s “castle.”\(^57\) Defining a motor vehicle as a person’s castle, however, is simply too broad because it is inconsistent with the purpose of the castle doctrine. The “castle” is intended to be a sacred place and is afforded special protections because one should not have to abandon this sacred retreat in the face of an attack.\(^58\)

When a person is inside a car or other motor vehicle, the person typically does not have a “back against the wall” because a safe means of escape is usually available. Because the vehicle is a mode of transportation, a person feeling threatened has a safe and easy method of retreat in most cases. Moreover, driving away protects both the person perceiving a threat and the person allegedly making the threat. To preserve the sanctity of life, even the life of wrongdoers, a driver should at least try to get away before killing any would-be attacker. Finally, while the castle doctrine itself has always been premised on the sanctity of the home, motor vehicles have never been recognized as carrying that same “sacred retreat” value. Therefore, motor vehicles should not be included in the definition of castle.

The more problematic change to F.S. 776.013, however, is the language providing “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.”\(^59\) This

\(^{58}\) See, Koons, *supra* note 11 at _____. Theoretically, the home is as far as one can retreat – it is the ultimate “back against the wall” scenario,” and therefore, an individual is entitled to act with force to protect himself and others without abandoning the castle.
provision is the primary distinction between F.S. 776.012 (Stand Your Ground) and F.S. 776.013 (Castle Doctrine). Without this presumption, the “castle” would be no more sacred than anywhere else someone has a right to be, and it would not be necessary to distinguish the castle from any other place.60 By including a presumption of reasonable fear, however, the statute continues the tradition of elevating the “castle” to sacred status. In other words, a person claiming self-defense for a violent act committed within the castle is not even required to assert a reasonable fear or perceived threat because the law automatically presumes reasonable fear.61

To understand why the presumption presents a problem, it is necessary to compare the common law with the current statute. Prior to the passage of the 2005 statute, law enforcement was not limited in any way in the investigation of violent acts.62 Once law enforcement established probable cause that an act of violence had occurred, the accused bore the burden of asserting any defense including self-defense (that the act arose as a result of reasonable fear of bodily harm).63 Now under the 2005 version of the statute, law enforcement is limited in the investigation of violent crimes that occur within the “castle” because it must presume the individual acted out of a reasonable fear.64

The new statute creating a presumption of reasonable fear drastically changes how law enforcement can investigate acts of violence in the castle. Although section 776.032(2) provides “[a] law enforcement agency may use standard procedures for

---

60 As discussed in Section III (A) above, a person may meet force with force under perceived threat of attack so long as that person has a right to be in that place. F.S. 776.012.
62 Section 776.032 of Florida Statutes did not exist prior to 2005.
64 FLA. STAT. §776.013 (2005); see also, Bartlett, 993 So. 2d at 159-60.
investigating the use of force,\textsuperscript{65} law enforcement is prohibited from arresting or detaining in custody any individual who uses force in the castle until “there is probable cause that the force that was used was unlawful.”\textsuperscript{66} Establishing probable cause as required by section 776.032 is virtually impossible, however, because law enforcement must presume the use of force was \textit{lawful} pursuant to section 776.013. Because law enforcement is only authorized to investigate \textit{unlawful} acts, it is essentially precluded from investigating violent acts occurring within the Castle. As a result, probable cause can never be established where an individual commits a violent act within the castle.\textsuperscript{67}

C. Adding in Immunity.

In addition to eliminating the duty to retreat and expanding the concept of the castle, Florida has provided immunity to anyone who acts in self-defense.\textsuperscript{68} Specifically, Fl. Stat. 776.032 provides

(1) A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) 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 was unlawful.

\textsuperscript{65} Fl. Stat. § 776.032(2).
\textsuperscript{66} Id.
\textsuperscript{67} This assertion is true assuming any of the four (4) statutory exceptions to the presumption are inapplicable. See Fl. Stat. § 776.013(2)(a) – (d). Where the facts arise under one of the listed exceptions, law enforcement may not presume the perpetrator acted out of reasonable fear of imminent peril or great bodily harm, and it may conduct a full investigation. If probable cause is established, the perpetrator would be arrested and could assert any defense. Further discussion and analysis of these sections are beyond the scope of this article.
\textsuperscript{68} Fl. Stat. § 776.032 (2005). Immunity from prosecution where one acts in self-defense has no root in common law and creates a broad protection to those who claim to act in self-defense.
The purpose of immunity is to eliminate the fear of prosecution experienced by those who may act in self-defense.\(^6^9\) While the costs and time associated with defending a lawful violent act may be significant, the potential for abuse and inconsistent application of the statute make this law injudicious. Additionally, the statute fails to accomplish its purpose because there are no guidelines for establishing or asserting immunity.\(^7^0\) Moreover, coupling immunity with the presumption of reasonable fear defined in F.S. 776.013 creates a practically impenetrable wall of protection around anyone committing an act of violence within the castle.

The lack of rules and guidelines for implementing the statute creates the potential for unequal and inconsistent application of the statute. In effect, law enforcement is called to make prosecutorial decisions without consulting the prosecutor because law enforcement is charged with making the initial immunity determination.\(^7^1\) The Immunity Statute prohibits the detention or arrest of any individual who has acted in accordance with FSS 776.012 or 776.013; however, law enforcement officers are not trained to conduct the legal analysis required by such determinations of immunity.\(^7^2\) Moreover, the statute provides absolutely no guidance as to how law enforcement should decide a person’s entitlement to immunity. Because law enforcement is not required to objectively assess cases pursuant to established criteria and guidelines, immunity will be granted based on an officer’s individual assessment rather than pursuant to a

\(^6^9\) HB 0249 2005. The legislatures’ intent was to immunize “law-abiding citizens who act to protect themselves, their families, and their property.”

\(^7^0\) FLA. STAT. § 776.032 (2005).

\(^7^1\) FLA. STAT. § 776.032(1); see also Bartlett, 993 So. 2d at 159-60.

\(^7^2\) A police officer generally has no formal legal training in statutory interpretation, trial preparation, the rules of evidence, or the burdens of proof at trial.
uniform decision-making process. This will necessarily result in the disparate treatment of factually similar cases throughout the state.

As it relates to the Castle Doctrine, the Immunity Statute creates another type of problem in that it forces law enforcement disprove a presumption rather than establish a case.73 Prior to 2005, law enforcement was required only to establish an unlawful act of violence had occurred. The report was then forwarded to the State Attorney for determination of prosecution, and the perpetrator was responsible for asserting any potential defense. Law enforcement was not responsible for rebutting any presumptions or defenses prior to filing a report, detaining a suspect, or making an arrest.74

Since passing the 2005 statute, however, ruling out self-defense is “part of the statutory requirement for [law enforcement] to be able to sign [a] complaint.”75 In other words, rather than just simply investigating and reporting the facts, law enforcement must now engage in an evaluation of those facts and make decisions that will affect whether a person will be accused of a crime. Accordingly, this law effectively removes from the province of the court the determination of a perpetrator’s guilt or innocence and vests this decision with the police (or other investigating authority).

As more fully explained in Section III (B) above, law enforcement is now forced to investigate alleged self-defense acts occurring in the castle from an entirely different standpoint. Rather than gathering evidence giving rise to probable cause that a crime

73 Fla. Stat. § 776.032 (2005); see Bartlett, 993 So. 2d at 159-60; Heckman, 993 So. 2d at 1006
74 See Bartlett, 993 So. 2d at 159-60
75 See Id. Although, the appellant argued that the statute was not a substantive change to how crimes are investigated, it actually is because now rather than just establishing probable cause that a crime has occurred, law enforcement must also seek to rule out an affirmative defense (self-defense) to determine entitlement to immunity. It goes beyond figuring out “did a crime occur;” it requires the police to make the defendant’s case and then disprove it beyond a reasonable doubt.
has occurred and forwarding those materials on to the prosecution, law enforcement must obtain evidence rebutting a presumption or otherwise decide the perpetrator is immune from prosecution.\textsuperscript{76} Obtaining such evidence is complicated since law enforcement is only authorized to investigate \textit{unlawful} acts and section 776.013 requires officers to presume acts of violence within the castle are \textit{lawful}.\textsuperscript{77}

In the event law enforcement does obtain probable cause and prosecution is initiated, the statute fails to guide prosecutors, courts, and defendants on how to invoke immunity. This has resulted in the inconsistent prosecution and treatment of similarly situated defendants throughout the State of Florida.\textsuperscript{78}

In the initial investigatory stage, no two jurisdictions in Florida agree entirely on how to apply the “stand your ground” laws to actual cases. For example, in Volusia County law enforcement granted immunity to a man, Dayne Rollins, who shot three individuals attempting to rob his home, but will charge him with possessing the short-barreled shotgun he used to defend himself because it had been illegally altered.\textsuperscript{79} Notably, Rollins did not fire any shots until the suspects fled his home.\textsuperscript{80} On the other hand, in Seminole County a convicted felon was granted immunity by law enforcement when he killed a man who broke into his home, but he will not be charged with possession of a firearm by a convicted felon.\textsuperscript{81} Each of these charging decisions,

\textsuperscript{76} \textsc{Fla. Stat.} § 776.032 (2005).
\textsuperscript{77} \textsc{Fla. Stat.} § 776.013 (2005).
\textsuperscript{79} Gary Taylor, \textit{Self-defense law: Standing ground or jumping the gun?} \textsc{Orlando Sentinel}, September 21, 2009, at A1.
\textsuperscript{80} Sara K. Clarke, \textit{Victim Fires Shots after Home Invasion in Ormond Beach}, \textsc{Orlando Sentinel}, September 14, 2009, A12.
\textsuperscript{81} Taylor, \textit{supra} note 78. “Carlton Montford, 50, who has a lengthy criminal record, not only won’t face charges in fatally shooting a man who broke into his home near Altamonte Springs in June, but he also won’t be charged with possession of a firearm by a convicted felon.”
however, seems contrary to section 776.013 which provides the presumption of reasonable fear is inapplicable where “[t]he person who uses defensive force is engaged in an unlawful activity.” Moreover, these cases evidence a lack of uniformity in the application of sections 776.013 and 776.032.

The term “unlawful activity” is vague, and it is applied inconsistently throughout the State. Notably, the alleged “unlawful activity” does not have to be related to the act of self-defense. Thus, a person who is driving without a license in violation of section 322.34 Florida Statutes is not entitled the same presumption of reasonable fear where someone breaks into his occupied vehicle as someone who is not engaged in any illegal activity at all. Likewise, a convicted felon is not entitled to the presumption of reasonable fear if in the act of self-defense the felon uses a gun.82

By not defining the term “unlawful activity,” the statute gives rise to numerous questions. Must the activity actually be a crime, or is violation of an ordinance sufficient? Must the activity rise to the level of a felony, or is a misdemeanor sufficient? Must law enforcement charge the crime for it to be used in withholding the presumption of reasonable fear? Must the crime result in a conviction before it can be used to withhold the presumption of reasonable fear? This statute fails to put the defendant on notice of what precludes entitlement to the presumption of reasonable fear, and therefore immunity.

The confusion and inconsistent application of the law increases as cases proceed through the court system. For example, during the summer of 2009, the First

82 Notwithstanding, in both Seminole and Volusia Counties convicted felons were granted immunity from prosecution for alleged self-defense acts despite the fact they were not entitled to the presumption of reasonable fear because they were engaged in unlawful activity, to wit: possession of a firearm by a convicted felon. See, Taylor, supra note 78.
District Court of Appeals ordered the release of Jimmy Ray Hair after two (2) years of incarceration awaiting trial. Mr. Hair had shot and killed an individual who allegedly attacked him through the open window in a car. At the time Mr. Hair shot his attacker, however, the intruder was actually retreating from Hair’s vehicle.\textsuperscript{83}

In a factually similar case, the Second District Court of Appeal ruled differently.\textsuperscript{84} David Heckman shot an intruder after the intruder left the garage attached to the Heckman’s home, and the Second District ruled Heckman was not entitled to immunity. The two cases directly conflict because the First District claims the statute “makes no exception from immunity when the victim is in retreat,”\textsuperscript{85} and the Second District claims that “immunity does not apply [where] the victim was retreating.”\textsuperscript{86}

The conflicts do not end here. Although all jurisdictions agree that an individual claiming self-defense is entitled to a hearing to determine whether immunity should be granted, the methods for invoking immunity and the applicable burden of proof are disputed.\textsuperscript{87} Because no rule of criminal procedure establishes a particular process for asserting immunity, many defendants resort to Florida Rule of Criminal procedure 3.190, and at least one (1) defendant has asserted immunity by filing a motion under Florida Statute Section 775.032.\textsuperscript{88}

A Rule 3.190(c)(4) motion to dismiss is proper where “[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant.” Thus, a defendant is required to swear to the facts asserted in the motion to dismiss, and the motion must be denied where the prosecution files a

\begin{itemize}
\item \textsuperscript{83} See Brown, \textit{supra} note 1.
\item \textsuperscript{84} State v. Heckman, 993 So. 2d 1004 (Fla. Dist. Ct. App. 2007).
\item \textsuperscript{85} Hair v. State, 17 So. 3d 804, 806 (Fla. Dist. Ct. App. 2009)
\item \textsuperscript{86} Heckman, 993 So. 2d at 1006.
\item \textsuperscript{87} See \textit{supra} note 22.
\item \textsuperscript{88} \textit{Id}.
\end{itemize}
traverse because it “place[s] essential material facts in dispute.” In the context of an
immunity assertion, however, facts may be disputed where a defendant would
nonetheless be entitled to immunity. Herein lies the controversy.

Holdings from the Fourth District firmly establish that “a motion to dismiss based
on statutory immunity is properly denied when there are disputed issues of material
fact.” The Fourth District’s reasoning directly conflicts with the First District Court of
Appeal’s holdings in Peterson and Hair. The Peterson court recognized the Florida
legislature intended to grant true immunity, as opposed to merely an affirmative
defense, in passing the “stand your ground” laws. Thus, the First District reasoned
that a trial “court may not deny a motion simply because factual disputes exist.” The
First District again recognized in Hair “that a motion to dismiss based on ‘Stand Your
Ground’ immunity cannot be denied because of the existence of disputed issues of
material fact.” The Second District appears to agree in part with the First District by
permitting assertion of immunity via a motion to dismiss and requiring fact-finding by the
Court. Nevertheless, the Second District does not identify any particular burden of
proof or test that must be met by either the defendant or the prosecution in an immunity
claim.

The First District went on to require “that a criminal defendant claiming protection
under the statute … demonstrate by a preponderance of the evidence that he or she is

90 Hair, 17 So. 3d at 805; Peterson v. State, 983 So. 2d 27 (Fla. Dist. Ct. App. 2008).
91 Dennis v. State, 17 So. 3d 305 (Fla. Dist. Ct. App. 2009); accord Velasquez v. State, 9 So. 3d 22 (Fla. Dist. Ct.
App. 2009); Govoni, 17 So. 3d at 810.
92 Peterson, 983 So. 2d at 29.
93 Id.
94 Hair, 17 So. 3d at 805
95 Heckman, 993 So. 2d at 1006.
96 Id.
immune from prosecution.⁹⁷ Accordingly, the appellate court seems to require the trial court to conduct a hearing, or at least sufficient fact-finding, to determine whether the defendant has met its burden.⁹⁸ In making its decision, the First District analyzed People v. Guenther, a Colorado Supreme Court case decided under a similar statute.⁹⁹ Although the First District noted the Guenther decision “imposed the same burden of proof as it would in … motions to suppress,”¹⁰⁰ in adopting the same standard in Florida the First District is actually imposing a higher burden than that required for motions to suppress.¹⁰¹

In Florida, the defendant only need establish a prima facie case that the search and/or seizure was unlawful pursuant to the Fourth Amendment. Upon meeting this initial low threshold burden, the burden shifts to the State to prove by clear and convincing evidence that the search and seizure were in fact lawful. In the majority of cases, the defense is not even required to call any witnesses and may rely on its unsworn motion to meet its burden. Thus, requiring a defendant to establish entitlement to immunity by a preponderance of the evidence is a higher burden than that required on a motion to suppress.¹⁰²

Additionally, the reasoning in Guenther is not transferable to the Florida statute because the Colorado Supreme Court held “[t]here is nothing in section 18-1-704.5 supporting that the General Assembly intended to broaden the conditions for statutory

⁹⁷ Peterson, 983 So. 2d at 28; accord, Hair, 17 So. 3d at 805 (holding “[t]he defendant bears the burden to prove entitlement to the immunity by a preponderance of the evidence).
⁹⁸ Peterson, 983 So. 2d at 29.
⁹⁹ 740 P.2d 971 (Colo. 1987). Notably, Colorado’s statute does provide immunity, but it does not provide a presumption of reasonable fear like Florida does at section §776.013 of Florida Statutes.
¹⁰⁰ Peterson, 983 So. 2d at 29.
¹⁰¹ See Mann v. State, 292 So. 2d 432, 433 (Fla. Dist. Ct. App. 1974) (finding “the entire [suppression] hearing was held under the misapprehension that the defendant had the burden of proof with respect to the legality of the warrantless search”).
¹⁰² See Id.; Fla. R. Civ. PRO. 3.190.
immunity to include a home occupant’s right to use any degree of physical force against another person solely on the basis of an appearance, rather than the actuality, of an unlawful entry into the dwelling by that other person.\(^\text{103}\) In other words, because the Colorado statute did not include a presumption of reasonable fear (such as the one codified at section 776.013), the defendant had the burden of proving entitlement to immunity by a preponderance of the evidence.\(^\text{104}\) The reasoning in Guenther is inapplicable because “[t]he creation of section 776.013 eliminated the burden of proving that the defender had a reasonable belief that deadly force was necessary by providing a conclusive presumption of such.”\(^\text{105}\)

Moreover, the Florida Legislature “intended to establish a true immunity and not merely an affirmative defense.”\(^\text{106}\) In the preamble to the legislation, the Legislature clarifies its intent “for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action.”\(^\text{107}\) This immunity is intended to be self-executing as evidenced by the language in the preamble and also by the plain language of the statute providing a person acting in self-defense is entitled to immunity from criminal prosecution. Criminal prosecution “includes arresting, detaining in custody, and charging or prosecuting the defendant.”\(^\text{108}\) Because immunity in Florida is intended to be self-executing in cases involving the “castle,” requiring the

\(^{103}\) Guenther, 740 P.2d at 979.
\(^{104}\) Id.
\(^{105}\) Heckman, 993 So. 2d at 1006.
\(^{106}\) Peterson, 983 So. 2d at 29.
\(^{107}\) Govoni, 17 So. 3d at 810 (emphasis in original) (C.J. Gross, concurring specially) (citing Ch. 2005-27 at 200, laws of Fla.).
\(^{108}\) FLA. STAT. §776.032 (2005).
defendant to prove entitlement to immunity by a preponderance of the evidence is fundamentally unfair and contrary to legislative intent.\textsuperscript{109}

Chief Justice Gross of the Fourth District Court of Appeal concurred specially in \textit{Govoni} recognizing the decision in \textit{Velasquez} was erroneous. He explained his position by citing to Rule 3.190(b) which provides “\textit{all} defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information, whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or \textit{any other defense}.”\textsuperscript{110} At the same time, he recognizes that “forcing disputed immunity claims to trial undercuts the concept of immunity.” Thus, on the one hand Chief Justice Gross appears to recognize the immunity intended by the legislature far exceeds a mere defense, but on the other hand he attempts to force the application of a procedural rule that contemplates only defenses and impose a burden of proof that essentially “undercuts the concept of immunity.” As a final caveat to his concurrence, Chief Justice Gross accepts \textit{Peterson}’s reliance on “[t]he well reasoned [sic] explanation of \textit{People v. Guenther}.” He fails to realize, however, that the \textit{Guenther} decision is based on a statute fundamentally different from Florida’s, and moreover the reasoning in \textit{Guenther} would be inapplicable because the standard for deciding motions to suppress in Florida is lower than that required in Colorado.

The Fifth District Court of Appeal recognized the conflict among the appellate districts in Florida, but refused to certify the question to the Florida Supreme Court.\textsuperscript{111} In \textit{Gray}, the Defendant appealed the trial court’s decision denying immunity after the

\textsuperscript{109} \textit{See} \textit{Govoni}, 17 So. 3d at 811 (emphasis in original) (C.J. Gross, concurring specially) (“forcing disputed immunity claims to trial undercuts the concept of immunity adopted by the legislature”).

\textsuperscript{110} \textit{Govoni}, 17 So. 3d at 810 (emphasis in original) (C.J. Gross, concurring specially) (citing Ch. 2005-27 at 200, laws of Fla.).

\textsuperscript{111} \textit{See} \textit{Gray} v. State 13 So. 3d 114 (Fla. Dist. Ct. App. 2009).
trial court found the “Defendant did not meet his burden of establishing his claim of immunity by a preponderance of the evidence.” On appeal, the defense urged the court to hold “that because the burden remains with the State to prove its case, including the absence of self-defense, the proper approach is to have the court make the determination at a proceeding much like the one Peterson requires, except that the burden at such a proceeding would be on the State to establish that the Defendant is not entitled to immunity.” The court refused to adopt the Defendant’s proposal and adopted the Peterson test instead. Interestingly, the Fifth District Court of Appeal recognizes that “it appears from the number of cases already resulting in opinions and the differing views expressed about how the new statutory immunity should be determined, that this is a question that eventually will require a definitive answer from our high court.”

IV. SOLUTIONS: CAN THE STATUTE BE FIXED?

As explained in Section III above, numerous problems exist with the Stand Your Ground, Castle Doctrine, and Immunity statutes passed by the Florida legislature in 2005. The issues can be divided into two (2) basic categories: those inherent in the language itself, and those resulting from a lack of guidelines and/or rules of procedure on the implementation. Because of the inherent problems, implementing guidelines and procedures will likely not make the statute any better. However, until the legislature has an opportunity to revisit the statute and revise the language, the Florida Supreme Court should issue rules of procedure to assist the lower courts in deciding these cases.

112 Id.
113 Id.
114 Id.
115 Id.
Guidelines should also be developed to assist law enforcement in the investigation of acts of violence, especially those occurring within the castle.

A. Inherent problems.

As explained above, the language of the statutes presents tremendous concerns regarding acts of violence. Eliminating the duty to retreat creates a mindset to “shoot first, ask later.” Rather than thinking through the consequences and attempting a more peaceful solution, individuals are authorized to act violently in the face of a \textit{perceived} threat. The reasonableness of any perceived threat, though, is a matter of opinion and subject to interpretation. Moreover, since an individual acting pursuant to section 776.012 is entitled to immunity from prosecution pursuant to section 776.032, courts will become much more likely to find an alleged threat reasonable to ensure compliance with the statute.

The statutory language is even more problematic in the new Castle Doctrine because the legislature created a presumption of reasonableness. Now, no governmental agency can review the reasonableness of any alleged threat unless law enforcement can prove a negative: that there was no reasonable threat. In other words, where a violent act occurs within the castle, law enforcement must begin by presuming that the act is lawful and pursuant to a reasonable perceived threat to the person committing the act. Rather than requiring law enforcement to obtain probable cause that a violent act has occurred, the statute requires law enforcement to obtain probable cause of a negative – that the actor did not have reasonable fear. Because the law presumes the actor to have been in reasonable fear, obtaining probable cause to rebut this presumption is nearly impossible.
Coupled with the immunity statute, the Florida legislature has now created an irrebuttable presumption that a person has acted reasonably when committing a violent act within the castle.\textsuperscript{116} In other words, there is no longer a factual determination to be made regarding the question of reasonable fear. Read together with section 776.032 which prohibits the prosecution (including arrest and/or detention) of anyone acting pursuant to the Castle Doctrine, this means that a person committing a violent act within the castle, as defined in section 776.013, cannot be prosecuted. Irrebuttable presumptions, however, are nearly always unconstitutional.

Although section 776.032 provides that the State may prosecute an individual where there is probable cause “that the force used was unlawful,” as a practical matter the State will rarely be able to obtain probable cause for violent acts committed within the statutorily defined castle. This presents an area ripe for abuse by would be criminals.

Moreover, since law enforcement must presume the individual acted in reasonable fear where the violence occurs within the castle, the investigatory method must necessarily be altered. Rather than obtaining probable cause that a violent act occurred and allowing a defendant to assert any defense, including self-defense, now law enforcement must search for evidence to disprove the reasonableness of the act. Officers and detectives are not trained in the nuances of legal analysis and theory to gather, consider, and weigh the evidence in light of the law.\textsuperscript{117}

One option may be for the legislature to provide guidelines or a checklist for investigation of these violent acts, one of two things would occur. First, law

\textsuperscript{116} See Catafalmo, supra, note 25, at ____ fn 114.
\textsuperscript{117} How much evidence law enforcement is authorized to gather is also questionable under section 776.032 since it cannot arrest or detain anyone in custody.
enforcement could become so dependent on the checklist that officers would fail to see the forest for the trees during an investigation. The result would be essentially the same problem we see now where a defendant entitled to immunity would be sitting in jail trying to assert immunity when it should have automatically been granted. Second, law enforcement could find the guidelines so vague, confusing, or difficult to apply that it would not utilize them anyway. Essentially, we would be asking officers and detectives to engage in the same process currently required by the statute with a few more administrative details but without any real substantive assistance to help them do their job. Therefore, implementation of investigatory guidelines is unlikely to correct the problems inherent in the statute.

Because the language of the statutes allows for increasingly violent behavior and protects the actor from prosecution, they should be repealed. The former statute provided more than adequate protection to persons truly acting in self-defense: a person only had a duty to retreat where it was reasonably safe to retreat, and a person did not have to retreat from a perceived threat in the home or workplace. Eliminating the duty to retreat, creating a presumption of reasonable fear in the castle, and granting immunity from prosecution shields criminals and protects a much broader array of violent acts than just those legitimately committed in self-defense. Therefore, the statutes should be stricken.

**B. Problems in the Application**

The interpretation of the statute and its application to actual cases at the trial and appellate levels has been inconsistent and unfair throughout the State. The cases analyzed in Part III, supra, represent the courts’ intent to limit the applicability of the
immunity statute, and individuals are nonetheless being required to defend legal acts of violence despite the legislature’s intent to grant a true immunity for such acts. Despite the legislature’s intent, law enforcement, prosecutors, and judges are not following the law.

Under caselaw a precedent has been established whereby a defendant must prove entitlement to immunity by a preponderance of the evidence. This shifts the burden of proof from the prosecution to the defense. Florida’s statute granting immunity to persons acting in self-defense goes beyond establishing a defense; it establishes a right not to stand trial.\textsuperscript{118} By forcing defendants to prove by a preponderance of the evidence that they are entitled not to face prosecution at all,\textsuperscript{119} the courts are essentially forcing them to do just that: face prosecution.

In deciding upon this burden of proof, Florida courts relied on a Colorado case examining a \textit{similar} statute. Colorado, however, is different in two (2) major ways: (1) the Colorado statute does not recognize a presumption of reasonable fear when the act of self-defense occurs in the castle; and (2) the Court established the burden of proof as “by a preponderance of the evidence” because it is the same burden of proof applicable in motions to suppress in Colorado, but the standard for a motion to suppress in Florida is lower than “by a preponderance of the evidence.” In the \textit{Guenther} opinion, the Colorado Supreme Court even acknowledged the analysis and outcome of that case would have been different if such a presumption were in place.\textsuperscript{120} Therefore, Florida’s reliance on the reasoning in this Colorado case is erroneous. The analysis cannot be applied to Florida’s statute because Florida has both immunity and a presumption of

\textsuperscript{119} \textit{Id.}
\textsuperscript{120} People v. Guenther, 740 P.2d 971 (Colo. 1987).
Moreover, the same burden used in Guenther should not be adopted in Florida because it is a higher burden than that required by motions to suppress in Florida, and therefore the same reasoning underlying the Colorado court’s decision is inapplicable in Florida.

At first glance, one could presume the problem in judicial interpretation throughout the State could simply be resolved by implementation of rules of procedure. Certainly creating a rule of procedure outlining a method for asserting immunity and clarifying the appropriate burden of proof would help to normalize the outcomes of factually similar cases throughout the State. Notwithstanding, creation of any guidelines or procedural rules will not resolve the issue presented in the language of the statute itself. Therefore, to require the Florida Supreme Court or any other body within the State to promulgate guidelines for the interpretation of the statute would be an effort in futility.

On the other hand, the legislature is not likely to repeal the statute in the near future. Hence, uniformity is necessary, at least at the court level. Therefore, a rule of procedure could provide that until the legislature has had the opportunity to reconsider the legislation. Any rule would need to clarify that asserting immunity is not the same as asserting a defense as section 776.032 is a grant of immunity and not just the preservation of a right to assert an affirmative defense. The rule should clearly establish that at no time does the defense bear the burden of proving by a preponderance of the evidence any entitlement to immunity; rather, once the defendant asserts entitlement to immunity, the prosecution should be required to prove, at least to

---

121 Interestingly, the Colorado legislature originally contemplated a statute providing both immunity and a presumption of reasonable fear. The legislature felt such a statute unwise and overbroad, however, because it would create automatic immunity for anyone claiming self-defense. Id. at 979.
the level of probable cause (if not to a higher burden), that the defendant did not act in reasonable fear.

For cases involving the castle, the presumption created by the statute appears to be irrebuttable, and to that extent this writer cannot think of any type of procedural rule that would allow the prosecution to overcome this presumption. Therefore, any act of violence occurring pursuant section 776.013 should not be prosecuted at all. In the event a prosecution is initiated, the case should be dismissed upon the defendant’s prima facie assertion of entitlement to immunity.

V. CONCLUSION

Florida’s Stand Your Ground, Castle Doctrine, and Immunity statutes are inherently flawed. To the extent other states are considering similar legislation, they should be strongly cautioned against passing legislation identical to Florida’s statutes. In the interest of preserving the sanctity of life, states should consider retaining the duty to retreat. Additionally, the Castle Doctrine should be confined to the home and cartilage of the home. States should also avoid creating any statutory presumption of reasonable fear which eliminates the factual determination of the justification of a violent act. Finally, states should not implement an immunity statute as broad as Florida’s because it essentially preempts the complete investigation and prosecution of violent acts, even those that may not be justifiable.

Although many states have embraced the notion of “stand your ground” over the common law “duty to retreat,” that focus coupled with immunity places a higher value on honor than on life. It makes a mockery of our democracy, and condones civilized men in resorting to barbaric behavior.
As evidenced in the district court decisions detailed above, the statutes have also created a judicial nightmare in Florida. The courts do not know how to handle cases where the law protects a criminal’s violent act. Rather than following the law, the courts appear to be imposing burdens of proof and other requirements to avoid granting immunity and forcing defendants to trial. In other words, courts are treating immunity as if it was an affirmative defense, and the statute in Florida is clearly a grant of true immunity. This appears to be the courts way of declaring disagreement with the law, and its way of forcing what it believes to be truly “criminal” acts to trial despite the statute.

Legislatures throughout the United States should heed the silent message from the Florida courts: these statutes should not be followed. In enacting the 2005 laws, the Florida legislature created protection for both criminal and legitimate self-defense acts. The prior statutes protected only legitimate self-defense acts, the legitimacy of which was determined by a jury. Now, the actual effect of Stand Your Ground, Castle Doctrine, and Immunity working together is to allow criminals to get away with murder.