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INTRODUCTION

Florida's "Stand Your Ground" Law has been controversial[1] since Governor Jeb Bush signed it into law on April 26, 2005.[2] The Protection of Persons/Use of Force Bill (the Judiciary Committee's Committee Substitute for Senate Bill 436)[3] expanded an individual's legal right to use force in self-defense, including deadly force,[4] without fear of criminal or civil consequences.[5] In doing so, the law abrogated "the common law duty to retreat when attacked before using force, including deadly force in self-defense or defense of others."[6] Although it should have

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1. Recent Developments, *Florida Legislation—The Controversy Over Florida's New "Stand Your Ground" Law*—FLA. STAT. § 776.013 (2005), 33 FLA. ST. U. L. REV. 351, 351–53 (2005) ("While several bills taken up for discussion during the 2005 Florida legislative session were controversial, the Judiciary Committee's Committee Substitute for Senate Bill 436 is, perhaps, at the top of the list. . . . [T]he battle over what is commonly referred to as Florida's 'stand your ground' bill, figuratively speaking, had many Floridians up in arms, debating the changes the proposed law would bring.").

2. 2005 Fla. Laws 199, 202.

3. *See id.* at 201 (using the terminology "[u]se of force in defense of person" to describe the law).

4. "Deadly force" is defined, in part, by section 776.06(1) of the Florida Statutes as "force that is likely to cause death or great bodily harm." FLA. STAT. § 776.06(1) (2007). The Fourth District Court of Appeal of Florida defined "deadly force" as whenever "the natural, probable, and foreseeable consequences of the defendant's acts are death." Garramone v. State, 636 So. 2d 869, 871 (Fla. Dist. Ct. App. 1994). In 1993, the Third District Court of Appeal of Florida held that the discharge of a firearm constitutes deadly force because "[a] firearm is, by definition, a deadly weapon." Miller v. State, 613 So. 2d 530, 531 (Fla. Dist. Ct. App. 1993).

5. *See* 2005 Fla. Laws 202 ("A person who uses force as permitted . . . is immune from criminal prosecution and civil action for the use of such force.").

6. STAFF OF FLA. S. COMM. ON THE JUDICIARY, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT ON CS/CS/SB 436 (Reg. Sess. 2005), *available at* http://www.flsenate.gov/data/session/2005/Senate/bills/analysis/pdf/2005s0436.ju.pdf. The Florida common law duty to retreat required that, prior to using deadly force, a person outside his or her home or place of work must use every reasonable means available to avoid the danger (including retreating). *See* State v. James, 867 So. 2d 414, 416 (Fla. Dist. Ct. App. 2003) ("[T]here is still a Florida common law duty to use every reasonable means to avoid the danger, including retreat, prior to using deadly force."). The common law duty to retreat placed emphasis on the sanctity of life by promoting the policy that "[h]uman life is precious, and deadly combat should be avoided if at all possible when

troubled the legislature that the individuals charged with enforcing the law—prosecutors and law enforcement—opposed the law,[7] the dissent by these groups did not dissuade the Florida Legislature. The law passed with unanimous approval in the Florida Senate and passed overwhelmingly in the Florida House of Representatives.[8]

Vehement arguments both for and against the law have been advanced during and since its passage. Proponents of the legislation, backed by the weighty support of the National Rifle Association ("NRA"),[9] claim that the law was necessary to give law-abiding citizens the ability to protect themselves.[10] The NRA's self-interest—sanctioning the use of deadly force in more circumstances and thereby sanctioning the use of firearms in those situations—and heavy involvement in creating and passing the legislation did not deter the Florida Legislature. One of the bill's sponsors, Representative Dennis K. Baxley, stated that the law would "curb violent crime and make the citizens of Florida safer,"[11] and that the passing of the law is "a clear position that we will stand with victims of violent attacks when the law is in their favor."[12] Former NRA President Marion Hammer,[13] who is currently a powerful NRA lobbyist in Florida,[14] said that the new law was necessary to restore and codify the Castle Doctrine and self-defense rights that the courts had eroded over the years.[15] She further claimed that these changes were needed because prosecutors have prosecuted "homeowners who shoot to defend their lives and homes."[16] Hammer said, "Prosecutors are always looking for somebody to prosecute and too often it's the victim. [The prosecutors] are part of the problem."[17]

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imminent danger to oneself can be avoided." *Id.* at 417 (quoting State v. Bobbitt, 415 So. 2d 724, 728 (Fla. 1982) (Overton, J., dissenting)).

7. *See, e.g.*, Abby Goodnough, *Florida Expands Right To Use Deadly Force in Self-Defense*, N.Y. TIMES, Apr. 27, 2005, at A18; Larry Keller, *Self-Defense Law Troubles Prosecutor*, PALM BEACH POST, June 27, 2007, at 1B; Adam Liptak, *15 States Expand Right To Shoot in Self-Defense*, N.Y. TIMES, Aug. 7, 2006, at A1.

8. The vote in the Senate was thirty-nine yeas to zero nays, and the vote in the House of Representatives was 94 yeas to 20 nays. *See* H.R. J. 12, Reg. Sess., at 342–43 (Fla. 2005); S. J. 8, Reg. Sess., at 262–63 (Fla. 2005); *see also* Dan Christensen, *NRA Uses New Florida Gun Law as National Model*, 79 DAILY BUS. REV. A1, A15 (2005).

9. *See* Goodnough, *supra* note 7.

10. *See* Christensen, *supra* note 8.

11. Goodnough, *supra* note 7.

12. *Id.*

13. Denise M. Drake, Comment, *The Castle Doctrine: An Expanding Right To Stand Your Ground*, ST. MARY'S L.J. 573, 576 (2008).

14. *See* Todd Leskanic, *Several States Consider 'Stand Your Ground' Bills*, TAMPA TRIB., Mar. 13, 2006, at 1.

15. *See* Christensen, *supra* note 8, at A17.

16. *Id.*

17. *Id.* Prosecutors seem to disagree with Hammer's statements, however, and claim that

Opponents of the legislation, including prosecutors, claim the bill unnecessarily expanded the right to use deadly force in self-defense.[18] Florida House Representative Dan Gelber, one of twenty representatives who voted against the bill, stated that "[i]t legalizes dueling. It legalizes fighting to the point of death, without anybody having a duty to retreat."[19] Elizabeth Haile, an attorney for the Brady Campaign to Prevent Gun Violence, declared that the law was unnecessary because "[i]f you are protecting yourself or your family in self defense, that's a basic legal right anyway."[20] Critics also went so far as to suggest the law would turn "the state of Florida into the O.K. Corral."[21]

After the law passed with overpowering support in Florida, the NRA vowed to promote similar legislation throughout the nation.[22] As in Florida, the NRA's self-interested crusade to pass "Stand Your Ground" laws did not discourage many other states' legislatures. Twenty three states have followed Florida's lead in passing similar legislation, including Alabama, Alaska, Arizona, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas.[23]

The NRA has not been completely successful, though. Similar legislation was rejected in Wyoming and Virginia, both of which are considered "gun-friendly" and conservative states.[24] The House Judiciary Committee in Wyoming voted against the proposed legislation "after the Wyoming Sheriff's Association and state trial lawyers association testified against it."[25]

With the laws' prevalence, the issues surrounding the laws will continue to be widely debated and legislated throughout the country. An

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there is no evidence indicating that prosecutors had been charging individuals who were using deadly force in self-defense when it was justified under the law. *See id.* at A15–17.

18. *See* Fred Grimm, *New Law Gives Too Many People a License To Kill*, MIAMI HERALD, Aug. 24, 2006, at 1B.

19. Bill Cotterell, *House Passes Self-Defense Bill*, TALLAHASSEE DEMOCRAT, Apr. 6, 2005, at A4.

20. *Laws Bolstering Defense Rights Bring Confusion*, AUGUSTA CHRON., July 10, 2007, at A03.

21. Cotterell, *supra* note 19; *see also* Grimm, *supra* note 18.

22. *See* Goodnough, *supra* note 7.

23. *See* Castle Doctrine: Protecting Our Right to Self-Defense, http://www.nraila.org/images/cd.jpg (last visited Oct. 14, 2008); *see also* Michael E. Young, *Rights Issue Elicits Passion on Both Sides: NRA, Brady Group Take Their Messages to States Weighing 'Castle Law,'* DALLAS MORNING NEWS, Jan. 20, 2008, at 25A.

24. *See* Kavan Peterson, *More States Sanction Deadly Force*, STATELINE.ORG, Apr. 26, 2006, http://www.stateline.org/live/details/story?contentId=107276.

25. *Id.*

analysis and critique of Florida's legislation—the first of its kind—can supply an important perspective to the debate.

The Florida law has numerous troubling aspects that create a multitude of questions including whether the law is working properly and whether the law provides adequate standards for prosecutors and law enforcement to follow in order to enforce the law. Considering the significant support of the law by the Florida Legislature and the NRA, the "Stand Your Ground" law appears to be here to stay, and advocacy that the law be repealed may be futile. Thus, perhaps the best avenue for change is to advocate for amendments to the law.

This article addresses problematic aspects of the law and its actual effects in Florida and then makes recommendations for amendments that would eradicate some of the law's problems. Part One of this article introduces the Protection of Persons Bill and the changes that it made to Florida law. Part Two addresses issues that have arisen with the law, including dissent among prosecutors and law enforcement, the irrebuttable presumption of an intruder's malicious intent, confusion with the application of the law and the law's functioning as more of a bar to prosecution than a defense, and troublesome incidents that have occurred in Florida. Next, Part Three lays out recommendations for creating a system to track claims of self-defense, recommends amendments to the current law, and explains the rationales behind the recommendations. Finally, Part Four concludes and summarizes how the recommended amendments can serve the purpose of clarifying and improving the law to the benefit of prosecutors, law enforcement, and Florida citizens.

I. THE RISE OF "STAND YOUR GROUND"

Jack King, the spokesman for the National Association of Criminal Defense Lawyers, stated, "'Most people would rather be judged by 12 than carried by six,' referring to juries and pallbearers."[26] King's statement encapsulates a view of self-defense that advocates using deadly force even when the circumstances are questionable as to whether such force is permissible because it is better to use deadly force and be judged by a jury than taking the chance of not using such force and ending up dead. The Florida legislature apparently agreed with this view when it passed the Protection of Persons Bill.[27] The legislature's purported rationale for passing the law was:

> WHEREAS, the Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders

26. *Laws Bolstering Defense Rights Bring Confusion, supra* note 20.

27. *See* FLA. STAT. §§ 776.012, 776.013, 776.031, 776.032 (2007).

> and attackers without fear of prosecution or civil action for acting in defense of themselves and others, and
>
> WHEREAS, the castle doctrine is a common-law doctrine of ancient origins which declares that a person's home is his or her castle, and
>
> WHEREAS, Section 8 of Article I of the State Constitution guarantees the right of the people to bear arms in defense of themselves, and
>
> WHEREAS, the persons residing in or visiting this state have a right to expect to remain unmolested within their homes or vehicles, and
>
> WHEREAS, no person or victim of crime should be required to surrender his or her personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack . . . .[28]

The new law, which took effect on October 1, 2005, substantially amended sections 776.012 and 776.031 and created sections 776.013 and 776.032 of the Florida Statutes.[29] The amendment to section 776.012 eliminated the duty to retreat before using deadly force.[30] Newly added section 776.013, entitled "Home protection; use of deadly force; presumption of fear of death or great bodily harm," states that a person is presumed to have the reasonable fear necessary to use deadly force if the person against whom the deadly force was directed was unlawfully and forcefully entering or had entered specified areas, including a dwelling,[31] residence,[32] or occupied vehicle,[33] "or if the person had removed or was attempting to remove another person against [his or her] will" from these areas.[34] For the presumption to apply, the statute also requires that the person who used the deadly force "knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible

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28. 2005 Fla. Laws 199, 200.

29. *See id.* at 199–202.

30. Section 776.012 of the Florida Statutes, entitled, "Use of force in defense of person," was amended to state:

> [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; or
>
> (2) Under those circumstances permitted pursuant to s. 776.013.

Id. at 201.

31. "'Dwelling' means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night." FLA. STAT. § 776.013(5)(a) (2007).

32. "'Residence' means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest." *Id.* § 776.013(5)(b).

33. "'Vehicle' means a conveyance of any kind, whether or not motorized, which is designed to transport people or property." *Id.* § 776.013(5)(c).

34. *See id.* § 776.013(1)(a).

act was occurring or had occurred."[35] Section 776.013(4) specifically states that any person who unlawfully and forcefully enters or attempts to enter another person's castle, defined to include a dwelling, residence, or occupied vehicle, is "presumed to be doing so with the intent to commit an unlawful act involving force or violence."[36]

Additionally, section 776.013(3), which addresses the ability to "stand your ground" in any place that a person legally has a right to be, states:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.[37]

This provision is a significant departure from Florida common law, which required a person to use every reasonable means available to retreat before using deadly force, except when the person was in his or her home or place of work.[38] By amending this section, the legislature did away with the common law duty to retreat before using deadly force in *all* places so long as the person meets the requirements of the statute: A person may use deadly force against another so long as he or she is somewhere he has a legal right to be (e.g., public streets, shopping centers) and he or she has a "reasonable belief" that the use of deadly force is necessary to prevent serious bodily injury or death.[39] The statute is silent as to whether the use of deadly force is permitted under these circumstances if an attacker is unarmed[40], but some have inferred this to be the case.[41] Florida's Fourth District Court of Appeal recently interpreted this provision as placing "no duty on the person to avoid or retreat from danger, so long as that person is not engaged in an unlawful

35. *Id.* § 776.013(1)(b).

36. *Id.* § 776.013(4).

37. *Id.* § 776.013(3). "Forcible felony," as defined by section 776.08 of the Florida Statutes means "treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual." FLA. STAT. § 776.08 (2007).

38. *See* State v. James, 867 So. 2d 414, 416 (Fla. Dist. Ct. App. 2003).

39. *See* § 776.013(3).

40. *See* § 776.013. The statute does not address what is required to create reasonable belief or fear and does not require an assailant to be armed in order for a person to have the reasonable fear necessary to justify using deadly force.

41. Henry Pierson Curtis, *Gun Law Triggers at Least 13 Shootings*, ORLANDO SENTINEL, June 11, 2006, at A1.

activity and is located in a place where he or she has a right to be."[42] Thus, the law allows people to use deadly force so long as they feel threatened with death or great bodily harm, even if a person has other means of protecting his or her safety, such as calling the police or retreating from the situation if it is possible to do so safely.

Like section 776.012, section 776.031 was amended to codify the position that a duty to retreat so long as a person is somewhere they are lawfully permitted to be no longer exists.[43] Although the title of this section is "[u]se of force in defense of others," it actually pertains to the use of force for protecting property.[44] The use of deadly force is only justified in the protection of property when a person "reasonably believes that such force is necessary to prevent the imminent commission of a forcible felony."[45]

In addition to section 776.013 discussed above, Senate Bill 436 also created section 776.032 of the Florida Statutes.[46] This section provides that a person who is permitted to use deadly force under sections 776.012, 776.013, and 776.031 receives immunity from "criminal prosecution and civil action for the use of such force."[47] The immunity from criminal prosecution includes immunity from arrest, detention in custody, and charges or prosecution of the individual for using deadly force.[48] Section 776.032(2) of the statute further states that "[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."[49] With the changes in the law brought by Senate Bill 436 have come major problems for prosecutors, law enforcement, and the general public.

II. PROBLEMATIC ASPECTS OF THE LAW

A. *Opposition by Prosecutors and Law Enforcement*

As agents of the State, prosecutors and law enforcement groups are charged with the duty to enforce the law. In Florida, both groups publicly voiced their opposition to the "Stand Your Ground" law, but unfor-

42. McWhorter v. State, 971 So. 2d 154, 157 (Fla. Dist. Ct. App. 2007).

43. Section 776.031 of the Florida Statutes, entitled "Use of force in defense of others," was amended to read that "[a] person does not have a duty to retreat if the person is in a place where he or she has a right to be." FLA. STAT. § 776.031 (2007).

44. *See id.* § 776.031.

45. *Id.*

46. 2005 Fla. Laws 199, 202.

47. FLA. STAT. § 776.032 (2007).

48. *See id.* § 776.032(1).

49. *Id.* § 776.032(2).

tunately the legislature did not seem to listen. Palm Beach State Attorney Barry Krischer stated, "I dislike the law because it encourages people to stand their ground . . . when they could just as easily walk away. To me, that's not a civilized society."[50] Krischer also discussed his belief that the law is not protecting the individuals from prosecution and civil liability that the legislature intended; instead, he believes that it provides protection for criminals because criminals, rather than law-abiding citizens, are the individuals who are actually shooting each other.[51] Krischer fears that the law makes people more inclined to shoot when faced with confrontation, especially because the law extended an authorization to use deadly force against an attacker in public.[52] Paul A. Logli, president of the National District Attorneys Association, voiced his opinion of the law when he said, "[The 'Stand Your Ground' laws] basically giv[e] citizens more rights to use deadly force than we give police officers, and with less review."[53] Leon County State Attorney Willie Meggs, president of the Florida Prosecuting Attorneys Association, called the legislation the "shoot your Avon Lady law" and believes the law was unreasonable and unnecessary because there was no indication that individuals were being prosecuted unjustly for defending themselves.[54] Like Krischer, Meggs believes this law will protect individuals the legislature did not intend to shield.[55] Meggs stated that "[a]ll this may do is give a legal defense to a bad person who would otherwise be prosecuted. The person who is dead doesn't get to say what they were going to do."[56] Broward State Attorney Mike Satz concurs with Meggs that the law was unnecessary and thinks it creates opportunities for individuals to take advantage of the law's provisions who should not be entitled to do so.[57] One example of this would be if two individuals from rival gangs engaged in a gunfight where one of the individuals is killed, and the one still standing claimed he or she had a reasonable fear of death or great bodily harm, thereby justifying the use of deadly force under the law. Considering the fact that prosecutors are public servants with the duty to seek justice and prosecute the individuals who violate the law, it is a wonder that their opinions seemed to have such little influence on the legislature's decision to pass the law.

Law enforcement officials, including Miami Police Chief John F.

50. Keller, *supra* note 7.
51. *See id.*; *see also* Christensen, *supra* note 8, at A1, A15–A17.
52. *See* Christensen, *supra* note 8, at A15–A17.
53. Liptak, *supra* note 7.
54. *See* Christensen, *supra* note 8, at A15.
55. *See id.*
56. *Id.*
57. *See id.* at A15–A17.

Timoney and St. Petersburg Police Chief Chuck Harmon have also voiced similar dissent to the law.[58] Chief Timoney claimed the law is dangerous and ultimately unnecessary.[59] He feared that many people could become innocent victims, including children, and that the law gave drivers with road rage and intoxicated bar patrons the belief that they have immunity when they use firearms in an altercation.[60] Chief Timoney stated, "Whether it's trick-or-treaters or kids playing in the yard of someone who doesn't want them there or some drunk guy stumbling into the wrong house . . . [the law is] encouraging people to possibly use deadly physical force where it shouldn't be used."[61]

The legislature's choice to pass the law is disconcerting considering prosecutors' and law enforcements' opposition to it. One would think that the opinions of the very individuals who have the responsibility to enforce and prosecute the law would be given greater weight by the legislature, particularly when the law directly impacts their jobs. Despite opposition by these groups, the law overwhelmingly passed and remains in force.

B. *The Conclusive Presumptions of a Reasonable Fear of Death or Great Bodily Harm and of an Intruder's Malicious Intent*

Another problematic aspect of the law that has driven dissent is its creation of conclusive presumptions of a reasonable fear of death or great bodily harm under section 776.013(1) and of an intruder's malicious intent under section 776.013(4). If an individual proves the two elements of section 776.013(1)(a)–(b)—that an intruder had unlawfully entered or was attempting to enter or was unlawfully removing or had removed a person against his or her will from the individual's "castle" and that the individual knew such unlawful act was occurring—and does not fall within the exceptions listed by section 776.013(2)(a)–(d),[62] the

58. *See* Goodnough, *supra* note 7.

59. *Id.*

60. *See id.*

61. *Id.*

62. *See* FLA. STAT. § 776.013(2)(a)–(d) (2007). There are four situations where the presumption does not apply. First, the presumption does not apply if the person against whom defensive force is used is a lawful resident of the specified area, such as an owner, lessee, or titleholder, and if there is not "an injunction for protection from domestic violence" or a pretrial order of no contact against that person. *See id.* § 776.013(2)(a). Second, the person being removed from a dwelling, residence, or vehicle cannot be a child, grandchild, or other person in the lawful custody or guardianship of the person against whom the defensive force is used. *See id.* § 776.013(2)(b). Third, the person using defensive force cannot be "engaged in an unlawful activity" and cannot be "using the dwelling, residence, or occupied vehicle to further an unlawful activity." *Id.* § 776.013(2)(c). Fourth, the person against whom the defensive force is used cannot be a law enforcement officer who is acting within his or her official duties in entering or attempting to enter the specified areas if the officer had identified him or herself or the person

law creates a presumption of having the reasonable fear of death or great bodily harm necessary to justify using deadly force.[63] Although not specifically delineated in the statute, the presumption created by this provision has been interpreted to be conclusive and irrebuttable.[64] The Senate Judiciary Committee stated that "[l]egal presumptions are typically rebuttable. The presumptions created by the committee substitute, however, appear to be conclusive," and the committee substitute (the form of the bill adopted) "does not require proof that the intruder was attempting to engage in a forcible felony. Under the committee substitute, the intruder's actual intent is irrelevant. The committee substitute, in effect, appears to create a conclusive presumption of the intruder's malicious intent."[65]

Indeed, the Florida House of Representatives specifically rejected an amendment by Representative Seiler that would have made the presumptions rebuttable with other evidence.[66] The courts have followed the legislature's lead. A Florida appellate court has interpreted the presumptions to be conclusive.[67] In *State v. Heckman*, the Florida Second District Court of Appeal stated that the presumptions were irrebuttable, citing to the Senate Committee's Staff Analysis 5–6 from February 25, 2005.[68]

Anthony J. Sebok, a law professor at Brooklyn Law School, thinks the law's central innovation is that it allows individuals to use deadly force in defense of property against an intruder.[69] Professor Sebok has stated the law contravenes a long-held principle of law: The value of life outweighs the value of protecting property.[70] Thus, he believes there is the potential for "serious miscarriages of justice" when there is a presumption that every unlawful intruder intends to threaten the lives of people within the expanded "castle" the law creates.[71] Professor Sebok

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using defensive force knew or had reason to know that the individual was a law enforcement officer. *See id.* § 776.013(2)(d).

63. *See* § 776.013(1)(a)–(b).

64. *See* STAFF OF FLA. S. COMM. ON THE JUDICIARY, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT ON CS/CS/SB 436, at 6 (Reg. Sess. 2005), *available at* http://www.flsenate.gov/data/session/2005/Senate/bills/analysis/pdf/2005s0436.ju.pdf; *see also* State v. Heckman, No. 2D06-5653, 2007 WL 4270594, at *2 (Fla. Dist. Ct. App. Dec. 7, 2007).

65. STAFF OF FLA. S. COMM. ON THE JUDICIARY, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT ON CS/CS/SB 436, at 6 (Reg. Sess. 2005).

66. *See* H.R. J., Reg. Sess., at 342 (Fla. 2005).

67. *See Heckman*, 2007 WL 4270594, at *2.

68. *See id.*

69. Liptak, *supra* note 7; *see also* Anthony J. Sebok, *Florida's New "Stand Your Ground" Law: Why It's More Extreme than Other States' Self-Defense Measures, and How It Got that Way*, FINDLAW, May 2, 2005, http://writ.news.findlaw.com/sebok/20050502.html.

70. *See id.*

71. *See id.*

raises an interesting and plausible hypothetical in which the law could result in such injustice. In this hypothetical, a student breaks into a teacher's vehicle with intent to vandalize it. Then, the teacher enters the vehicle and discovers the student. Under these circumstances, the teacher can use deadly force against the student and be entitled to the presumption, thus rendering the teacher immune from criminal prosecution or civil suit.[72] Sebok concludes that "the law tells average citizens they can kill when they reasonably believe that their homes or vehicles have been illegally and forcibly invaded."[73]

Under the presumptions created by section 776.013 of the Florida statutes, Jack King's statement about being carried by six pallbearers versus being judged by a twelve-person jury[74] becomes irrelevant. No longer will a person need to worry about being judged by a jury for using deadly force so long as the user of force can prove the requirements in section 776.013(1)(a)–(b). If the presumption applies, then there can be no criminal or civil repercussions for the use of deadly force.[75] When found to apply, the presumption's practical effect is that a jury will no longer be able to decide the factual question of whether the defendant had the reasonable fear necessary to use deadly force. Instead, the factual questions the jury will have to decide are whether the alleged intruder was attempting or had unlawfully and forcibly entered the defendant's home, and whether the defendant had reason to know that such an intrusion had occurred.[76]

In analyzing the presumptions, one should be discouraged by their practical effects. The presumed reasonable fear of death or great bodily harm of the user of force and the malicious intent of an intruder provides the victim of intrusion too much discretion to use deadly force. These presumptions eliminate the requirement of necessity and authorize the use of deadly force, even if non-deadly or no force would have been reasonable. Essentially, the presumptions allow a person within his "castle" to act with impunity, even if he or she has no reasonable fear, knows the intruder does not have any malicious intent, or knows that the use of deadly force is unreasonable. According to the law, if an intoxicated teenager enters his neighbor's home by mistaking it for his own, the

72. *See id.*

73. *See id.*

74. *See supra* note 26 and accompanying text.

75. *See* FLA. STAT. § 776.032(1) (2007).

76. *See* STAFF OF FLA. S. COMM. ON THE JUDICIARY, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT ON CS/CS/SB 436, at 6 (Reg. Sess. 2005), *available at* http://www.flsenate.gov/data/session/2005/Senate/bills/analysis/pdf/2005s0436.ju.pdf; *see also* STAFF OF FLA. S. COMM. ON THE JUDICIARY, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT ON CS/SB 436, at 7 (Reg. Sess. 2005), *available at* http://www.flsenate.gov/data/session/2005/Senate/bills/analysis/pdf/2005s0436.cj.pdf; *see* FLA. STAT. § 776.013(1)(a)–(b) (2007).

homeowner can presumably use deadly force. Even if the State could prove that the homeowner knew the intruder was his neighbor's teenager and that the teen meant no harm, the presumptions entitle him to use deadly force without having reasonable fear of death or great bodily harm.

A critical question that should be addressed is the policy choice behind the irrebuttable presumptions. Creating irrebuttable presumptions of a reasonable fear of death or great bodily harm for the user of force and of the intruder's malicious intent should make one ask why the legislature would want these presumptions to be irrefutable even if overwhelming evidence exists that would prove the user of force did not act reasonably. Miscarriages of justice can occur when the facts tell a different story, but the legal presumptions prevent the jury from making determinations as to whether using force was necessary and whether deadly force was required.

At first glance, the irrebuttable presumptions may seem to be a sound conception because few would disagree that people have the right to be free from intrusion in their homes. But a more thorough analysis should make one question whether this is sound policy. The law should not abrogate the requirements that reasonable fear must exist in the user of force and that the amount of force used should be reasonable. Under sections 776.013(1)(a)–(b) and 776.013(4), the irrebuttable presumptions incentivize a "shoot-first" mentality rather than a reasonableness approach. Because the self-defense law is based on whether or not the user of force had a reasonable belief of death or great bodily harm, the law should not impute presumptions of having this reasonable belief, nor should it vindicate using deadly force when less force would be reasonable. Should not a law based on reasonableness encourage individuals to act reasonably in *all* circumstances?

C. *The Actual Effects*

1. PROSECUTORS: THE LAW AS A BAR TO PROSECUTION

More than two years after the "Stand Your Ground" law went into effect, the law's actual effects and implications remain elusive. One significant factor causing this elusiveness is the lack of judicial interpretation of the law. Because only a few cases have actually been brought to trial, the "Stand Your Ground" law may act more as a bar to prosecution than a defense.

Russell Smith, president-elect of the Florida Association of Criminal Defense Lawyers, originally thought the law's impact would be seen

in trials, but he has not found that to be the case.[77] Smith stated that "the real impact [of the law] has been that it's making filing decisions difficult for prosecutors. It's causing cases to not be filed at all or to be filed with reduced charges."[78] Smith's statement supports the idea that the law acts more as a bar to prosecution than a defense, as does the experience of Duval County State Attorney Harry Shorstein.[79] Shorstein believes that although the law cannot be blamed for the homicide binge in his jurisdiction, it has significantly influenced a handful of homicide and attempted homicide cases.[80] Shorstein thinks the law has hindered prosecutors.[81] Although only implicated in a few cases in his jurisdiction, he believes the law has a wide and prevalent influence on cases that is "difficult to document."[82] He stated:

> [The law] caused a general expansion of self-defense, which makes all issues of self-defense more favorable to the defendant or suspect than before. . . . It's also created a greater propensity to use deadly force than existed before. There's a lesser sensitivity to gun violence and death, and that's not good.[83]

Thus, according to prosecutors, the law has not turned Florida into the Wild West, nor has it caused a demonstrable increase in homicides.[84] But it does have an impact on decisions of whether to prosecute at all or bring reduced charges against individuals using deadly force.[85]

The assertion that the law acts more as a bar to prosecution than a defense cannot be fully substantiated, however, because statistics on the number of self-defense claims statewide, either before or after the law took effect, are not available.[86] Nonetheless, some documented cases where charges are reduced or not brought at all are illustrative of how the law can function as a bar to prosecution or a bargaining chip for defendants in plea deals.[87] An article in the *Orlando Sentinel* newspaper on June 11, 2006, stated that since the law went into effect on October 1,

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77. J. Taylor Rushing, *Deadly-Force Law Has an Effect, but Florida Hasn't Become the Wild West; State Attorneys Say It Makes Filing Charges More Difficult for Prosecutors*, FLA. TIMES-UNION, July 10, 2006, at A-1.

78. *Id.*

79. *See id.*

80. *See id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.*

85. *See id.*

86. *See* Henry Pierson Curtis, *Gun Law Triggers at Least 13 Shootings*, ORLANDO SENTINEL, June 11, 2006, at A1.

87. *See generally id.* (documenting the new law's effects); Rushing, *supra* note 77; *see also* Missy Diaz, *Teenager Takes Plea Deal in Stabbing Case*, FLA. SUN-SENTINEL, Sept. 29, 2007, at 1B.

2005, at least 13 people in Central Florida used firearms and claimed the law's protection.[88] The incidents resulted in six dead and four wounded, and all but one of the ten deceased or maimed were unarmed.[89] At the time of the report, five of the shooters had been cleared of all charges, three shooters had been charged, and the remaining incidents were still under review.[90]

Duval County State Attorney Shorstein cited five cases where the law has influenced the State Attorney office's decisions in cases, resulting in refraining from filing charges or reducing charges.[91] These cases included an incident where a man was shot by a motorist following an argument where the man allegedly attacked the motorist, an incident where a man was shot and killed by an acquaintance in a domestic dispute, and a road rage episode where a woman was stabbed to death by another woman.[92]

Similarly, the law affected a case in which a man stabbed another at a party. The prosecutors in that case gave the defendant a deal for seven years in prison if he pled guilty to manslaughter.[93] Assistant State Attorney Andy Slater stated that the "Stand Your Ground" law coupled with conflicting witness testimony caused him to offer the plea agreement.[94] The defendant's defense attorney, Richard Lubin, thought the deal was in the best interest of his client, even though he felt they had a strong defense, because it eliminated the possibility of his client receiving a sentence of life imprisonment for second-degree murder.[95]

Based on these incidents, the law is acting more as a bar to prosecution or a plea bargaining chip rather than a defense. However, unless statistics are produced regarding all cases that involve claims of self-defense, it will remain impossible to tell whether these examples are anomalies or whether they are actually representative of the effects of the law. Nonetheless, the incidents which never reach the inside of a courtroom because charges are not brought or reduced plea deals are accepted are the most important in determining how the law functions in practice. Thus, a system to track claims of self-defense and how these claims are handled and resolved is imperative for determining the law's actual effects. The recommendation for this type of system is further discussed in Section III. Another impact of the law that plays an integral

88. *See* Curtis, *supra* note 86.
89. *See id.*
90. *See id.*
91. *See* Rushing, *supra* note 77.
92. *See id.*
93. *See* Diaz, *supra* note 87.
94. *See id.*
95. *See id.*

role in determining whether or not an individual claiming the law's protections is charged and prosecuted is law enforcement's investigation and handling of incidents.

2. LAW ENFORCEMENT: VARYING METHODS FOR HANDLING INCIDENTS

The "Stand Your Ground" legislation altered how law enforcement assesses and handles incidents involving self-defense claims. Under section 776.032(2) of the Florida statutes, the police are forbidden to arrest or detain a suspect unless they have evidence establishing probable cause that the force used was unlawful.[96] Thus, although the law requires self-defense claims to be investigated, an individual claiming he or she acted in self-defense cannot even be arrested unless the police have evidence that the person's actions do not fit within the requirements of the statute.[97]

The effect of these changes is illustrated by five months of court records for Lake, Orange, Osceola, Polk, Seminole, and Volusia counties. These records showed "widespread differences in the way claims are investigated and prosecuted."[98] Assessment of the records uncovered that some incidents received over twenty hours of investigation by detectives, while others were sent straight to the prosecutors' offices and were never reviewed by detectives.[99]

A comparison of the handling of three incidents illustrates the varying methods of investigating cases by law enforcement. In one incident, an off-duty police officer who used deadly force and claimed he feared for his life while drinking at an acquaintance's house was arrested and charged by the Seminole County Sherriff's Office.[100] The prosecutors subsequently dropped the charges after interviewing the witness for approximately fifteen hours and deciding that there was insufficient evidence to rebut the officer's self-defense claim.[101] But the Orange County Sheriff's Office did not consult the State Attorney's Office when deciding not to bring charges against a homeowner who shot and wounded an intoxicated intruder who believed he had entered a friend's house.[102]

In yet another Orange County incident, the law enforcement agency's on-call detective did not investigate a shooting where a fifteen-year-old male suspected of attempting to steal a car was shot in the back

96. *See* FLA. STAT. § 776.032(2) (2007).
97. *See id.*
98. Curtis, *supra* note 86.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

of the leg by the car owner's husband.[103] Although a witness claimed that the young man may have been shot while he was running away, the detective instructed deputies to forward their reports straight to the State Attorney's office.[104]

Some investigators argue that the law has not changed how incidents are assessed and investigated by law enforcement agencies. Others, including Sergeant Rich Ring, head of the Orlando Police's Homicide Squad, assert the opposite conclusion.[105] Ring stated that while the claims are still investigated, the change is that, "[i]n the old days, we'd say 'Where is the weapon?' Now the person only needs to have a 'reasonable fear of death or great bodily harm' and be able to articulate it . . . But what's reasonable fear? It's so vague, it's different for every one."[106]

The varying amounts of time spent investigating and the different methods for handling incidents involving claims of self-defense under the law is difficult to reconcile with the desire for the law to be applied uniformly. Because cases are not handled uniformly, too much discretion may be vested in law enforcement. This is especially troubling if law enforcement can pick and choose which incidents to investigate more thoroughly than others because it opens the door for personal bias, such as racial or gender animus, to play an improper role in the police's decisions. Furthermore, the varying procedures used by law enforcement for investigating incidents of self-defense under the law raises other questions: Does section 776.032(2) of the law hinder law enforcement agencies' ability to investigate self-defense claims? If so, does it give law enforcement disincentive to investigate? Among other factors, the unclear aspects of the law and the lack of uniformity by law enforcement in investigating incidents have contributed to a number of troubling episodes in Florida.

3. INCIDENTS IN FLORIDA

Despite the lack of specific statistics regarding the law's effect on how many incidents using deadly force are claiming the law's protections and whether or not users of force are being prosecuted or given reduced sentences via plea bargains, numerous incidents in Florida raise serious questions as to the application of the law. A sampling of these incidents strikes at the center of the controversies surrounding the law, including who should be able to claim the law's protections, whether

103. *Id.*
104. *Id.*
105. *See id.*
106. *Id.*

charges should be brought against the person who used deadly force, whether the law is even applicable, and whether amendments should be made to the law. The first incident provides a basis for exploring the problem with determining what constitutes "unlawful activity" under the law. The second shows issues that can arise with the irrebuttable presumption. The third illustrates problems with the statute failing to state the amount of force that can be used in self-defense and the law's application to defense of others. Finally, the fourth incident shows one of the problematic aspects of providing immunity from all criminal prosecution and civil suits.

On June 11, 2006, Jacqueline Galas, a prostitute of New Port Richey, shot and killed her longtime client Frank Labiento.[107] According to the police and prosecutors, the evidence showed that Labiento intended to kill Galas. In fact, he told her of his intent while the two sat at Labiento's kitchen table.[108] When Labiento stood up to answer the phone, he left his .357-caliber handgun on the table in front of Galas.[109] According to the story she told police, Labiento then came at her in a threatening manner, and she shot him in the chest.[110] The arrest report stated that Galas "made no attempt to flee, nor did she verbally warn the victim that she was going to shoot him,"[111] and she did not call for medical help as Labiento was dying.[112] Although originally arrested and charged with second-degree murder, prosecutors dropped the charge.[113] Assistant State Attorney Michael Halkitis stated that Galas's decision to shoot rather than flee would have made his choice not to prosecute much more difficult under the old law which still required the duty to retreat before using deadly force.[114] Halkitis further remarked, "It's a very clear case of an issue covered by 'Stand Your Ground.'"[115]

But Halkitis's statement that this is clearly covered by the law should be questioned. Section 776.013(3) states that a person may only use deadly force if he or she is attacked, is *not engaged in an unlawful activity*, and is in a place where he or she has a legal right to be.[116] Galas admitted she was working as a prostitute and that she regularly "per-

107. David Sommer, *Prosecutors Drop Murder Charge Against Prostitute*, TAMPA TRIB., July 27, 2006, at 15.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Liptak, *supra* note 7.

115. Sommer, *supra* note 107.

116. *See* FLA. STAT. § 776.013(3) (2007).

formed sex acts with Labiento in exchange for money."[117] This raises the questions of what constitutes being engaged in an "unlawful activity," and when the law's protections should apply. Galas may not have been engaged in sex for money at the exact time when she used deadly force against Labiento, but she did admit to acting in her capacity as a prostitute.

Similarly, imagine a scenario where an individual was dealing drugs to a customer in the customer's home, and the customer attacked the dealer. At the time the drug dealer was attacked and reasonably used deadly force in self-defense against the customer, he or she was not actively exchanging the drugs for money. Should the drug dealer be entitled to assert the defense? When there is not an explicit definition of "unlawful activity," it is unclear as to who should be able to claim the law's protections.

A critical analysis of this incident reveals numerous problems with the "unlawful activity" provision. The provision lacks any definition or explanation, so it is impossible to know the precise time-framing and degree of unlawful activity that will cause a user of force not to be protected by the law. For example, is a person who trespasses on another's land or a person carrying an unlicensed firearm exempt from the law's protection, even if the person is faced with an attack which will cause death or great bodily harm? When there is no clear definition of this provision, it gives too much discretion to prosecutors and law enforcement to decide whether or not the provision is applicable and thus whether or not a person will receive the law's protections.

The circumstances of another incident illustrate the problem with the irrebuttable presumptions created in favor of the person using deadly force under section 776.013. Jason M. Rosenbloom was shot twice by his neighbor Kenneth Allen in Allen's doorway.[118] Allen had complained to the local authorities about Rosenbloom putting out more trash bags than local ordinances allowed.[119] When Rosenbloom knocked on Allen's door, the two men began to argue.[120] Allen claimed that Rosenbloom had his foot in the door and was attempting to rush inside the house before he pulled the trigger.[121] Rosenbloom denied this allegation.[122] The conflicting claims only converge on the fact that Allen shot Rosenbloom, who was unarmed, in the stomach and then in the chest.[123]

117. Sommer, *supra* note 107.
118. *See* Liptak, *supra* note 7.
119. *Id.*
120. *Id.*
121. *See id.*
122. *Id.*
123. *See id.*

Afterward, Allen said he was afraid,[124] and stated, "I have a right . . . to keep my house safe."[125]

Without other witnesses, it is Allen's claim versus Rosenbloom's claim. Section 776.013(1)(a)–(b) would protect Allen from civil and criminal suits so long as he could show that Rosenbloom was "unlawfully" and "forcibly" entering or attempting to enter his home, and that he believed such entry was occurring when he shot Rosenbloom. If Allen proved this, then he is presumed to have the reasonable fear necessary to justify using deadly force.[126] Thus, even if the State could prove that Allen did not fear Rosenbloom and could see that he was plainly unarmed and had no malicious intent, it is irrelevant because the presumption in favor of Allen is conclusive and irrebuttable.[127]

One should question whether justice was done in this situation. If there was evidence that Allen did not have reasonable fear or that Rosenbloom had no malicious intent, then the presumptions should be rebuttable so that such injustice does not occur. In this incident, it was a case of a dispute between acquaintances that escalated into violence, not a situation where a homeowner finds a random burglar inside his home and has to make a split-second decision. This is not the type of incident in which the user of force should be unquestionably protected by irrebuttable presumptions. Rather, it is exactly the type of scenario where the facts regarding the user of force's reasonableness in the need to use force and the use of deadly force—as opposed to less force—should be used to determine whether the act was justified self-defense.

Another incident particularly shows the issues that can arise with the law's failure to specifically state the amount of force that can be used and the application of the law to defense of others claims. Michael Frazzini was in a camouflage mask and carrying a fourteen-inch souvenir baseball bat when he was shot and killed by Todd Rasmussen.[128] According to Frazzini's family, Frazzini was watching over his mother's home and backyard because she thought twenty-two-year-old Corey Rasmussen "had stolen her car keys and [had been] disturbing her property."[129] The only accounts of the events that transpired and led to the

124. Grimm, *supra* note 18.

125. Liptak, *supra* note 7.

126. *See* FLA. STAT. § 776.013 (2007).

127. *See* STAFF OF FLA. S. COMM. ON THE JUDICIARY, SENATE STAFF AND ECONOMIC IMPACT STATEMENT ON CS/CS/SB 436, at 6 (Reg. Sess. 2005), *available at* http://www.flsenate.gov/data/session/2005/Senate/bills/analysis/pdf/2005s0436.ju.pdf; *see also* State v. Heckman, No. 2D06-5653, 2007 WL 4270594, at *3 (Fla. Dist. Ct. App. Dec. 7, 2007).

128. Jacob Ogles, *Shooting Protected by Law in Question*, NEWS-PRESS (Fort Myers), Aug. 4, 2006, at 1A.

129. *Id.*

death of Frazzini are from Todd Rasmussen and his family.[130] Corey Rasmussen, Todd's son, was alerted by his sister that someone was lurking in the bushes behind the backyard.[131] Corey confronted and pulled a knife on Frazzini when he saw Frazzini's novelty bat (which he allegedly believed to be a lead pipe).[132] Todd Rasmussen told police that he had his daughter retrieve his .357 revolver and went outside where he saw Corey and Frazzini standing off.[133] According to Todd, he yelled a warning, and then he shot and killed Frazzini, claiming Frazzini lunged at him and Corey.[134]

The prosecutors declined to arrest or bring charges against Todd Rasmussen for murder or manslaughter because they said that so long as Todd Rasmussen had fear of death or bodily injury to himself or another—in this case his son—then he had the right to use deadly force.[135] The prosecuting attorney, Hamid Hunter, said that, taking the Rasmussen family's account of events at "face value," there was reasonable belief that Todd Rasmussen feared for his son's life.[136] Lee County Chief Assistant State Attorney Randy McGruther remarked that the state would not prosecute a case if there is not a reasonable belief that a jury will convict.[137] Hunter candidly concluded, "Nobody involved in this decision feels good about it."[138]

Originally, the state attorney's report stated that Frazzini's body was found on Todd Rasmussen's property.[139] Further investigation found that Frazzini was actually found on his mother's property.[140] The prosecuting attorney, Hunter, admitted the error and that he had never actually been to the scene of the crime; however, the prosecutor's office still determined that Todd Rasmussen should not be charged.[141] The prosecutors claimed that where Frazzini was killed is not a factor under "Stand Your Ground" because the law simply requires that Rasmussen reasonably fear for the life of his son in order for him to legally exercise deadly force.[142]

This incident illustrates the issue that can arise because the statute

130. *Id.*
131. Sam Cook, *Stand Your Ground Law Intimidates Prosecutors*, NEWS-PRESS (Fort Myers), Aug. 6, 2006, at 1B.
132. Ogles, *supra* note 128.
133. *Id.*
134. Cook, *supra* note 131.
135. Ogles, *supra* note 128.
136. *Id.*
137. *Id.*; *see also* Cook, *supra* note 131.
138. Ogles, *supra* note 128.
139. *Id.*
140. *Id.*
141. *See id.*
142. *See id.*

does not explicitly specify the appropriate/permitted amount of force that can be used in self-defense. The fact that Frazzini was holding a novelty bat compared to the knife-carrying Corey Rasmussen and gun-carrying Todd Rasmussen has even caused one of the law's co-sponsors to question the application of "Stand Your Ground."[143] State Representative Jeff Kottkamp stated, "The intent is that you can only use the same amount of force as you believe will be used against you . . . . It certainly wasn't that you can shoot and kill somebody wielding a souvenir baseball bat."[144] But that distinction is not clear from the wording of the law.[145] Without a requirement of commensurate force specifically written into the law there is no room for interpretation, which can result in injustice.

The Rasmussen/Frazzini incident also shows another problem with the law's application to defense of others.[146] Representative Kottkamp stated that the Florida Legislature did not intend for the law to protect individuals who charged at others with deadly weapons and that "[Frazzini] was found on his mother's property, so I don't know how Stand Your Ground applies."[147] According to Hunter, however, the law applies because Corey and Todd Rasmussen were someplace they had a right to be—in their backyard and utility easement—and Todd Rasmussen had a reasonable belief that Frazzini was going to kill or do great bodily injury to his son.[148]

But if Corey Rasmussen was the original aggressor by confronting and brandishing a knife against Frazzini, should the law protect Todd Rasmussen for shooting and killing Frazzini? Should Rasmussen have been able to use this amount of force when the person he shot was holding a toy bat and the person he was protecting was holding a knife? There is something inherently unjust in this type of circumstance. Under the "Stand Your Ground" law, however, Hunter is likely correct because section 776.012 appears to envelop the mistake of fact defense and turns the assessment solely into a reasonableness inquiry.[149] Thus, Todd Rasmussen would only be required to show that he had a reasonable belief that it was necessary to defend Corey Rasmussen to prevent Frazzini from using force which would cause imminent death or great bodily harm. Even if it was proved that Corey Rasmussen was the original aggressor, and Todd Rasmussen was mistaken about this fact, a mistake

143. *See id.*
144. *Id.*
145. *See* FLA. STAT. § 776.013(3) (2007).
146. *See id.* §§ 776.012, 776.013.
147. Ogles, *supra* note 128.
148. *See id.*
149. *See* § 776.012.

of fact defense is unnecessary under the law because it only requires Todd Rasmussen's act to be objectively reasonable.[150] Regardless of whether or not Todd Rasmussen was mistaken about who was the initial aggressor, should not a jury decide if he acted objectively reasonable? This may be an instance of prosecutors using their own discretion to replace that which should be for a jury to decide.

The incident involving the death of nine-year-old Sherdavia Jenkins reveals more problems with the law. While playing on the front stoop of her home, Sherdavia Jenkins was killed by a stray bullet from a shootout between Damon "Red Rock" Darling and Leroy "Yellow Man" LaRose.[151] Although the police originally said that they would not charge Darling, both men were eventually arrested and charged with second-degree murder with a deadly weapon, attempted second-degree murder with a deadly weapon, and possession of a weapon/firearm by a convicted felon.[152]

The Jenkins incident raises three more problematic aspects of the law. First, if a person using deadly force is protected by the law, then even innocent bystanders who become victims are prohibited from filing civil suits, and the state cannot bring criminal charges against the user of deadly force.[153] There is an inherent injustice to families who lose a loved one and then have no recourse because a law provides absolute immunity from criminal prosecution and civil suits for a person using deadly force within the requirements of the statute.

In addition to the troubling idea that the law provides no remedies for innocent bystanders who are killed or injured by users of deadly force acting properly in self-defense, there is a second problem with the legislature's rationale for passing the law. Chief Assistant State Attorney in the Fourth Judicial Circuit of Florida, Jay Plotkin, illustrated this problem when he said, "[u]nfortunately, you can't write a law that says only good citizens can use deadly force to protect themselves . . . If a bad guy is defending himself against another bad guy, the law applies to him, too."[154] Although only a hypothetical, as both LaRose and Darling were eventually charged with second-degree murder and two other crimes, this scenario raises questions as to whether the people the legislature intended the law to protect are the same people who can claim the law's protections. If the bullet that struck Jenkins was from the gun of the individual who responded based on a reasonable fear of death or

150. *See id.* § 776.012.

151. *See* Grimm, *supra* note 18.

152. *See Man Charged in Death of Sherdavia Jenkins in Court*, CBS4.COM, July 27, 2006, http://cbs4.com/topstories/Miiami.News.Sherdavia.2.398313.html.

153. *See* FLA. STAT. § 776.032(1) (2007).

154. Grimm, *supra* note 18.

bodily injury, then the shooter would have complete immunity from both criminal prosecution and civil suits under section 776.032 of the Florida Statutes.[155] Should not a law that can result in such incongruous results be amended so that such results do not occur?

The Florida Legislature declined to make such an amendment. In response to the Jenkins incident, Senate Bill 878[156] and House Bill 371[157] were introduced in the Florida Senate and the Florida House of Representatives, respectively. These bills sought to amend sections 776.013 and 776.032 of the current law.[158] The suggested amendments to section 776.013 would require an overt act to support the belief that the use of deadly force was necessary and would define "[u]nlawful activity" as an "activity undertaken by a person which is prohibited by the laws of this state."[159] The bills' amendments to section 776.032 would remove criminal and civil immunity to defendants who harm innocent bystanders,[160] including children like Sherdavia Jenkins. Both of these bills died on May 4, 2007, the Senate Bill 878 in the Committee on Criminal Justice[161] and House Bill 371 in the Safety and Security Council.[162]

Third, the outcome of the Jenkins incident presents a significant problem of too much discretion in how prosecutors apply the law. Here, this may be a scenario where the prosecutors are willing to bypass the "Stand Your Ground" law based on their belief that the jury would convict the defendants based on their criminal backgrounds despite the law. As with the police, the law may vest too much discretion in prosecutors when they are making determinations of whether the law's protections should apply. If prosecutors make decisions to prosecute contingent on whether or not a jury is more likely to convict the user of force based on *who* he or she is, then the law will not be applied equally. Prosecutors should not give effect to personal or social biases by basing the decision of whether or not to prosecute a case on *who* the user of force is rather than *what* he or she did. Another factor which plays an integral role in the law's actual effects is the determination of probable cause by police.

155. *See* § 776.032.

156. *See* S.B. 878, 109th Leg., Reg. Sess. (Fla. 2007) (proposed amendments to FLA. STAT. §§ 776.013, 776.032).

157. *See* H.R.B. 371, 109th Leg., Reg. Sess. (Fla. 2007) (proposed amendments to FLA. STAT. §§ 776.013, 776.032).

158. *See* S.B. 878; H.R.B. 371.

159. *See* S.B. 878; H.R.B. 371.

160. *See* S.B. 878; H.R.B. 371.

161. Florida Senate, http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2007&billnum=878 (last visited Sept. 23, 2008).

162. Florida House of Representatives, http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=34944&SessionId=54 (last visited Sept. 23, 2008).

D. *The Determination of Probable Cause by Police*

Sergeant Ring's statement describing the difficulty in determining reasonable fear depicts one of the differences before and after the law went into effect. Previously, using deadly force in a place other than the home or workplace without retreating would generally result in charging the individual using such force with a crime. Now, under section 776.032, the police must look for evidence proving the person did not have reasonable fear of great bodily harm or death.[163] This evidence must be used to determine whether the user of force acted reasonably. If the law enforcement officials cannot establish probable cause that the force used was unlawful because it was motivated by something other than reasonable fear, then the police are forbidden from even arresting the person who used deadly force.[164]

In order to arrest an individual, law enforcement must have probable cause to believe that a crime is being or has been committed.[165] In *Seago v. State*, the Court stated, "Facts constituting probable cause need not meet the standard of conclusiveness and probability required to support a conviction."[166] Under the "Stand Your Ground" law, law enforcement must decide whether or not the user of force acted with a reasonable belief under the circumstances. Thus, determining if probable cause exists requires police to assess the nexus between reasonable fear and the amount of force used—including deadly force. Because "Stand Your Ground" does not purport to change the Florida common-law objective standard for reasonableness when assessing self-defense claims,[167] law enforcement's determination will turn on whether or not the user of force was objectively reasonable under the circumstances. Thus, under the objective standard, law enforcement is to assess the situation based on whether an objectively reasonable person would have had reasonable fear that the alleged attacker was going to kill or do great bodily harm. Section 776.032(2) says law enforcement agencies are to make this determination using "standard procedures for investigating the

163. *See* FLA. STAT. § 776.032(2) (2007).

164. *See id.*

165. *See* Stone v. State, 856 So. 2d 1109, 1111 (Fla. Dist. Ct. App. 2003); Swartz v. State, 857 So. 2d 950, 951–52 (Fla. Dist. Ct. App. 2003).

166. Seago v. State, 768 So. 2d 498, 500 (Fla. Dist. Ct. App. 2000); *Swartz*, 857 So. 2d at 952 (quoting *Seago*, 768 So. 2d at 500).

167. *See, e.g.*, Price v. Gray's Guard Serv., Inc., 298 So. 2d 461, 464 (Fla. Dist. Ct. App. 1974) ("The conduct of a person acting in self defense is measured by an objective standard, but the standard must be applied to the facts and circumstances as they appeared at the time of the altercation to the one acting in self defense."); Gil v. State, 266 So. 2d 43, 44–45 (Fla. Dist. Ct. App. 1972) ("In order to take advantage of self-defense in a homicide, the situation must be such as to induce a reasonably prudent person to believe that danger was imminent and that there was a real necessity for the taking of a life.").

use of force."[168]

Under section 776.032(2) of the Florida Statutes, law enforcement is the initial arbiter in deciding whether a person's use of deadly force was reasonable or excessive.[169] Thus, unless prosecutors decide to pursue cases where police initially decline to investigate, law enforcement's decision about whether the user of force had reasonable fear and used reasonable force will determine whether or not a case is adjudicated. In "Stand Your Ground: New Challenges for Forensic Psychologists," an article by forensic psychologist Patricia Wallace, Wallace states that "it is important to understand how the law enforcement agency defines and measures the construct of reasonable fear and correlates it with reasonable force, including deadly force."[170] As illustrated in Part II(c)(ii) by the varying methods for handling cases by law enforcement, including the difference in the amount of time spent investigating incidents and whether or not cases of self-defense are actually reviewed by detectives, the standard investigation procedures can differ depending on the law enforcement agency.[171] Wallace explains that although these agencies are trained to handle crime scenes, determining the reasonableness of the force used and the existence of reasonable fear goes beyond the decisions that are made during standard investigation procedures.[172] Wallace concludes that law enforcement agencies need periodic training programs and the psychological tools that give these groups the necessary training for assessing the fear-force constructs and human behavior.[173]

In many situations involving the use of deadly force, the only basis for determining whether the force used was reasonable will be the user of force's version of the facts, because the receiver of the force died. Thus, law enforcement's determination of whether probable cause demonstrating that the user of force was unreasonable will often hinge solely on the claim of the self-interested party. The user of force is most likely to provide a rendition of facts that would make it seem objectively reasonable that he or she had reasonable fear and that the amount of force used was reasonable. When combining this scenario with the documented different methods and amounts of time spent investigating incidents by law enforcement officials, an analytical approach should recognize a significant problem. If police rely solely on the user of force's claim and do not perform a more thorough investigation into

168. § 776.032(2).

169. *Id.*

170. Patricia Wallace, *Stand Your Ground: New Challenges for Forensic Psychologists*, FORENSIC EXAMINER, Fall 2006, at 37.

171. *See* Curtis, *supra* note 86.

172. *See* Wallace, *supra* note 170, at 39.

173. *See id.* at 41.

whether there is other evidence that the force used was unreasonable, then there is too great an opportunity for injustice. "Standard investigating procedures" may not be adequate to assess claims of self-defense when the only obvious leads to determine reasonableness are the self-interested user of force's claim. Thus, police must be diligent and more probing when investigating the situations where there does not appear to be more evidence than the user of force's claim. Where police do not conduct more thorough investigations in these situations, miscarriages of justice can occur.

E. *Case Law Involving "Stand Your Ground" Defenses*

There has been very little judicial interpretation of the "Stand Your Ground" law since it went into effect, and the judicial interpretation provided by the courts has focused on whether the law can be applied retroactively. The Fourth District Court of Appeals of Florida held that the law did not apply retroactively to crimes committed prior to the law's passage.[174] The Court noted that there was nothing in the legislation indicating that the legislature intended for the law to apply retroactively.[175] The Court further reasoned that because section 776.013 substantively—rather than procedurally or remedially—changed section 776.012,[176] it would be a violation of article X, section 9 of the Florida Constitution[177] for section 776.013 to be applied in this manner.[178] The Florida Supreme Court upheld the Fourth District Court of Appeals decision[179] and further held that section 776.013 of the Florida Statutes does not apply to cases pending at the time the statute became effective.[180] The Court stated that "[t]he primary effect of section 776.013 is to specifically incorporate 'no duty to retreat' for certain situations when deadly force can immediately occur without needing to first retreat."[181] In a footnote addressing the presumptions created by section 776.013, the Florida Supreme Court noted, "We [the Court] do not here address or consider the validity of conclusive presumptions."[182]

The case of Norman Borden presented another question as to the law's application but ultimately did not produce any significant judicial

174. State v. Smiley, 927 So. 2d 1000, 1001 (Fla. Dist. Ct. App. 2006).

175. *Id.* at 1003.

176. *Id.*

177. Article X, section 9 of the Florida Constitution provides that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." FLA. CONST. art. X, § 9.

178. *See Smiley*, 927 So. 2d at 1003.

179. Smiley v. State, 966 So. 2d 330, 337 (Fla. 2007).

180. *Id.* at 332.

181. *Id.* at 334.

182. *Id.* at 334 n.3.

interpretation of the law. The facts of the case, according to Borden, were as follows: While walking his dogs, Borden was threatened by two men in a Jeep who were linked to the Latin gang Surenos 13.[183] After a brief verbal altercation, Borden kicked the Jeep and went into his house to get his gun.[184] The two men also retreated from the initial confrontation and picked up a third man, who was a documented member of Surenos 13.[185] The three men returned in the Jeep and were driving toward Borden.[186] Borden claimed to fear that they were trying to run him over.[187] Borden pulled his gun and shot five times through the windshield.[188] He then moved to the side of the vehicle and fired nine more rounds.[189] In the end, two of the three men in the car were killed and one was wounded.[190] The man who survived admitted to investigators that Borden may have thought he and his friends were trying to hit him with the Jeep.[191] He also testified at trial that they were planning to "rough [Borden] up a little bit."[192]

Norman Borden was charged and put on trial for two counts of murder and one count of attempted murder.[193] Prosecutor Craig Williams admitted that the first round of shots were in self-defense and were not at issue.[194] Williams said that the only issue for the jurors to decide was whether the threat faced by Borden was still imminent before he fired the second round of shots.[195] Williams argued that Borden exceeded his right to use self-defense after firing the first five shots because the Jeep had stopped and the threat had dissipated.[196] Borden claimed that the second round of shots was in self-defense because he continued to fear for his life.[197]

Borden's attorney made a motion to throw out the case based on the "Stand Your Ground" law.[198] The trial judge denied the motion and

183. *See* Nancy L. Othón, *Files Released in Double Killing*, FLA. SUN-SENTINEL, Mar. 19, 2007, at 1B.

184. *See id.*

185. Nancy L. Othón, *Trial Begins in Deaths of 2 Men*, FLA. SUN-SENTINEL, June 21, 2007, at 1B.

186. *See* Othón, *supra* note 183.

187. Nancy L. Othón, *Dismissing Charges Weighed*, FLA. SUN-SENTINEL, Apr. 12, 2007, at 9B.

188. *See* Othón, *supra* note 185.

189. *See id.*

190. *See, e.g.*, Othón, *supra* note 183.

191. *See* Othón, *supra* note 187.

192. *See* Othón, *supra* note 185.

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See* Othón, *supra* note 183.

198. *See* Othón, *supra* note 185.

allowed the case to go to the jury.[199] The jury then acquitted Borden of all charges.[200] Prosecutor Craig Williams said that he was almost relieved when Borden was acquitted because he had privately believed that Borden was justified under the circumstances.[201] He charged Borden, however, because he felt that a jury needed to decide the case.[202] After Borden's acquittal by the jury, Prosecutor Williams was not surprised by the verdict and stated that the three men "were bringing a lot of violence to [Borden]. It's tough to put yourself in that guy's shoes and say he didn't act appropriately. It's really tough."[203] After the trial, both Prosecutor Williams and Borden's attorney, Public Defender Carey Haughwout, agreed that the "Stand Your Ground" law was not even a factor in the verdict[204] and that Borden's case would not likely have future effect on defendants claiming self-defense under the law.[205]

The Borden case would have more significance if the judge had thrown the case out based solely on the "Stand Your Ground" law. The denial of the motion to dismiss only shows that judicial discretion has not been changed by the law, which ultimately is of little importance if most cases never reach a judge in the first place.

Likewise, when James Behanna was put on trial for manslaughter, which Behanna claimed was in self-defense, the trial court judge rejected the defense counsel's motion to dismiss based solely on the "Stand Your Ground" law.[206] The judge also denied the defense's motion for a judgment of acquittal after the State rested its case and at the conclusion of all evidence because of conflicting testimony and allowed the case to go to the jury.[207] Behanna was ultimately convicted of manslaughter by a jury and sentenced to fifteen years in prison and five years of probation.[208]

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199. *See id.*

200. *See* Nancy L. Othón, *Borden Not Guilty*, FLA. SUN-SENTINEL, June 26, 2007, at 2A.

201. *Can Self-Defense Laws Stand Their Ground? New Statutes Like Oklahoma's Cause Confusion in Other States*, OKLAHOMAN (Oklahoma City), July 10, 2007, at 1A.

202. *See id.*

203. Othón, *supra* note 185.

204. *See id.*

205. *See* Larry Keller, *Jury Acquits Shooter in Castle Doctrine Case*, PALM BEACH POST, June 26, 2007, at 1A.

206. *See* Anthony McCartney, *Paralegal Charged in Fatal Stabbing*, TAMPA TRIB., Oct. 17, 2006, at 6; *see also* Colleen Jenkins, *Jury Says Paralegal Guilty in Stabbing*, ST. PETERSBURG TIMES, Oct. 27, 2006, at 1B.

207. *See* Behanna v. State, 985 So. 2d 550, 554 (Fla. Dist. Ct. App. 2007).

208. *See id.*; *see also* Colleen Jenkins, *"Nobody Wins" as Sentence Is in Middle*, ST. PETERSBURG TIMES, Dec. 5, 2006, at 1B. On appeal, however, the Florida Second District Court of Appeals reversed Behanna's conviction and remanded for a new trial because the trial court "erroneously excluded evidence that would have supported Behanna's self-defense defense." *See Behanna*, 985 So. 2d at 551.

Under a cursory analysis, the rejection by the judges to dismiss the cases based solely on the "Stand Your Ground" law demonstrates that the law is functioning properly in the courts by still allowing juries to decide whether or not a person was acting in self-defense. A critical analysis, however, reveals that the cases of Borden and Behanna do not provide insight into one of the most important functions of the law: The initial decision whether to charge and prosecute an individual. The episodes where no charges are brought against the user of force based on the law, such as the Galas/Labiento, Rasmussen/Frazzini, and Allen/Rosenbloom incidents, show how the law actually works in practice. The law's real impact can be seen in the incidents which never reach the courtroom. The incidents where individuals are not charged support the idea that the law may be acting as a bar to prosecution, as the initial determinations to charge and prosecute or not will ultimately determine whether an individual claiming self-defense will face legal consequences. In addition to the lack of judicial interpretation that fails to provide substantial insight into the law's impact, there are concerns with the legislature's intent and rationale for passing the "Stand Your Ground" law.

F. *Problems with the Legislature's Rationale for Passing the Protection of Persons Bill*

When looking at the law's actual effects, the legislature's rationale for the law appears problematic. In the purported reasoning for passing the law, the legislature stated that the law was passed in order to give "law-abiding people" the right to protect their family and themselves from intruders and attackers without having to worry about criminal or civil penalties before taking action in defense of themselves and others.[209] But some of the individuals who might be able to claim the protections of the law do not appear to be the types of "law-abiding" individuals the legislature sought to protect. Jacqueline Galas was a prostitute who shot her customer Frank Labiento.[210] Both of the shooters in the gunfight that killed Sherdavia Jenkins had extensive criminal records.[211] Future incidents may further illustrate that the law can shield people who do not abide by the law. Ultimately, the individuals that can be protected by the "Stand Your Ground" law may not be the "law-abiding citizens" that the legislature claimed the law was intended to protect.

As written, the law also seems to be intended to protect individuals

209. *See* 2005 Fla. Laws 199, 202.
210. *See* Sommer, *supra* note 107.
211. *See* Grimm, *supra* note 18.

who are subject to *random* violence. Some of the reported cases, however, show that the law is protecting individuals from violence by acquaintances when the acquaintances' disputes escalate. Frank Labiento was a long-time customer of Jacqueline Galas; Jason Rosenbloom was Kenneth Allen's neighbor; and Michael Frazzini's mother was Todd Rasmussen's neighbor, and Rasmussen knew Frazzini. These incidents involved disputes in which both parties were at least relatively well-known to each other. Such examples are far from the random violence that the law appears to be intending to protect against. If protection from random violence is what the law is actually intended to protect, then, arguably, the analysis should change when the victim and user of self-defense are acquaintances. One solution would be to deem incidents involving acquaintances as per se unreasonable unless the user of self-defense can prove that a weapon or an explicit threat with the means to achieve it were present. The opposite approach would be for the legislature to state that this law was intended to protect individuals regardless of whether or not they were acquainted with the victim. Based on the legislature's purported rationale, however, acquaintances claiming the law's protections appear to be another instance where the law may be used to protect individuals that the Florida Legislature did not intend.

Furthermore, is the law aimed at permitting and condoning the use of firearms for people to protect themselves? By specifically including the statement that people have the right to bear arms in defense of themselves under the State Constitution,[212] the legislature seems to be saying just that. The heavy influence and publicity by the NRA should indicate that the group has its own self-interest in the law. Regardless of the NRA's input and promotion, including the statement regarding the right to bear arms in the rationale for passing the law makes the law appear to be directed toward sanctioning the use of firearms. This raises serious questions: What is the real purpose behind including the statement about the right to bear arms under the Florida Constitution? What message is the legislature sending to the citizens of Florida? Is the legislature encouraging the use of firearms when a person acts in self-defense? And if so, should it be?

III. Recommendations: The Need for Change and Clarification

There are a variety of steps that the Florida Legislature should take that would clarify and provide insight into how the law functions in practice. As an administrative matter, the legislature should mandate the

212. *See* 2005 Fla. Laws 202.

creation of a system to track self-defense claims so that people can see the actual effects of the law. Also, the Florida Legislature should make amendments to clarify the "Stand Your Ground" law. Such amendments would significantly aid police, prosecutors, and the general public in understanding how and when the law applies. I recommend three amendments. First, the legislature should amend section 776.013(1) so that the presumptions of a reasonable fear of death or great bodily harm and of an intruder's malicious intent are rebuttable. Second, the legislature should specifically state the amount of force that can be used when a person acts in self-defense. Third, "unlawful activity" should be defined or, on the other hand, stricken entirely from section 776.013(3), so that it is clear what the provision means, how it is applicable, and when the immunity granted in section 776.032 applies. While none of these recommendations is perfect, these amendments, if made, can substantially clarify some of the problems that plague the current law.

A. *Create a System to Track and Document Self-Defense Claims*

As an administrative matter, the Florida Legislature should require that claims of self-defense and the outcomes of the cases are tracked and documented by prosecutors and law enforcement. This would enable all Floridians to see the actual effects of the law and understand how the law functions in practice.

Law enforcement should track how cases are investigated and the methods by which they investigate. This would provide insight into what law enforcement's normal investigating procedures are and which cases receive more or less attention than others. Prosecutors also need to document the incidents that they decide not to prosecute and the incidents in which defendants are given plea deals. Furthermore, prosecutors should document the outcomes of the cases that are prosecuted to provide statistics on the effectiveness of defendants using the law as a defense. Taken together, the effect of a system to track and document incidents involving claims under the "Stand Your Ground" law would provide important statistics which can be used to determine the law's actual effects inside and outside the courtroom.

B. *Eliminate the Presumptions of a Reasonable Fear of Death or Great Bodily Harm and of an Intruder's Malicious Intent Under Section 776.013 or Make the Presumptions Rebuttable*

The legislature should either eliminate the presumptions of reasonable fear and of an intruder's malicious intent or should at least make the presumptions rebuttable with other evidence. The conclusive presump-

tions essentially make it so that a person can use deadly force to protect his or her "castle" so long as there is an unlawful and forcible entry by another and the user of force believed such was occurring. The user of force is justified in using deadly force even if the facts can prove that the user of force did not have reasonable fear or that using deadly force was excessive. If an individual can act with complete impunity whenever he can prove that another was unlawfully entering or attempting to enter and that the individual believed such intrusion to be occurring, then it ultimately makes it safer for individuals to act without thinking and encourages a "shoot first" mentality. Although the new law does not appear to provide the same heightened degree with regards to the sanctity of life as the common law, the law should not do away with the possibility that the intruder's intent was not malicious and that the user of force did not have a reasonable fear of death or great bodily harm.

The cases where there would be sufficient evidence to prove that the user of force did not have reasonable fear or that the intruder had no malicious intent are likely to be few. But where there is such evidence, then it should be able to be considered by a jury when determining if the use and amount of force was justified under the circumstances. Unless the presumptions are eliminated or made rebuttable, then there is too great a chance that miscarriages of justice will occur.

Furthermore, removing the presumptions or at least making them rebuttable would send the message that individuals must act reasonably in all situations, and these changes would deter injustice from occurring in situations where the user of deadly force did not have a reasonable fear or that the user of force knew or reasonably believed the intruder had no malicious intent. The old adage that with great power comes great responsibility is apt: The power to take another human life should always be tempered with the responsibility that a person have a reasonable belief of death or great bodily harm and that the amount of force used was reasonable. While the presumptions exist and are irrebuttable, this great power is not properly accompanied by great responsibility.

C. *Define the Amount of Force Which Can Be Used*

The permissible amount of force which can be used in situations must be clearly defined. The law should explain that the amount of force used in response to the force with which the person was being threatened must be roughly equivalent to the force or threat. This clarification would remove some of the remaining doubt as to when deadly force—most importantly the use of firearms—is permissible. Because the law states that a person can meet "force with force," it leaves too much room for interpretation as to the amount of force that the law allows under the

circumstances. As Representative Kottkamp said, the law's intent is that a person can only use force that is commensurate with the force used against him or her.[213] In the Frazzini incident, Frazzini was carrying a fourteen-inch toy bat at the time when he was confronted by Corey Rasmussen, who pulled a knife. Then Todd Rasmussen shot Frazzini, claiming he feared for his son's life.[214] There is an inherent injustice when someone carrying a novelty bat is killed while facing two adult men, one wielding a knife and the other a firearm. Whether the situation merited the use of deadly force is highly questionable.[215]

Some individuals, who have lost a friend or family member when another person has stood his or her ground, have expressed their views on what the law requires from a person standing his or her ground and how the law applies. Jason Rosenbloom's mother, Doreen, made the statement following the shooting of her son by his neighbor that "[t]his law is pretty scary . . . . All you have to do is say you feel threatened, and you can shoot someone and get away with it."[216] A friend of Justin Boyette, Eric Wagner, spoke of his interpretation of the law after Boyette was shot and killed by Michael Brady, who was cleared of all charges by a grand jury.[217] Wagner stated, "A lot of people are going to die as soon as people figure out this law . . . . All you have to say is, 'I was afraid,' and you can blow someone away."[218] David Jenkins, the father of Sherdavia Jenkins, the little girl who was gunned down by a stray bullet from a gunfight between two men, stated, "Children and innocent people shouldn't have to live in fear of someone saying, 'I don't like the way you look at me. Bam! You're dead.'"[219]

Even if these individual interpretations of the law are contrary to the legislature's intent, the statute, as written, is unclear as to the amount of force which can be used. If other members interpret the law similarly, and their interpretations are against the legislature's intent, then the legislature must take the initiative to clarify what the law means so as to provide notice to all citizens. As a matter of policy, a law which can potentially be used to justify taking another person's life in certain situations needs to specifically define the amount of force that can be used in those situations. Without such clarification, it confuses law enforcement,

213. *See* Ogles, *supra* note 128.

214. *See id.*

215. *See* Cook, *supra* note 131; Ogles, *supra* note 128.

216. Grimm, *supra* note 18.

217. Curtis, *supra* note 86.

218. *See id.*

219. Madeline Baró Diaz, *Parents of Slain Girl Take on Shooting Law*, FLA. SUN-SENTINEL, Dec. 10, 2006, at 7B.

prosecutors, and the public as to when the law applies, and innocent lives may be unjustly lost.

D. *Limit Law Enforcement and Prosecutor's Discretion in Determining What Constitutes "Unlawful Activity"*

Section 776.013(3) requires that an individual cannot be involved in an "unlawful activity" in order to be able to use deadly force in a place where they legally have a right to be.[220] A crux of this requirement, "unlawful activity," allows for too much discretion to law enforcement and prosecutors. The law fails to provide standards which dictate the precise time-framing and degree of unlawful activity which cause the law's protections to be inapplicable. Without such guidance, law enforcement and prosecutors are given too much discretion in determining when the provision is applicable.

Despite the prosecutor's claim that the case was "very clear" under the law,[221] the Galas and Labiento incident illustrates how important the "unlawful activity" element could be in determining whether an individual is prosecuted. If a person is carrying a gun illegally, but otherwise meets the requirements of section 776.013(3), is he or she entitled to the protection of the statutes, including immunity from all civil and criminal prosecution? Also, are the law's protections not applicable only when a person is engaging in the "unlawful activity" during the exact time that he or she uses deadly force? Or is the totality of the circumstances to be taken into account, including the capacity in which the person is acting, such as Galas being at Labiento's home for purposes of prostitution or a drug dealer at someone's home for the purposes of selling drugs?

Situations such as those described above are not clear under section 776.013(3). The carrying of a gun illegally can be especially vexing because of the policy choices associated with it. On one hand, a person should be able to protect him or herself by using deadly force if faced with an assailant intent on killing or doing severe bodily harm to him or her. On the other hand, society should not condone individuals carrying firearms without having gone through the proper safeguards such as obtaining licenses and permits for the weapons.

The allocation of excessive discretion to law enforcement and prosecutors in determining when the "unlawful activity" provision is applicable can be remedied in two different ways. First, the legislature can define "unlawful activity" and explain the extent to which the provision applies, including the precise time-framing and degree of unlawful activity that will exempt an individual using force from the claiming the

220. *See* FLA. STAT. § 776.013 (2007).

221. *See* Sommer, *supra* note 107.

law's benefits. This would be valuable in providing law enforcement, prosecutors, and the public with a definition as to what constitutes "unlawful activity" and whether an individual can claim the law's protections. If the legislature were to provide such a definition, it must also clarify whether this provision applies to individuals who are engaged in the unlawful activity at the specific time that self-defense is used or whether it applies to individuals who are involved in unlawful activity—such as acting in his or her capacity as a prostitute or drug dealer—but are not conducting such activity at the specific time that self-defense was used. Alternatively, the "unlawful activity" requirement can be stricken from the law entirely. This method would make the law's protections available to all individuals, regardless of whether or not they are engaged in unlawful activity at the time of using force in self-defense. The downside to this method, however, is that the law would no longer jive with the legislature's intent to protect "law-abiding citizens"—even though it is questionable as to whether the law's application will satisfy this intention—because the law would also shield the individuals who did not abide by the law. Either of these solutions would clarify this ambiguous provision and provide the police and public with guidance for when a person using deadly force can claim section 776.013(3) as a defense.

CONCLUSION

More than three years after the law was enacted it remains difficult to determine the actual effects and implications of the law on Florida's citizens, law enforcement, and legal community. As of now, both the proponents and opponents of the "Stand Your Ground" law can produce support for their arguments. For the law's advocates, prosecutors' statements that homicides cannot be attributed to the law show that the law is working well and that it has not turned Florida into the Wild West, as many of the people who opposed the law predicted. But on the other hand, the opponents of the law can view the confusion and disparity in the law's application as verifying the belief that the law is ill-conceived and can result in questionable outcomes. Furthermore, the cases where individuals are not charged or are given generous plea deals in part because of the law vindicate the opponents. However, the supporters of the law can respond by saying that there are relatively few cases which implicate the law since its enactment, thus a few atypical results are just another part of the American legal system. Ultimately, the actual effects of the "Stand Your Ground" law may be difficult to document, but these effects are nevertheless real and have an impact on prosecutors, law enforcement, and society.

Despite whether one agrees or disagrees with the law, it is here to stay. It governs the citizens of Florida, and thus these citizens must have notice of their rights under the law and knowledge of when it does and does not apply. Furthermore, prosecutors and law enforcement groups also need to understand the law's applicability, and these groups must have clear standards for enforcing the law.

If the legislature takes the initiative to amend the law, it will aid all Floridians regardless of whether they belong to groups that enforce the law or are civilians who are required to abide by it. If the law is actually working as a bar to prosecution more so than a defense, then the legislature should be obligated to make changes so that the law functions in a manner that will be least likely to cause injustice. Amendments to clarify the law will serve to provide notice to citizens of when the law applies and a more concrete framework for law enforcement and prosecutors to use in applying the law to individuals claiming self-defense. Eliminating the presumptions in section 776.013 or making them rebuttable with other evidence, explicitly stating the amount of force that can be used in particular circumstances, and limiting prosecutors' and law enforcement's discretion by defining unlawful activity are steps which will facilitate this process. Based on the legislature's history of refusing to amend or further define the law, however, it may not be a "reasonable belief" to think this will occur.