“STAND YOUR GROUND” LAWS AND JUSTICE: THE CONTROVERSY OVER IMMUNITY TO CRIMINAL PROSECUTION

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Abstract

“Stand Your Ground” laws have received a plethora of media attention in 2012, none of which have been in a positive light. These laws providing a person with immunity from criminal prosecution are now being scrutinized for their confusing nature. “Stand Your Ground” laws allow a person to stand his or her ground and meet force with force, including deadly force, when specific requirements are met. These laws intend for law-abiding citizens to protect themselves and others without fear of being criminally prosecuted. However, they often do not provide consistent guidelines to enforce and apply the immunity. Therefore, two persons under similar circumstances could use deadly force under the reasonable belief that it is necessary to do so to prevent death or great bodily harm against themselves or another, but one be granted immunity and the other not. This Comment argues that “Stand Your Ground” laws that provide a person with immunity from criminal prosecution for justifiable use of deadly force are flawed. This Comment further asserts that state legislators should amend their “Stand Your Ground” laws to provide a person to use the law as an affirmative defense to criminal prosecution and not immunity.

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I. INTRODUCTION

During an altercation on February 26, 2012 in Sanford, Florida, George Zimmerman shot and killed seventeen-year-old Trayvon Martin.¹ Martin was unarmed and carrying a can of iced tea and a bag of skittles at the time of the shooting.² When Zimmerman told his account of the incident to police, he explained that he shot Martin in self-defense.³ Although Zimmerman confessed to killing Martin, he initially was not charged for Martin’s death “because there were no grounds to disprove his accounts of the events.”⁴ Specifically, Zimmerman was determined to be immune from criminal prosecution pursuant to Florida’s “Stand Your Ground” law.⁵

“Stand Your Ground” laws allow for a person to stand his or her ground and meet force with force, including deadly force, when specific requirements are met.⁶ Prior to the enactment of these statutes that allow a person to stand his or her ground, a minority of states had a duty to retreat requirement in their common law.⁷ This common law doctrine, derived from early

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² Id.
³ See Id. “According to an Orlando Sentinel story later confirmed by Sanford police, Zimmerman tells authorities that after Zimmerman briefly lost track of Martin, the teen approached him. After the two exchange words, Zimmerman says, he reaches for his cell phone, and then Martin punches him in the nose. Zimmerman says Martin pins him to the ground and begins slamming his head into the sidewalk.” Id.
⁴ Id.
⁵ See FLA. STAT. § 776.032 (2005). The bill purporting to the “Stand Your Ground” law was passed by the Florida state legislature and took effect of October 1, 2005. See Senate Staff Analysis and Economic Impact Statement, Florida Staff Analysis, S.B. 436, 2/25/2005.
⁶ FLA. STAT. § 776.013(3) (2005); see also TEX. PEN. CODE ANN. §9.32 (Vernon Supp. 2007); W. VA. CODE ANN § 55-7-22 (West 2008); GA. CODE ANN. § 16-3-21 (West 2006); N.C. GEN. STAT. ANN. § 14-51.3 (West 2011).
⁷ See State v. Cox, 23 A.2d 634 (Me. 1941) (noting that “the accused must have retreated before resorting to homicide in self-defense, unless it reasonably appeared to him as a reasonable man that he could not retreat without increasing the danger to himself or to one he was then lawfully defending”); see State v. Talley, 33 A. 181 (Del.
England,8 required a person to “retreat to the wall at one’s back” before using deadly force in self-defense.9 In nineteenth century America, many jurisdictions abandoned the English common law doctrine in exchange for the American concept of “no duty to retreat” if one is legally justified in standing one’s ground.10

Depending on the jurisdiction, the “Stand Your Ground” law is used as an affirmative defense or immunity to criminal charges and civil suits.11 As an affirmative defense, the defendant may assert facts and arguments to defeat the prosecution’s claim that the defendant did not meet the specific requirements to assert the defense.12 However, if the jurisdiction provides a person with immunity under the “Stand Your Ground” law, then that person will be “immune from criminal prosecution and civil action for the use of such force.”13

Supporters of “Stand Your Ground” laws claim that the duty to retreat creates an unfair burden on victims and that taking away the duty will eliminate that burden.14 Supporters also argue that the new law will deter criminal activity.15 Opponents of the laws, on the other hand, disagree with these assertions and fear that the new law allows people to take the law into their

8 See Joseph H. Beale, Retreat From A Murderous Assault, 16 HARV. L. REV. 567, 568 (1903) (citing 24 Henry VIII. c. 5) (examining the king’s courts during King Edward I’s reign when the crime of homicide could be justified).
10 Id.
11 A group of states apply “Stand Your Ground” laws as immunities. See FLA. STAT. § 776.032(1) (2005); GA. CODE ANN. § 16-3-24.2 (West 2006); N.C. GEN. STAT. ANN. § 14-51.3(b) (West 2011); OKLA. STAT. ANN. tit. 21, § 1289.25 (West). But see TEX. PEN. CODE ANN. §9.32 (Vernon Supp. 2007) (requiring that the defendant raise the issue of self-defense as an affirmative defense); COLO. REV. STAT. ANN. § 18-1-704 (West 2003).
12 See BLACK'S LAW DICTIONARY 482 (9th ed. 2009).
13 FLA. STAT. § 776.032(1) (2005). “As used in this subsection, the term ‘criminal prosecution’ includes arresting, detaining in custody, and charging or prosecuting the defendant.” Id.
14 Bobo, supra note 9, at 364.
15 Id. at 365.
own hands.\textsuperscript{16} Moreover, opponents argue that needless violence will occur as a result of the law.\textsuperscript{17}

This Comment will argue that “Stand Your Ground” laws that provide a person with immunity from criminal prosecution for justifiable use of deadly force are flawed. This Comment will claim that state legislators should amend “Stand Your Ground” statutes to provide a person to use the law as an affirmative defense to criminal prosecution and not immunity. Furthermore, “Stand Your Ground” laws should offer a set of criteria that the defendant must show in order for the use of deadly force to be justified.

Part II focuses on the origins of modern “Stand Your Ground” laws throughout the United States and how the laws have developed from the English common law doctrine of “duty to retreat” into the American common law doctrine of “no duty to retreat.” Part III explains what an affirmative defense and immunity is and which types of actions are afforded to its use. In addition, Part III examines how “Stand Your Ground” laws are applied in various jurisdictions as an affirmative defense or immunity, and shows when persons are privileged to justifiable use of deadly force.

Part IV of this Comment explores modern views from both supporters and opponents of the law. Part V scrutinizes “Stand Your Ground” laws that are applied as immunity to criminal prosecution by showing the contradictions between the legislative intent and the actual practice of the immunity. Part V also shows how the application of immunity with the law improperly imposes the duty of fact-finder to law enforcement, as well as interferes with defendants’ and victims’ rights to due process and equal protection under the law. Part VI suggests that state legislators should amend “Stand Your Ground” laws to be applied as an affirmative defense and

\begin{flushleft}
\textsuperscript{16} Id. at 369. \\
\textsuperscript{17} Id. at 365.
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proposes the appropriate standard of proof. This Comment concludes in Part VII with the importance of uniformed criteria and how the proposed amendment to “Stand Your Ground” laws would affect, or would have affected, controversial cases.

II. THE HISTORY OF “STAND YOUR GROUND” LAWS

A “Stand Your Ground” law is a self-defense doctrine that allows a person to stand his or her ground and meet force with force, including deadly force, and eliminates the general duty to retreat.18 Under this provision, the use of deadly force is justified when the actor “reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or another.”19 The purpose for “Stand Your Ground” laws is based on the theory that law-abiding people should be able to “protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.”20

A. English Common Law: The Duty to Retreat

The duty to retreat is an English common law doctrine that makes it necessary for a person to retreat to the wall at one’s back before one could legitimately kill in self-defense.21 It followed that “[w]henever retreat and reasonable necessity to kill were proven, the proper finding of the court would be [justifiable] homicide, which meant there was no penalty.”22 The reasoning behind the duty to retreat requirement was that “the state wanted to keep a monopoly

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18 FLA. STAT. § 776.013(3); see also TEX. PEN. CODE ANN. §9.32(c); W. VA. CODE ANN. § 55-7-22(c); GA. CODE ANN. § 16-3-21; N.C. GEN. STAT. ANN. § 14-51.3(a); ARIZ. REV. STAT. ANN. § 13-405(B) (2010).
19 See FLA. STAT. § 776.012(1) (2005); see also TEX. PEN. CODE ANN. §9.32(a). A person who “is justified commits an act that, in the eyes of society, was not wrong.” Michelle Jaffe, Up in Arms over Florida’s New “Stand Your Ground” Law, 30 NOVA L. REV. 155, 157 (2005) (citing Marcia Baron, Justifications and Excuses, 2 OHIO ST. J. CRIM. L. 387, 389 (2005)); but see id. (noting that “a person who is excused does commit a wrongful act, but is blameworthy due to underlying circumstances”).
21 Bobo, supra note 9, at 342.
22 Id. at 343 (alteration in original).
over the resolution of conflict at the level of dispute between individuals.”\(^{23}\) Furthermore, the duty to retreat requirement was “a ‘powerful means to produce a society of civility,’ as obedience to that duty meant that in most disputes, no fatal outcome would occur.”\(^{24}\) An Englishman could not take the law into his own hands, but need to look to the state to “champion” his interests.\(^{25}\)

**B. New American Trend Leading to United States Supreme Court Decisions**

The precursor to present “Stand Your Ground” laws came in the nineteenth century when many jurisdictions abandoned the English common law doctrine “in favor of the American concept of no duty to retreat—that one was legally justified in standing one’s ground to kill in self-defense.”\(^{26}\) Much of the resentment towards the duty to retreat was due to the view that this duty was a doctrine of cowardice.\(^{27}\) With the United States on a westward movement, “the concept of the right to defend one’s honor” began to move with it.\(^{28}\) This “code of honor” also became welcomed among the southern states where people favored “an unwritten code based more in equity and honor than in ordinary law.”\(^{29}\)

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\(^{23}\) *Id.* Requiring a duty to retreat meant that “any punishment rendered should be meted out by the courts.” Denise M. Drake, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 St. Mary’s L.J. 573, 582 (2008).

\(^{24}\) Bobo, *supra* note 9, at 343. The duty to retreat imposed a heavy burden to one’s self-esteem recognizing the shame and dishonor in asking people to run away from danger; at the cost of one’s pride, it also showed a compassion for life. Drake, *supra* note 23, at 582.

\(^{25}\) Wyatt Holliday, “The Answer to Criminal Aggression is Retaliation”: Stand-Your-Ground Laws and the Liberalization of Self-Defense, 43 U. Tol. L. Rev. 407, 410 (2012). An Englishman “could act as his own champion only if he took every precaution to avoid using violence in his own defense—he had to retreat until backed against a wall.” *Id.*

\(^{26}\) Bobo, *supra* note 9, at 343.


\(^{28}\) Catalfamo, *supra* note 27, at 507. See Drake, *supra* note 23, at 578 (discussing the nonexistence of formal laws in West Texas following the Civil War and the limited use for statutes passed by politicians who were far removed from everyday lawfulness).

As settlers began to move westward, state supreme courts began to favor the right to stand one’s ground. In *Erwin v. State*, the Ohio Supreme Court held that “a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.” In *Runyan v. State*, the Supreme Court of Indiana also recognized the no duty to retreat doctrine and ruled that “when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence [sic], his assailant is killed, he is justifiable.”

Following the rulings in various state supreme courts, the United States Supreme Court began to hear cases on the duty to retreat issue. In *Beard v. United States*, the Supreme Court held that “a person had no duty to retreat while on his premises when under attack that he did not provoke and reasonably believe in good faith that deceased intended to take his life or do great bodily harm.” While the defendant was on his or her own premises, the Supreme Court seemed to endorse the no duty to retreat doctrine.

However, in *Allen v. United States*, the Court “confused the issue.” After hearing the case for the third time, the Allen Court upheld a jury instruction requiring a defendant to use “all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power” The Court reasoned that this case differentiated itself from prior cases in which it held that the defendant

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30 Bobo, supra note 9, at 344.
31 29 Ohio St. 186 (Ohio 1876).
32 57 Ind. 80, 84 (1877). The court recognized that the “American mind” is strongly against the enforcement of a duty to retreat when attacked. *Id.*
33 Bobo, supra note 9, at 347.
34 158 U.S. 550, 564 (1895).
35 Jaffe, supra note 19, at 165. Beard is precedent for the modern castle doctrine. *See infra* note 46.
36 Jaffe, supra note 19, at 165.
had no duty to retreat because “in the previous cases the defendants were upon their own property.”

Although the Allen decision made it difficult to understand the Supreme Court’s stance on the duty to retreat, its stance was clarified in Brown v. United States. In Brown, the Supreme Court upheld the no duty to retreat maxim and noted that “detached reflection cannot be demanded in presence of uplifted knife where person was somewhere he had a right to be when the incident occurred.” As a result, the Court ruled that a defendant is not obligated to retreat from anywhere he has a right to be.

C. The Expansion of the Castle Doctrine

While some states still maintain a duty to retreat, there are some exceptions. One exception is known as the castle doctrine, stemming from the notion that one’s home is one’s

38 Jaffe, supra note 19, at 166 (citing Allen, 164 U.S. at 498); but see Allen, 164 U.S. at 498 (citing Beard, 158 U.S. at 564 (holding that the obligation to retreat was no greater than it would have been if he had been assailed in his own home); Alberty v. United States, 162 U.S. 499, 508 (1896) (holding that the defendant was under no duty to retreat after finding the deceased trying to obtain access to his wife’s chambers through a window and the deceased attacked him with a knife).


41 Brown, 256 U.S. at 343.

42 See id. at 344. This is precedent for the “stand your ground” doctrine. See FLA. STAT. § 776.013(3) (noting that a person who is not engaged in an unlawful activity and is attacked in any other place where he or she has a right to be has no duty to retreat and has to stand his or her ground and meet force with force, including deadly force).

43 See, e.g., Lane v. State, 222 A.2d 263, 267 (DE. 1966) (noting that “if the deceased first attacked the defendant, even though the attack was of such a character as to create in the defendant’s mid a reasonable belief that he was in danger of death or great bodily harm, it was the defendant’s duty to retreat, if he could safely do so, or to use such other reasonable means as were within his power to avoid the killing of the assailant”); Davis v. Strack, 270 F.3d 111, 126 (2d Cir. 2001) (applying New York’s duty to retreat requirement that “[t]he defendant has a duty to retreat if he knows he can retreat with complete safety as to himself and others, and he reasonably believes the other person’s use of deadly physical force against him is either actually occurring or is imminent”); CONN. GEN. STAT. ANN. § 53a-19 (West 2010); N.J. STAT. ANN. § 2C:3-4(b)(2)(b) (West 1999).

44 Bobo, supra note 9, at 351; see, e.g., State v. Shaw, 441 A.2d 561 (Conn.1981) (noting that “a person is not justified in using deadly physical force upon another person if he know that he can avoid the necessity of using such force with complete safety by retreating, except that the actor shall not be required to retreat if he is in his dwelling”); N.J. STAT. ANN. § 2C:3-4(b)(2)(b)(i); N.Y. PENAL LAW § 35.15(2)(a) (McKinney 2004).
The castle doctrine provides that “if a person is attacked in his own dwelling or on his own premises, without any fault on his part, he need not retreat but may stand his ground and use such force as may be necessary to protect himself, even to the extent of killing his adversary.”

Since then, many states have enacted legislation that expands the castle doctrine to areas outside of the home, such as the workplace or a vehicle, and eliminates the general duty to retreat. The purpose of these expansions to the castle doctrine was to bring these laws in conformity with the Supreme Court’s decision in Brown v. United States. Moreover, a person has no duty to retreat if the actor has a right to be present at the location where deadly force is used and may stand his ground. These enactments are more commonly known as “Stand Your Ground” laws.

III. APPLICATIONS OF “STAND YOUR GROUND” LAWS IN THE UNITED STATES

Since “Stand Your Ground” laws are doctrines of self-defense, the first step is to analyze the concept of self-defense before making further inquiry into the different ways that jurisdictions have applied these laws. The doctrine of self-defense arose to prevent punishment for actions deemed necessary under the circumstances. Self-defense is categorized into two.

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45 Id. at 353 (citing State v. Stevenson, 344 S.E.2d 344, 335 (N.C. Ct. App. 1986)).
46 Pell v. State, 122 So. 110, 116 (Fla.1929); see also 40 C.J.S. Homicide §212 (2007).
47 See FLA. STAT. §776.013(a) (extending the scope of the castle doctrine to an occupied vehicle); see also TEX. PEN. CODE ANN. §9.32(b)(1)(A) (extending the scope of the castle doctrine to the actor’s vehicle and place of place of employment or business).
48 Neyland, supra note 39, at 729 (citing Brown, 256 U.S. at 335).
49 TEX. PEN. CODE ANN. §9.32(c); see also 40 Am. Jur. 2d Homicide § 160.
50 Self Defense—Deadly Force, 2005 Fla. Sess. Law Serv. Ch. 2005-27 (C.S.C.S.S.B. 436) (“[N]o person or victim of crime should be required to surrender his or her personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack”).
51 The doctrine of self-defense can be a valid defense to murder and the lesser crimes of voluntary manslaughter, and involuntary manslaughter. See State v. Hall, 569 A.2d 534, 585 (Conn. 1990) (noting that the trial court should have instructed the jury on self-defense with respect to the lesser offense of manslaughter in the second degree); Jordan v. State, 782 S.W.2d 524, 526 (Tex. App. 1989) (noting that the court’s failure to apply self-defense to the lesser included offenses was erroneous).
52 Neyland, supra note 39, at 721.
parts: perfect self-defense and imperfect self-defense.\(^{53}\) Perfect self-defense may be either justifiable or excusable, and operates as a complete defense to a crime.\(^{54}\) In regards to the use of deadly physical force, a justifiable homicide in self-defense occurs “when a defendant without provoking the confrontation, kills another under the reasonable apprehension of death or great bodily harm to the defendant.”\(^{55}\) An excusable homicide in self-defense, however, occurs “where a defendant, although somewhat at fault in provoking the confrontation in the first place, retreats as far as possible when attacked, announces his or her desire for peace, and kills his or her adversary from a reasonably apparent necessity to preserve defendant’s own life.”\(^{56}\)

Imperfect self-defenses are based on mitigation and only reduce a defendant’s criminal culpability to a lesser crime.\(^{57}\) For example, a “defendant’s actions in imperfect self-defense can result in a conviction for voluntary manslaughter if he or she intentionally kills a person based upon an unreasonable but honest belief that circumstances existed that justified deadly force.”\(^{58}\) Furthermore, “[i]f the belief in the need to defend subjectively exists but is objectively unreasonable, there is imperfect self-defense.”\(^{59}\)

A. Privileges

\(^{53}\) See 2 CRIM. L. DEF. § 132.50.


\(^{55}\) See Bailey v. Commonwealth, 104 S.E.2d 28, 31 (Va. 1958). “The justification that exonerates a defendant from criminal responsibility for the use of deadly force is limited by an objective standard where society would agree that the use of deadly force was necessary and a part of that objectivity analysis includes the duty if all possible to avoid the harm.” State v. Edwards, 717 N.W.2d 405, 413 (Minn. 2006).


\(^{57}\) Kirkpatrick, 184 P.3d at 256 (citing 40 AM.JUR.2D Homicide § 139).

\(^{58}\) State v. Pennington, 227 P.3d 978, 989 (Kan. Ct. App. 2010); but also see id. (citing Kirkpatrick, 184 P.3d at 256).

Prosser & Keeton define privilege as “the modern term applied to those considerations which avoid liability where it might otherwise follow.”60 It grants a person the legal freedom to do or not to do a given act.61 Moreover, privilege immunizes conduct that would subject the actor to liability if the conduct were done under ordinary circumstances.62

Privileges created by law “are based upon the value attached to the interest to be protected or advanced by their exercise, or upon the necessity of giving to certain functionaries that freedom of action necessary to the proper performance of their functions.”63 Where the privilege is based upon the value attached to the interest to be protected or advanced by its exercise, “the privilege protects the actor from liability only if the acts are done for the purpose of protecting or advancing the interest in question.”64 In regards to deadly force, a person is not privileged to its use unless the deadly force is “employed where life is imperiled or serious injury is threatened.”65 This principle derives from “the basic value judgment that human life has such intrinsic value that there can be no justification for killing unless it is necessarily done in the

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60 Prosser & Keeton on Torts § 16 (5th ed. 1984); BLACK'S LAW DICTIONARY 1316 (9th ed. 2009) (“a special legal right, exemption, or immunity granted to a person or class of person; an exemption to a duty”).
61 Id.
62 See Id; Prosser & Keeton on Torts § 16. Qualified privilege is “a privilege that immunizes an actor from suit only when the privilege is properly exercised in the performance of a legal or moral duty.” BLACK'S LAW DICTIONARY 1317 (9th ed. 2009) Another type of privilege is absolute privilege, which “immunizes an actor from suit, no matter how wrongful the action might be, and even though it is done with an improper motive.” BLACK'S LAW DICTIONARY 1316 (9th ed. 2009). In addition, special privilege is “granted to a person or class of persons to the exclusion of others and in derogation of the common right.” BLACK'S LAW DICTIONARY 1317 (9th ed. 2009). However, like qualified privileges, the application of which are fundamentally dependent upon the proper context, see Restatement (Second) of Torts § 10 (1979) (showing that privilege is only granted if the statement is made for the protected purpose, is limited in scope, and is discreet in its conveyance and to whom it is stated), the application of Stand Your Ground laws should be fundamentally dependent upon certain conditions in the context. See, e.g., Appendix I (showing under which circumstances a person may stand his or her ground and use deadly force for self-defense).
63 See Restatement (Second) of Torts § 10(2)(b)-(c) (1979); see also id. at cmt. d.
64 Restatement (Second) of Torts § 10(2)(c); see id. at cmt. d (discussing how privilege is to be used only for protecting the valued interest).
protection of life.” However, determining whether a person is privileged to use deadly force is not so clear-cut.

Understandably, states have not conceptualized “Stand Your Ground” laws as privileges. In general, a privilege is “given to persons performing certain public functions in order that they may exercise their functions without fear that in doing so their private interests may be affected.” But private citizens are not performing a public function when they employ the use of deadly force. Unlike judges or members of legislature who are performing within the scope of their duties, a private individual could not be deemed to have absolute privilege—which immunizes an actor from suit despite the wrongfulness of his conduct—because he or she does not have a duty to kill unless in doing so to preserve life. The same can be said for qualified privilege—which immunizes an actor from suit “only when the privilege is properly exercised in the performance of a legal or moral duty.” The justifiable use of deadly force is conditional to

66 Id.
67 See Justification for the Use of Force in the Criminal Law, 13 STAN. L. REV. 566, 595 (1961) (discussing the privileges of combatants to kill each other must be mutually exclusive, when in fact both might have such privileges if one is reasonably proceeding under a false assumption of fact).
68 Restatement (Second) of Torts § 10 cmt.10 (1979) (noting that “it is necessary that nothing done in the performance of their duty can subject them either to liability or to annoyance or expense incident to even unsuccessful litigation”).
69 E.g., Mead Corp. v. Hicks, 448 So.2d 308, 313 (Ala. 1983) (discussing how absolute privilege communications are those made during legislative or judicial proceedings, or contained in legislative acts made under authority of law”); Lee v. City of Rochester, Lee v. City of Rochester, 254 A.D.2d 790, 791 (N.Y. App. Div. 1998) (noting that “a police officer may give details of past and present incidents that would interest or affect the public which would be protected under qualified privilege).
70 See Owen v. Kronheim, 304 F.2d 957 (D.C. Cir. 1962) (discussing how judges are absolutely privileged if they are made in the judge’s official capacity while he is acting within his jurisdiction).
71 See Butler v. Town of Argo, 871 So. 2d 1,23 (Ala. 2003) (citing Webster v. Byrd, 494 So.2d 31 (Ala. 1986) (noting that “legislative bodies have privilege from certain causes of action stemming from performance of their legislative functions”)).
72 BLACK’S LAW DICTIONARY 1316 (9th ed. 2009).
73 See The Use, supra note 65, at 1222 (discussing that a person has a duty to protect life). ); see also Becker v. Philco Corporation, 389 U.S. 979, 983 (1967) (holding that “internal reports made by a government employee to his superior should have an absolute privilege since the superior will be able to evaluate the accuracy of a statement concerning conditions within his own department,” but communications from private corporations should not).
74 BLACK’S LAW DICTIONARY 1317 (9th ed. 2009); but see Fisher v. Wal-Mart Stores, Inc., 619 F.3d 811, 821 (8th Cir. 2010) (discussing how employee’s responsibilities and duties were helping Wal-Mart to prevent fraud, and that she had qualified privilege in her statement that “concerned a matter which the parties have an interest of duty”).
the protection of life;\textsuperscript{75} therefore, a private actor may not be privileged to do so unless he or she is engaged in conduct to protect a life.\textsuperscript{76}

The type of privilege most comparable to “Stand Your Ground” laws is special privilege. Special privilege is “a privilege granted to a person or class of persons to the exclusion of others and in derogation of the common right.”\textsuperscript{77} Under such circumstances, the privilege is the right to use deadly force; the common right is the right to live;\textsuperscript{78} the privileged class of persons would be the actor—the person using deadly force;\textsuperscript{79} and the person(s) excluded from the privileged use of deadly force would be those individuals who do not meet the requisite criteria needed for the use of force to be justified.\textsuperscript{80} Nevertheless, using “Stand Your Ground” laws as a special privilege would lose on constitutional grounds since the Fourteenth Amendment Equal Protection clause prohibits a grant to a class where the classification is placed on an arbitrary basis.\textsuperscript{81}

B. Affirmative Defense

\textsuperscript{75} The Use, supra note 65, at 1222.
\textsuperscript{76} Id. “[O]nly a threat of life or limb, and not property, allows a citizen to exercise the right [to preserve life] that the State cannot unable to protect.” Daniel Michael, Florida’s Protection of Persons Bill, 43 HARV. J. ON LEGIS. 199, 212 (2006) (alteration in original).
\textsuperscript{77} BLACK’S LAW DICTIONARY 1317 (9th ed. 2009).
\textsuperscript{78} See Mattis v. Shnarr, 547 F.2d 1007, 1017-19 (8th Cir. 1976) (discussing how the taking of the fundamental right to life, without due process safeguards provided by a trial, could only be justified by a compelling state interest.
\textsuperscript{79} See, e.g., TEX. PEN. CODE ANN. § 1.07(2) (“Actor” means a person whose criminal responsibility is in issue in a criminal action). The actor would be privileged to use deadly force only if engaged in conduct to protect human life. The Use, supra note 65, at 1222.
\textsuperscript{80} E.g., FLA. STAT. § 776.013(3) (2005) (noting that a person must be in a place that he or she has a lawful right to be).
\textsuperscript{81} See, e.g., infra note 158; Compare the grant of special privilege with FLA. STAT. § 776.032(2) (2005) (allowing a law enforcement agency to determine if a person is immune from criminal liability for the justifiable use of deadly force). In Vardaman v. McBee, the Supreme Court of Mississippi states:

Class legislation, also often called local or private legislation, is legislation limited in operation to certain persons or classes of persons, natural or artificial, or to certain districts of the territory of the State, and statutes which make unreasonable or arbitrary classifications or discriminations violate provisions of constitutions prohibiting special laws granting any special or exclusive privileges, immunities, or franchises, or passed for the benefit of individuals inconsistent with the general law of the land.

21 So.2d 661, 664 (Miss. 1945).
An affirmative defense is “a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff or prosecution's claim, even if all the allegations in the complaint are true.”

It must be pled by the defendant with the purpose of providing “the plaintiff [or prosecution] with adequate notice of a defendant’s intention to litigate an affirmative defense,” and to provide the plaintiff [or prosecution] the opportunity to offer a rebuttal. The defendant bears the burden of proving an affirmative defense. This burden originated in early English common law when a defendant could only present evidence of a defense as a means to mitigate punishment following conviction. In various states, self-defense is an affirmative defense, and a number of those states that enacted “Stand Your Ground” laws also provide that a person is justified in using deadly force in certain situations as an affirmative defense.

In 2007, the Texas state legislature enacted its version of the “Stand Your Ground Law and specified that “a person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force.” The defendant must prove the affirmative defense by a preponderance of the evidence that the attacker caused the accused to reasonably believe he was in danger and that deadly force was immediately necessary. The issue of fact is to be determined by the

82 BLACK'S LAW DICTIONARY 482 (9th ed. 2009).
83 See Davignon v. Clemmey, 322 F. 3d 1, 15 (1st Cir. 2003) (alteration in original).
84 Id.; see infra note 161, at 171.
86 See 40 AM. JUR. 2D Homicide § 137.
87 See TEX. PEN. CODE ANN. §9.32 (Vernon Supp. 2007); See W. VA. CODE ANN. § 55-7-22 (West).
89 See Nance v. State, 807 S.W.2d 855 (Tex. App. 1991) (noting that the burden of proof for the affirmative defense is by a preponderance of the evidence).
Furthermore, the State, or prosecution, has the burden of persuasion in proving beyond a reasonable doubt that the defendant did not act in self-defense, given that the defendant raised the evidence that he killed in self-defense.\textsuperscript{92}

C. Immunity

Immunity is defined as “freedom from suit or liability.”\textsuperscript{93} Typically, when immunity is given to individual actors, it is afforded to those who serve as public officials.\textsuperscript{94} Take prosecutorial immunity as an example. Pursuant to 42 U.S.C. § 1983, two types of immunity apply to prosecutors depending on the function the prosecutor was performing at the time of misconduct.\textsuperscript{95} Firstly, a prosecutor has absolute immunity when he or she acts as an advocate\textsuperscript{96} and is “immunized even when the plaintiff establishes [that] the prosecutor acted intentionally, in bad faith, and with malice.”\textsuperscript{97} Similar to privileges, there are policy considerations for why immunity, specifically absolute immunity, is granted to an individual actor.\textsuperscript{98} Primarily, exposing prosecutors to civil liability would “burden and undermine the functioning of the criminal justice system.”

\textsuperscript{93}Prosser & Keeton on Torts § 131 (5th ed. 1984); BLACK'S LAW DICTIONARY 817 (9th ed. 2009) (“any exemption from a duty, liability, or service of process”).
\textsuperscript{94}See Margaret Z. Johns, Reconsidering Absolute Prosecutorial Immunity, 2005 B.Y.U. L. REV. 53 (2005) (discussing absolute and qualifying prosecutorial immunity); see also 3B C.J.S. Ambassadors & Consuls §§ 12-13 (discussing the purpose and functions of diplomatic immunity); see also 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).
\textsuperscript{95}Johns, supra note 94, at 53-54 (citing Kalina v. Fletcher, 522 U.S. 118, 127-29 (1997)). See Burns v. Reed, 500 U.S. 478, 486 (1991) (discussing absolute immunity); but see also Buckley v. Fitzsimmons, 509 U.S. 259, 268-69 (1993) (discussing how prosecutor’s administrative duties and investigatory functions that do not relate to advocate’s preparation for initiation of prosecution are entitled to qualified, and not absolute immunity).
\textsuperscript{96}Johns, supra note 94, at 54 (citing Burns, 500 U.S. 478, 487-96).
\textsuperscript{97}Id. at 54 (citing Kalina, 522 U.S. at 124) (alteration in original). “An immunity exists when no inquiry is permitted into motive or motives.” Prosser & Keeton on Torts § 131. However, when dealing with a homicide, an assailant’s motives should be considered to help determine whether or not the person killed with premeditation or malice aforethought. See FLA. STAT. § 782.04 (2010) (purporting to “a premeditated design to effect the death of the person killed”); See Yeager v. State, 635 S.E.2d 704 (Ga. 2006) (ruling that evidence was sufficient to support conviction for murder with malice aforethought when the evidence showed that the defendant was upset that the victim was going to re-enlist in the Navy and leave her).
\textsuperscript{98}Id. at 55.
system.” However, a prosecutor is not immune from liability when performing functions not within the scope of his or her judicial duties.

Secondly, a prosecutor has qualified immunity when he or she acts as an investigator or administrator and is “immunized unless the misconduct violated clearly established law of which a reasonable prosecutor would have known.” Moreover, qualified immunity applies to executive officers, including police officers and governors. The Supreme Court in Burns v. Reed “emphasized that since § 1883 does not provide for any immunities, the Court would exceed its proper role in affording absolute immunity to conduct that was only accorded qualified immunity in 1871 when the statute was adopted.”

Qualified immunity is useful to prosecutors because “[i]t provides protection for the honest prosecutor from the burden and intimidation of retaliatory litigation, while affording the victims a remedy where the prosecutor has intentionally violated clearly established constitutional guarantees.” The Court created an objective test for establishing qualified immunity shielding government officials performing discretionary functions from liability for

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99 “The idea [of immunity] was that, though the defendant might be a wrongdoer, social values of great importance required that the defendant escape liability.” Prosser & Keeton on Torts § 131 (alteration in original). Compare id. at 55 with Restatement (Second) of Torts § 10 cmt. 10 (1979) (noting that “it is necessary that nothing done in the performance of their duty can subject them either to liability or to annoyance or expense incident to even unsuccessful litigation”). Judicial immunity is “recognized in the United States as ‘a general principle of the highest importance to the proper administration of justice.’” The Immunities, 764 PLI/Lit 725, 727 (2007) (citing Bradley v. Fisher, 80 U.S. 335 (1872)). For this reason, judges are given absolute immunity. See Johns, supra note 94, at 76 (citing Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (holding that judges are entitled to absolute immunity under 42 U.S.C. § 1983)). However, “a judge is not immune when he or she leaves his or her jurisdiction.” The Immunities, 764 PLI/Lit at 732 (noting that “For a judge to assume authority outside the geographic bounds of his office is the kind of clear judicial usurpation which cannot be condoned by any grant of immunity. No public policy would be served by granting immunity for such arrogant excesses of authority”).

100 See Duffy v. Wolle, 123 F.3d 1026, 1034 (8th Cir. 1997) (noting that a judge’s actions in employment discrimination is not immunized). See also Gravel v. U.S., 408 U.S. 606, 625 (1972) (noting that legislative immunity under § 1883 does not apply to activities outside the legislative function).

101 Id. at 54 (citing Kalina, 522 U.S. at 122-23).
102 Johns, supra note 94, at 54 (citing Buckley, 509 U.S. at 268).
103 See id. at 77; see Pierson, 386 U.S. at 555; see Scheuer v. Rhodes, 416 U.S. 232, 245-59 (1974).
104 Johns, supra note 94, at 84 (citing Burns, 500 U.S. at 494).
105 Id. at 107.
civil damages as long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

In more recent years, jurisdictions with “Stand Your Ground” laws have provided that a person who is justified in using deadly force is immune from criminal prosecution and civil action for the use of such force. However, unlike the immunity granted to public officials with absolute immunity or to executive officers with qualified immunity, the immunity in these jurisdictions is granted to private citizens. Furthermore, while the immunities given to public officials and executive officers were granted in regards to their governmental functions, the “Stand Your Ground” laws affording private citizens with immunity are granted solely upon the actor’s conduct which is something that immunities were not historically meant to protect.

IV. MODERN VIEWS ON “STAND YOUR GROUND” LAWS

A. Supporters of the Law

With the support of the National Rifle Association, state legislators began passing laws intending to protect “honest citizens” from frivolous lawsuits. Supporters of the “Stand Your Ground” laws argue that the duty to retreat created an unfair burden on victims. Other supporters, namely gun advocates, contend that these laws have lowered the national crime rates. They contend that there is a relationship between the number of people with guns and

106 Id. at 78 (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
107 See FLA. STAT. § 776.032(1) (2005); GA. CODE ANN. § 16-3-24.2 (West 2006); N.C. GEN. STAT. ANN. § 14-51.3(b) (West 2011); KAN. STAT. ANN. § 21-5231 (West 2011).
108 See Gravel, 408 U.S. at 625.
109 Johns, supra note 94, at 54 (citing Buckley, 509 U.S. at 268).
110 Id. “The immunities…are grounded principally in the special statuts of the defendant as a governmental entity, or an officer thereof”. Prosser & Keeton on Torts § 131.
112 See Holliday, supra note 25, at 434.
113 See Bobo, supra note 9, at 364.
114 Jaffe, supra note 19, at 179.
the crime rate. Moreover, as the number of people with guns increases, the violent crime rate decreases. While opponents of the law contend “Stand Your Ground” laws will lead to vigilantism, supporters contest this assertion and have argued that the law was created to balance the justice system that was once weighed more favorably towards the criminal.

B. Opponents of the Law

Critics of these laws refer to “Stand Your Ground” laws as “Shoot First” laws. They argue that laws that allow people to stand their grounds and meet force with force permit people to “take the law into their own hands.” Moreover, needless violence will occur as the result of the law. State legislators have also criticized these laws for their confusion. For instance, Florida State Senator Chris Smith stated that “[s]tand your ground’ appears to be giving suspects better protections from arrest and prosecution than increased security measures for the citizens the law was originally intended to protect.” Furthermore, he is calling for a change in the “Stand Your Ground” law to prohibit the use of the law in situations where the shooter provoked the confrontation. The law is supposed to allow a person to stand his or her ground and meet force with force, but not to “purse and confront.” Other critics would rather have the law encourage the preservation of life and that “Shoot First” laws “encourage confrontations to turn

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115 Id.
116 Id.
117 Bobo, supra note 9, at 364.
118 Neyland, supra note 39, at 736.
119 Bobo, supra note 9, at 365.
120 Id. at 325.
122 Id.
These opponents of “Shoot First” laws feel that the law “neglects a basic premise of civilized society: respect for life.”

V. “STAND YOUR GROUND” LAWS AS IMMUNITY TO CRIMINAL PROSECUTION IS FLAWED

A. Contradiction Between Legislative Intent and Actual Practice

The “Stand Your Ground” law, enacted in Florida in 2005, “was not introduced in response to a specific case or incident but rather was an attempt to counterbalance the protection courts give to the rights of criminals vis-à-vis the rights of their victims.” The Florida Supreme Court in Dennis v. State cites to the preamble of the bill creating the law, stating that the Legislature intended “for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.” The court also held that “the plain language of § 776.032 grants defendants a substantive right to assert immunity from prosecution and to avoid being subjected to a trail.” Criminal prosecution, as defined by § 776.032(1), includes the “arresting, detaining in custody, and charging or prosecuting” of the defendant.

In Peterson v. State, the court recognized that wording selected by the Florida legislature “intended to establish true immunity and not merely an affirmative defense,” in enacting the

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124 Neyland, supra note 39, at 736.
126 Michael, supra note 76, at 203.
128 Dennis v. State, 51 So.3d 456, 462 (Fla. 2010).
129 FLA. STAT. § 776.032(1).
“Stand Your Ground” laws. The immunity was intended to be self-executing in cases involving [“stand your ground,”] but “requiring the defendant to prove entitlement to immunity by a preponderance of the evidence is fundamentally unfair and contrary to legislative intent.” In addition, forcing disputed immunity claims to trial undercuts the concept of immunity adopted by legislature. The Florida state legislature, as well as those from other states with nearly identical “Stand Your Ground” laws, fails to take in account that granting immunity from criminal prosecution was not the only means of permitting people to protect themselves without fear of prosecution or civil action. In absolute or qualified immunity, defense is raised as an affirmative defense. Like the Florida state legislature’s intent to allow law-abiding citizens to protect themselves without fear of prosecution, the Supreme Court has also noted that the reasoning for granting absolute or qualified immunity was for it to be used to serve a similar purpose. Therefore, as with other forms of immunity, the “Stand Your Ground” law in Florida could be raised as an affirmative defense.

B. Imposes Duty of Fact-finder on Law Enforcement

In addition to the contradictions between the legislative intent and the actual practice of “Stand Your Ground” laws in jurisdiction affording the law as immunity to criminal prosecution,

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130 Peterson v. State, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008). The term “true immunity” is a term used with the doctrine of qualified immunity and is used in situations concerning public officials when their conduct is within the scope of their public duties. See Sorey v. Kellett, 849 F.2d 960 (5th Cir. 1988).
132 Govoni v. State, 17 So. 3d 809, 811 (Fla. Dist. Ct. App. 2009) (Gross, C.J., concurring); see also Peterson, 983 So. 3d at 29 (requiring the trial court to conduct a hearing, or at least sufficient fact-finding, to determine whether the defendant has demonstrated immunity by a preponderance of the evidence).
133 See Kidwell v. General Motors Corp., 975 So.2d 503 (Fla. Dist. Ct. App. 2007) (recognizing absolute immunity and qualified immunity as an affirmative defense) (Fariello v. Gavlin, 873 So.2d 1243, (Fla. Dist. Ct. App. 2004) (noting that immunity is an affirmative defense that should be pled by the party asserting it).
135 See John, supra note 92, at 55 (discussing how exposing prosecutors to civil liability would “burden and undermine the functioning of the criminal justice system”); see also Pierson, 386 U.S. 547 (discussing absolute immunity); Buckley, 509 U.S. 259 (discussing qualified immunity).
the law also imposes a duty of fact-finder on law enforcement agencies. In jurisdictions such as Florida and Kentucky, the law permits a law enforcement agency to “use standard procedures for investigating the use of force and may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.” Before the “Stand Your Ground” law was enacted in Florida, law enforcement only had the duty “to establish that an unlawful act of violence had occurred, and then forward evidence to the state attorney to determine whether to prosecute.” Now law enforcement must engage in an evaluation of those facts and make decisions that will affect whether or not a person will be accused of a crime.

The first issue that this creates is that it places a duty of fact-finder on law enforcement that is generally given to a prosecutor, judge, or jury. However, the typical law enforcement officer that appears at the scene of a crime is not trained in the rigor of legal analysis “to gather, consider and weigh the evidence in the light of the law.” Additionally, there are no objective guidelines for law enforcement to use in determining whether there were grounds for immunity. Law enforcement officers make subjective determinations based on the officer’s individual assessment rather than pursuant to a uniformed decision making process. Section 776.032

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136 See, e.g., FLA. STAT. § 776.032.
137 FLA. STAT. § 776.032(2); KY. REV. STAT. ANN. § 503.085(2) (West 2006).
138 Megale, supra note 125, at 120.
139 Id. (citing Velasquez v. State, 9 So. 3d 22, 24 (Fla. Dist. Ct. App. 2009).
140 Black’s Law Dictionary (9th ed. 2009).
141 Megale, supra note 125, at 130.
142 Megale, supra note 125, at 120; but see infra 158, at 934 (discussing how selective prosecution made on an arbitrary basis is unconstitutional). When all you have at the scene of the crime is the shooter, a dead person, and no witnesses, “Stand Your Ground” makes the existing evidence present during the initial investigation most favorable to the shooter. See THE PROGRESSIVE MESSAGE, 158 Cong. Rec. H1530-02, H1535 (daily ed. March 20, 2012) (statement of Rep. Jackson Lee).
presumes that we live in a utopian society,\(^\text{143}\) and that law enforcement officers or persons claiming a justifiable use of deadly force do not make false reports or give false testimonies.\(^\text{144}\)

C. Negates Adequate Due Process

The Fourteenth Amendment Due Process Clause reads: “No person shall...deprive any person of life, liberty, or property, without due process of law.”\(^\text{145}\) But in fact, “Stand Your Ground” laws that to provide a person with immunity from criminal prosecution negate adequate due process from taking effect. Typically when dealing with criminal prosecution, the accused is provided with certain rights protected by the Constitution.\(^\text{146}\) For instance, the accused has a right to an impartial judge and a trial by jury.\(^\text{147}\) In *Taylor v. Hayes*, the Court held that another judge should have been substituted for the purpose of final disposing of contempt charges against a defense attorney where the record showed that “marked personal feelings were present on both sides” and that marks of “unseemly conduct [had] left personal stings.”\(^\text{148}\) Moreover, the Fourteenth Amendment requires judges [and jurors] to recuse themselves on account of conflict of interest;\(^\text{149}\) however, a law enforcement officer, in making the determination on whether there were grounds for immunity,\(^\text{150}\) does not have this obligation. He or she makes this determination based on their individual assessment with no regard to a conflict of interest.\(^\text{151}\)

\(^{143}\) *The New Sense of Utopia: The Construction of a Society Based on Justice.*, 2000 WLNR 10283742 (illustrating a society without false morals and where human dignity and rights were respected).

\(^{144}\) *See* Napue v. People of State of Ill., 360 U.S. 264, 269 (1959) (noting that “a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under Fourteenth Amendment” protection); *see* Landrigan v. City of Warwick, 628 F.2d 736 (1st Cir. 1980) (noting that plaintiff’s constitutional rights may be violated if action is subsequently taken on the base of a false police report by a police officer).

\(^{145}\) U.S. Const. amend. XIV, § 1.

\(^{146}\) *See* U.S. Const. amend. V, VI, XIV.

\(^{147}\) U.S. Const. amend. XIV (*See* Taylor v. Hayes, 418 U.S. 488, 155-58 (1974) (discussing the right to an impartial judge); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (ruling that the Sixth Amendment right to trial by jury was applicable to the states under Fourteenth Amendment due process).


\(^{149}\) *Id.* (alteration in original).

\(^{150}\) *See* Megale, *supra* note 6, at 120; FLA. STAT. § 776.032.

\(^{151}\) *Id.*
The “Stand Your Ground” law also negates due process because of its vagueness on how to apply the immunity. The basis principle of due process is that “an enactment is void for vagueness if its prohibitions are not clearly defined.” The Supreme Court has also ruled “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” Because “Stand Your Ground” does not provide guidance to prosecutors, courts, or defendants on how to invoke immunity, it permits law enforcement to make immunity determinations on a subjective basis. In addition, the law does not provide clear definitions for terms such as “unlawful activity” and raises a number of concerns for applying the proper standard.

D. Interferes With Fourteenth Amendment Equal Protection

The immunity to criminal prosecution that states apply to ‘Stand Your Ground” laws also violates the Equal Protection Clause under the Fourteenth Amendment. Since “Stand Your Ground” laws are so vague as to offer to guidelines to law enforcement and the courts on how to invoke immunity or to define ambiguous terms, the determination is made on an arbitrary basis. As a result, factually similar cases end up with different outcomes. In Bell v. State, the Florida Supreme Court held that in order to constitute a denial of equal protection, the selective enforcement must be deliberately based on an unjustifiable or arbitrary classification. Since the Equal Protection clause directs that all persons similarly circumstanced should be treated

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153 Id.
154 Megale, supra note 125, at 121.
155 See FLA. STAT. § 776.013.
156 Id. at 122 (“Must the activity actually be a crime, or is a violation of an ordinance sufficient?”). As “reasonable” is not defined there is no way for an individual to comport his action within the confines of the law and as to prevent being slain due to the reasonable fear of another. Challenge to Georgia's "Stand Your Ground" Self-Defense Law, OPPOSING VIEWS (April 12, 2012), http://www.opposingviews.com/i/politics/georgias-stand-your-ground-law-challenged.
157 See Megale, supra note 125, at 123 (comparing two Florida cases that were factually similar).
158 369 So.2d 932, 934 (Fla. 1979).
alike, then the “Stand Your Ground” laws in Florida and in other jurisdictions that grant immunity to persons for justifiable use of force are unconstitutional.

VI. HOW “STAND YOUR GROUND” LAWS SHOULD BE APPLIED

A. Affirmative Defense: Texas Penal § 9.32

Because “Stand Your Ground” is a self-defense doctrine, it should also be applied as an affirmative defense. In Texas, the criminal defendant is not immune from criminal prosecution. In contrast, the “Stand Your Ground” law is raised as an affirmative defense when the use of deadly force was justifiable under the law. Under the Texas law enacted in 2007, “in order to be justified in having no duty to retreat, the defendant must show that he or she: (1) had the right to be present at the location where deadly force was used; (2) did not provoke the person against whom deadly force was used; and (3) was not engaged in criminal activity at the time deadly force was used.”

However, the inquiry into whether the defendant was justified in using deadly force does not stop there. He or she must still prove that their actions were justified so that any criminal responsibility should be absolved. To show that the use of deadly force was justified, the actor must also show that actor reasonably believed the deadly force was necessary to prevent the use of unlawful deadly force against him or to prevent the commission of an inherently dangerous felony.

\[^{159}\text{F.S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412 (1920).}\]
\[^{160}\text{See Lynn v. Com., 499 S.E.2d 1, 9 (Va.App. 1998) (noting that self-defense and defense of others are affirmative defenses).}\]
\[^{161}\text{Neyland, supra note 39, at 729-30.}\]
\[^{162}\text{See Alonzo v. State, 353 S.W.3d 778 (Tex. Crim. App. 2011).}\]
\[^{163}\text{TEX. PEN. CODE ANN. §9.32(c).}\]
\[^{164}\text{Neyland, supra note 39, at 730.}\]
\[^{165}\text{See TEX. PEN. CODE ANN. §9.32(b). The inherently dangerous felonies that the Texas statute cites are aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. TEX. PEN. CODE ANN. §9.32(a)(2)(B).}\]
As an affirmative defense, the use of “Stand Your Ground” laws would still coincide with the legislative intent that the law was meant to serve. The affirmative defense does not negate a law-abiding citizen’s ability “to protect themselves, their families, and others without fear of criminal prosecution.” However, by being applied as an affirmative defense, those claiming “Stand Your Ground” will no longer have an unfair advantage. The affirmative defense to “Stand Your Ground” will permit the actor the use deadly force, but they must offer up the evidence which is to be determined by the trier-of-fact—a judge or jury—and never a law enforcement agency.

B. Standard of Proof

Just as any other affirmative defense, the “Stand Your Ground” law as an affirmative defense must be pleaded and proved by the defendant, or they are considered waived. The importance of this is to give the opposing party notice of the defensive issues to be tried. In criminal prosecution, the defendant has the burden of proving the affirmative defense by a preponderance of the evidence. If a fact-finder believes that the defendant’s actions are justified, “that fact-finder may not convict the defendant for an offense based on those actions.” The prosecution must prove beyond a reasonable doubt all essential elements of the charge and has the burden of persuasion to disprove the justification beyond a reasonable doubt.

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167 See Alonzo, 353 S.W.3d at 781.
169 See Land Title Co. of Dallas, Inc. v. F. M. Stigler, Inc., 609 S.W.2d 754 (Tex. 1980).
170 See CONN. GEN. STAT. ANN. § 53-2020(b) (West 2011) (showing the burden of proof of affirmative defense in prosecution for possession of an assault weapon).
171 Alonzo, 353 S.W.3d at 781.
172 Id.
By making the defendant prove the affirmative defense by a preponderance of the evidence, the “Stand Your Ground” law will also be consistent with the burden of proof required in jurisdictions granting immunity for the justifiable use of deadly force. In addition, requiring the prosecution to prove beyond a reasonable doubt all essential elements of the charge, and disproving the essential elements of the affirmative defense follows precedent given by the United States Supreme Court.

C. Proposed Model Statute for “Stand Your Ground” Laws

Although this Comment proposes that state legislatures amend their “Stand Your Ground” laws similar to the language and application used in Texas, the Texas law itself is not enough. The new “Stand Your Ground” law should offer additional text for which to appropriately and equitably use “Stand Your Ground” as a defense. For example, the statutes should include situations where the use of deadly force is lawful when a person is not lawfully present at the location where deadly force is used. Similar to the initial aggressor/provocation rule, “the defense of self-defense should be available to a person who was a trespasser only if the trespasser availed or attempted to avail himself/herself of a reasonable means of retreat from the imminent danger of death or great bodily harm/bodily harm before repelling/attempting to repel an unlawful attack. As the Texas “Stand Your Ground” law stands now, a person cannot stand his or her ground and use deadly force on another person when unlawfully on the other’s

173 See Peterson v. State, 983 So.2d at 29 (holding that when a defendant raises the question of statutory immunity during pretrial, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches).
174 See In re Winship, 397 U.S. at 361 (ruling that the prosecution has to prove beyond a reasonable doubt all elements of the offense charged).
175 See Appendix I (providing an example of my proposed amendment to Texas Penal Code §9.32 “Stand Your Ground” statute). [make it clear that appendix I is your proposal—it’s not absolutely clear here—you’re suggesting an amended 9.32]
176 See TEX. PEN. CODE ANN. §9.32(b)(4).
177 Vernon's Okla. Forms 2d, OUJI-CR 8-54 (2011 ed.).
property; it makes no difference if he or she is on the property incidentally due to a mistake of fact. This is an important addition to the statute because it will give an actor the justification of using deadly force on another person in situations where the actor unintentionally enters the land or property of another without intent to commit a crime if he or she communicates the attempt to retreat.

The statutes should also include situations when the death of a person not intending to use deadly force on is killed.\textsuperscript{178} Texas Penal Code Section 9.05 reads:

\begin{quote}
Even though a person is justified under this chapter in threatening or using physical force or deadly physical force against another, if in doing so such person recklessly injures or kills an innocent third person, the justification afforded by this chapter is unavailable in a prosecution for the reckless injury or killing of the innocent third person.\textsuperscript{179}
\end{quote}

By including this language as apart of the “Stand Your Ground” law, it will be clear that the law does not extend to the deaths of innocent third parties as a result of the justifiable use of deadly force against the actual attacker. In addition, the statute should clearly express that the issues of justification from criminal liability under the “Stand Your Ground” is an affirmative defense.\textsuperscript{180} That way, there will be no confusion as to how the courts should interpret the defense when raised by the defendant.

Besides additional text to the model Texas statute, “Stand Your Ground” laws should also include definitions for specific terms, and redefine those terms already present. Specifically, the terms to be modified should be “unlawful activity,” “use of force,” “deadly force,” and “reasonable belief.” The term ”unlawful activity” should be defined as: “The commission or attempted commission of aggravated kidnapping.

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\textsuperscript{178} See TEX. PEN. CODE ANN. §9.05 (West 2011).
\textsuperscript{179} Id.
\textsuperscript{180} See COLO. REV. STAT. ANN. § 18-1-710 (West 2003).
\end{flushright}
murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.”

However, if state legislatures decide to include other inherently dangerous felonies that would fall under this category, then they may add those offenses to this section as they see fit. The new statute should also include:

(1) “Use of force” means any or all of the following directed at or upon another person or thing: (A) Words or actions that reasonably convey the threat of force, including threats to cause death or great bodily harm to a person; (B) the presentation or display of the means of force; or (C) the application of physical force, including by a weapon or through the actions of another.

(2) “Use of deadly force” means the application of any physical force described in paragraph (1) which is likely to cause death or great bodily harm to a person. Any threat to cause death or great bodily harm, including, but not limited to, by the display or production of a weapon, shall not constitute use of deadly force, so long as the actor's purpose is limited to creating an apprehension that the actor will, if necessary, use deadly force in defense of such actor or another or to affect a lawful arrest.

In addition, the term “reasonable belief” should be defined as “a belief that would be held by an ordinary and prudent man in the same circumstances as the actor.” By not properly defining these terms, a person is not able to comport his or her actions “within the confines of the law.” The elimination of these ambiguous terms will lead to a more favorable chance that the determination of them will not be made on an arbitrary basis, limiting the likelihood that constitutional issues will arise.

VII. CONCLUSION
A. Importance of Uniformed Criteria: A Look at the Trayvon Martin Incident

The Trayvon Martin incident has left American citizens questioning the controversial “Stand Your Ground” laws throughout the United States.\footnote{See Attorneys in Trayvon Martin case make arguments, CBS NEWS (March 24, 2012), http://www.cbsnews.com/8301-201_162-57403977/attorneys-in-trayvon-martin-case-make-arguments/ (discussing the growing outrage over Trayvon Martin’s death illustrated by many demonstrations in major cities).} As a result of public protesting, the state of Florida has conducted a task force to examine the Florida statute at issue by holding public hearings and reviewing previous cases in which the “Stand Your Ground” law was invoked.\footnote{See Florida’s Stand Your Ground law faces task force scrutiny, CBS News (May 1, 2012), http://www.cbsnews.com/8301-503544_162-57425600-503544/floridas-stand-your-ground-law-faces-task-force-scrutiny/.} The task force will then issue recommendations to the state legislature prior to its next session.\footnote{Id.}

The reason why it is critical to have uniformed criteria for “Stand Your Ground” laws is to prevent controversial cases, such as Trayvon Martin’s, from ever occurring. Under the proposed amendments to “Stand Your Ground” laws, the person invoking the defense will no longer be immune from criminal prosecution. If these amendments had been implemented prior to the Trayvon Martin incident, then George Zimmerman would have had the burden of proving the affirmative defense by a preponderance of the evidence.\footnote{See CONN. GEN. STAT. ANN. § 53-202o(b).} First, Zimmerman would have had to provide evidence to show that he reasonably believed that deadly force was necessary to prevent the use of deadly force against him.\footnote{See TEX. PEN. CODE ANN. §9.32(b).} Second, Zimmerman would have to show evidence to establish his claim that he did not have a duty to retreat.\footnote{See TEX. PEN. CODE ANN. §9.32(c).} More importantly, these determinations on whether or not he was justified in using deadly force would be made solely by
a judge or jury as opposed to a law enforcement agency as imposed in the current language of Section 776.032.192

B. A Look at How the Proposed Amendment to “Stand Your Ground” Laws Would Have Affected Other Controversial Cases

Besides the controversy that rose to national attention in the Trayvon Martin case, there have been other cases that have not had as much publicity. On January 25, 2012 in Miami, Florida, Greyston Garcia stabbed Pedro Roteta to death after Roteta was fleeing from a failed attempt to steal a radio from Garcia’s unoccupied vehicle.193 As the facts of the case showed, after his roommate alerted Garcia about the attempted theft, Garcia grabbed a knife and ran outside towards Roteta.194 Roteta ran away as Garcia chased him and was stabbed in the back.195 Although Roteta had a pocketknife in his pocket during the altercation, Garcia admitted to the police that he attacked Roteta despite never seeing Roteta with a weapon.196 Greyston Garcia was acquitted due to Florida’s “Stand Your Ground” immunity.

In September 2010, David James was shot and killed by Trevor Dooley during an altercation in Valrico, Florida.197 In this case, which is currently in the pre-trial stage, the record shows that James was playing basketball on the neighborhood court with his daughter.198 While

192 See Alonzo, 353 S.W.3d at 781; contra Fla. Stat. § 776.032(2) (allowing a law enforcement agency to determine whether immunity should be granted). Under different circumstances, suppose that Trayvon Martin had a gun instead of the can of soda, or had a switchblade instead of the bag of skittles. Nevertheless, if none of the items were visible to the actor using deadly force as justification, then the reasonableness of believing that the use of deadly force was necessary under the circumstances should be called into question. That question—whether or not the actor had a reasonable belief to use such force—should be left to the justice system to determine, and it should not be determined prematurely by law enforcement or the prosecution.


194 Id.

195 Id.

196 Id.

197 Id.

he and his daughter were playing basketball, another child was skateboarding on the other end of
the court. Dooley walked out of his home with a concealed gun and confronted the child for
violating neighborhood rules. James stood up for the child and a heated argument ensued.

What happened next is what is at issue. Witnesses say that at some point Dooley revealed his gun
to James and as James tried to wrestle the gun away, he was shot and killed. Dooley contends
that James approached him and began choking him. It was at that moment when he thought
that he would black out that he pulled the trigger, in fear of his life. On May 11, 2012, the
circuit court judge denied the defendant’s motion to dismiss criminal charged based on immunity
under Florida Statute Section 776.032.

If the “Stand Your Ground” law in Florida had been applied as an affirmative defense,
Greyston Garcia would not have been acquitted from his murder charge. In order to have been
justified in using deadly force, Garcia would have had to prove by a preponderance of the
evidence that he reasonably believed that it was necessary to prevent the use of deadly force
against him by Pedro Roteta. But since Garcia admitted that he never saw Roteta with a
weapon, it would be nearly impossible for the trier-of-fact to find that an “ordinary and prudent
person in the same circumstances” would have thought that they were in danger if no weapon
was present on a fleeing person. As for Trevor Dooley, his issues would be proving by a
preponderance of the evidence that he was not the provoker and that he had a reasonable belief
that it was necessary to use deadly force against David James. Since these are factual issues, the

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199 Id.
200 Id. at 3.
201 Id.
202 Id. at 3-4.
203 Id. at 6.
204 Id.
205 Id. at 18.
206 TEX. PENAL CODE ANN. §9.32(b).
207 See TEX. PENAL CODE ANN. § 1.07.
trier-of-fact would be left with this determination on whether the deadly force used was justified. The prosecution will have the burden of persuasion to disprove the justification.\textsuperscript{208}

As task forces, such as in Florida, make their recommendations to state legislators, the only way to keep “Stand Your Ground” as law is to change its application. No longer can state officials sit back and wait for other controversial cases to unfold as a result of this inapplicable law granting people immunity to criminal prosecution for a justifiable use of deadly force.\textsuperscript{209}

\textsuperscript{208} Alonzo, 353 S.W.3d at 781.

\textsuperscript{209} “To see what is right and not to do it, is want of courage or of principle. Analects, bk. ii., c. xxiv., v. 2.
APPENDIX I

Proposed Amendment to Texas Penal Code § 9.32 Deadly Force in Defense of Person

(a) A person is justified in using deadly force against another:

(1) if the actor would be justified in using force against the other under Section 9.31; and

(2) when and to the degree the actor reasonably believes the deadly force is immediately necessary:

210 TEX. PEN. CODE ANN. §9.31 (Vernon Supp. 2007) reads:

(a) Except as provided in Subsection (b), a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. The actor's belief that the force was immediately necessary as described by this subsection is presumed to be reasonable if the actor:

(1) knew or had reason to believe that the person against whom the force was used:

(A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;

(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or

(C) was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery;

(2) did not provoke the person against whom the force was used; and

(3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

(b) The use of force against another is not justified:

(1) in response to verbal provocation alone;

(2) to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful, unless the resistance is justified under Subsection (c);

(3) if the actor consented to the exact force used or attempted by the other;

(4) if the actor provoked the other's use or attempted use of unlawful force, unless:

(A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and

(B) the other nevertheless continues or attempts to use unlawful force against the actor; or

(5) if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was:

(A) carrying a weapon in violation of Section 46.02; or

(B) possessing or transporting a weapon in violation of Section 46.05.

(c) The use of force to resist an arrest or search is justified:

(1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.

(d) The use of deadly force is not justified under this subchapter except as provided in Sections 9.32, 9.33, and 9.34.

(e) A person who has a right to be present at the location where the force is used, who has not provoked the person against whom the force is used, and who is not engaged in criminal activity at the time the force is used is not required to retreat before using force as described by this section.

(f) For purposes of Subsection (a), in determining whether an actor described by Subsection (e) reasonably believed that the use of force was necessary, a finder of fact may not consider whether the actor failed to retreat.
(A) to protect the actor against the other’s use or attempted use of unlawful deadly force; or

(B) to prevent the other’s imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

(b) The actor's belief under Subsection (a)(2) that the deadly force was immediately necessary as described by that subdivision is presumed to be reasonable if the actor:

(1) knew or had reason to believe that the person against whom the deadly force was used:

(A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;

(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or

(C) was committing or attempting to commit an offense described by Subsection (a)(2)(B);

(2) did not provoke the person against whom the force was used; and

(3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

(c) The use of deadly force is not justified:

(1) in response to verbal provocation alone;

(2) to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful, unless the resistance is justified under Subsection (d);

(3) if the actor consented to the exact force used or attempted by the other;

(4) if the actor provoked the other's use or attempted use of unlawful force, unless:

(A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and

(B) the other nevertheless continues or attempts to use unlawful force against the actor; or

(5) if the actor was a trespassor on the other’s property; unless:
(A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and

(B) the other nevertheless continues or attempts to use unlawful force against the actor; or

(6) if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was:

(A) carrying a weapon in violation of Section 46.02; or

(B) possessing or transporting a weapon in violation of Section 46.05.

(d) The use of force to resist an arrest or search is justified:

(1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.

(e) A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section.

(f) For purposes of Subsection (a)(2), in determining whether an actor described by Subsection (e) reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat.

(g) Even though a person is justified under this Section in threatening or using physical force or deadly physical force against another, if in doing so such person recklessly injures or kills an innocent third person, the justification afforded by this Section is unavailable in a prosecution for the reckless injury or killing of the innocent third person.

(h) The issue of justification form criminal liability under this section is an affirmative defense.

Definitions

(1) “Use of force” means any or all of the following directed at or upon another person or thing: (A) Words or actions that reasonably convey the threat of force, including threats to cause death or great bodily harm to a person; (B) the presentation or display of the means of force; or (C) the application of physical force, including by a weapon or through the actions of another.
(2) “Use of deadly force” means the application of any physical force described in paragraph (1) which is likely to cause death or great bodily harm to a person. Any threat to cause death or great bodily harm, including, but not limited to, by the display or production of a weapon, shall not constitute use of deadly force, so long as the actor's purpose is limited to creating an apprehension that the actor will, if necessary, use deadly force in defense of such actor or another or to affect a lawful arrest.

(3) “Unlawful activity or criminal activity” under this Section means the commission or attempted commission of any offense described by Subsection (a)(2)(B).

(4) “Reasonable belief” means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor.