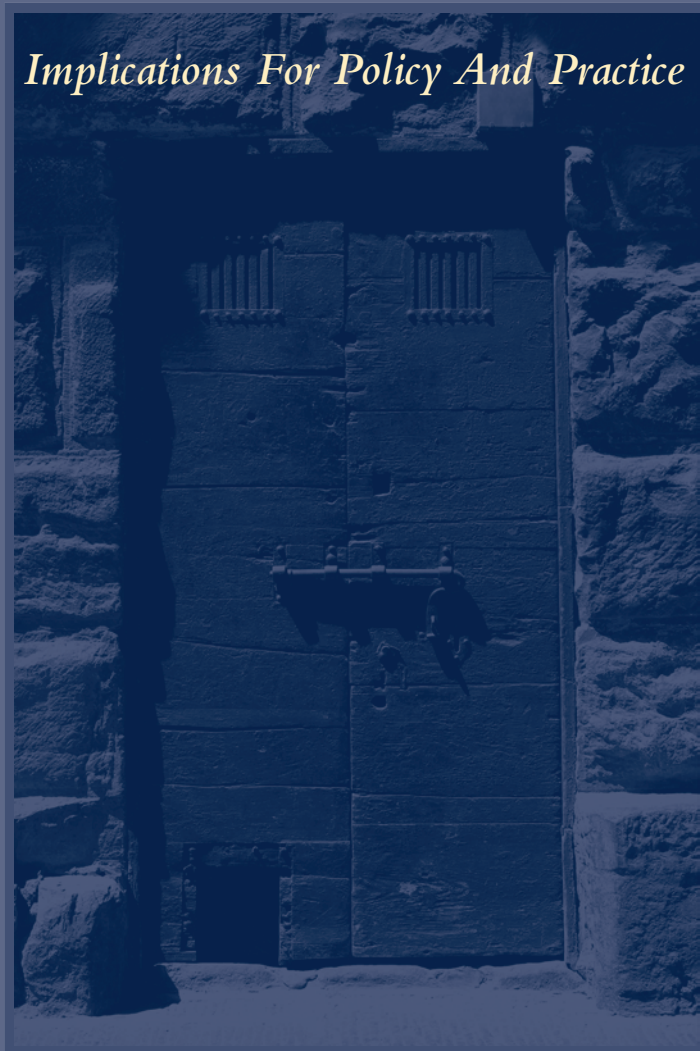


# EXPANSIONS TO THE CASTLE DOCTRINE

*Implications For Policy And Practice*



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# INTRODUCTION



“A MAN’S HOME is his castle,” or so runs the old adage. The notion that our homes are our sanctuaries and that we can defend against an invader within them is hardly new. In fact, the right to protect ourselves or others in our homes, with deadly force if necessary, dates back through civilized society at least as far as early English common law. It was an exception to the general rule that one should first try to disengage or retreat, if attacked, which was often a prerequisite for a claim of self-defense.

Historically, legislation in this area—frequently called “Castle Doctrine” or “no-retreat” laws—has followed the common law. It has allowed individuals the right to use reasonable force, including deadly force, to protect themselves or others against an intruder in their homes. In 1914 Judge Benjamin N. Cardozo put it thus:

It is not now and never been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home...Flight is for sanctuary and shelter, and shelter if not sanctuary, is in the home.<sup>1</sup>

Over the past few years there has been a movement at the state level to expand the Castle Doctrine.<sup>2</sup> These new laws extend the right to self-defense, with no duty to retreat, to places outside the home such as a vehicle, workplace, or anywhere else a person has a right to be. Such expansions could have significant implications for public safety and the justice system’s ability to hold people accountable for violent acts.

In March 2007, the National District Attorneys Association’s American Prosecutors Research Institute (APRI),<sup>3</sup> with funding from the Joyce Foundation, convened a symposium of

## Changes to the Castle Doctrine Enacted in Some States

- Extending the right to self-defense, with no duty to retreat, to places outside the home, such as a place of business, a motor vehicle, or anywhere else a person has a legal right to be (such as a park or public sidewalk);
- Permitting use of deadly force even when only property, as opposed to a person, is under threat in certain breaking and entering situations; and
- Providing blanket civil and criminal immunity for a person who uses deadly force under this expanded right of self-defense.

prosecution, law enforcement, government, public health, and academic experts representing over a dozen states to discuss the legislative expansions to the Castle Doctrine. The experts considered whether the expansions could have unintended consequences that would negatively affect public safety.

This paper sets out the advisory group’s key topics of discussion and details the issues and concerns raised during the March symposium. These included:

- Why has there been an interest in making legislative changes to the Castle Doctrine?
- What does the expanded legislation say, and are there provisions that are problematic in any way?
- What concerns might the new laws raise for law enforcement?
- How will the expanded Castle Doctrine affect local prosecutors?
- What are the public health and safety implications of the Castle Doctrine ex-

pansion?

- What research is needed before further expansions to the Castle Doctrine should be considered?

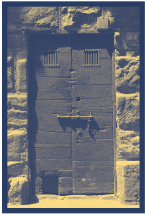
Our inquiry demonstrated that there is a real and immediate need to test the utility and soundness of such laws, particularly as more and more states consider passing expansions to the Castle Doctrine.

<sup>1</sup> *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914).

<sup>2</sup> As of the time of writing, 23 states have made legislative expansions to the Castle Doctrine: Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Wyoming, and West Virginia.

<sup>3</sup> APRI is the research and technical assistance division of the National District Attorneys Association.

# IMPETUS FOR LEGISLATIVE CHANGE



AS NOTED ABOVE, states have long acknowledged the right of individuals to defend their homes through the Castle Doctrine. Moreover, as district attorneys well know, prosecutorial discretion keeps cases of justified and proven self-defense in one's home from being prosecuted in the first place. Why, then, are expansions that include areas outside the home and that eliminate civil and criminal liability necessary?

Symposium experts agreed that there are several factors contributing to changes in no-retreat legislation:

- A diminished sense of public safety after the terrorist attacks in 2001;
- A lack of confidence in the criminal justice system's ability to protect victims;
- The perception that the due process rights of defendants overshadow the rights of victims; and
- The decrease in gun legislation over the last decade.

These are considered in turn below.

## Diminished Sense of Public Safety

There was a change in perceptions of public safety after the terrorist attacks of 9/11. Many citizens experienced heightened anxiety and fear immediately after the attacks, and became concerned that government agencies could not protect every citizen in the event of subsequent terror attacks. This feeling among the public may have ignited a desire to be proactive in their own defense, so that they could defend themselves and others against attacks from would-be terrorists.

Of course, the right to defend oneself at home was legal long before the terrorist attacks and subsequent expansions to no-retreat legislation. However, anecdotal evidence from discussions with constituents reveals that many were unaware of or misinformed about this right. Individuals were more likely to support expansions to the Castle Doctrine when they were not aware of its prior existence and application.

## Need to Protect the Vulnerable

Another possible explanation for calls to expand the Castle Doctrine is the vulnerability of some victims of domestic violence, intimate partner violence, or stalking to further victimization. The common protection afforded by the justice system in these cases is a restraining or protection order, which can be ignored or, as in the case of Yvette Cade,<sup>1</sup> expire without reinstatement. Ms. Cade's estranged husband, against

whom she had a restraining order, went to Ms. Cade's workplace, doused her with gasoline, and set her on fire.

Some experts, particularly in the law enforcement community, see the Cade case and many others like it as examples of the criminal justice system's failure to protect victims. In fact, prosecutors and law enforcement officers indicated that the failures can be so pervasive that patrol officers might suggest that victims of domestic violence, intimate partner violence, stalking, or similar types of crime acquire a weapon so they can defend themselves if the need arises.

These stories suggest that an expanded Castle Doctrine might benefit certain types of victims, particularly those in abusive relationships. However, it is not appropriate to use these situations as a justification for expanding the Castle Doctrine. First, there is no research to bear out the notion that arming victims deters attackers.<sup>2</sup> Second, the traditional Castle Doctrine and normal theories of self defense already allow victims to defend themselves when under persistent attack or threatened in the seclusion of their own homes. An expansion is not needed.

In one example, a female victim of sexual abuse feared that her abuser would attack her again despite the restraining order she obtained, so a detective suggested that she arm herself. One night, the abuser tried to enter her residence through a bedroom window. The woman grabbed the knife she had on her bedside table and stabbed the abuser in the leg, sticking him to the window frame and allowing her time to call 911. This woman would hardly face criminal prosecution for using reasonable force to defend herself in her own home. Her story is certainly compelling, but is not a reason to expand the Castle Doctrine.

## Perceived Imbalances in the Justice System

In tandem with the perceived inability of the criminal justice system to protect domestic violence victims, a perceived disparity in the judicial process was also cited by symposium experts as a reason to support legislation expanding the Castle Doctrine. Specifically, proponents of the expanded Castle Doctrine opined that prosecutors and judges are more concerned with the due process rights of defendants rather than the rights of the victim.

## Decrease in Gun Legislation

Gun laws have become one of the most controversial areas of public policy. Over the last decade, there has been a slow but

steady political shift toward loosening gun laws in some jurisdictions. Bans enacted in the 1990s on assault weapons and certain other guns have started to expire, and efforts to renew such bans have been unsuccessful. In 2007, a federal appeals court overturned the District of Columbia's ban on handguns on the ground that it is unconstitutional. The United States Supreme Court heard argument in the case, *District of Columbia v. Heller*, in March 2008.

Law-makers have taken note of the political winds. Some of the symposium experts quite candidly admitted that the expansions to the Castle Doctrine were a direct result of actions by legislators who wanted to demonstrate one of two things: their support for a broad interpretation of the Second Amendment's "bear arms" provisions, or the alleged protection of the individual's rights over the general public interest.

Although the political atmosphere giving rise to decreased

gun legislation might partially explain the push for no-retreat laws, the Castle Doctrine applies to all types of weapons—not just guns. As such, the debate over expanding the Castle Doctrine cannot be reduced to a debate over the Second Amendment.

<sup>1</sup> Prince George's County, MD case: *People v. Hargrave* CT-05-1942X. Unpublished.

<sup>2</sup> To date only one study deals explicitly with the Castle Doctrine and its impact on women in domestic violence settings. Koons (2006) found that the expanded Castle Doctrine did not provide a direct benefit to women who live with their batterers, but rather created ambiguity in the law with regard to presumption of reasonableness. This ambiguity arises from questions about the duty to retreat when a cohabitant is the attacker. To further complicate matters with regard to domestic violence victims, the litmus tests for whether one's response to attack is reasonable (e.g., whether or not deadly force was used in defense of a deadly threat, whether or not the defendant retreated to the greatest extent possible, and whether or not the deadly threat was imminent) ignore the dynamics of on-going abuse, dominance, and control (Koons, 2006).

## KEY LEGISLATIVE CHANGES AND PROBLEMATIC AREAS OF THE CASTLE DOCTRINE



**THE FIRST STATE** to legally expand the Castle Doctrine was Florida, which enacted the Personal Protection Bill on October 1, 2005.<sup>1</sup> The new law extends the right to self-defense with no duty to retreat to places outside the home, such as a place of business, a motor vehicle, or anywhere a person has a legal right to be. It also provides civil and criminal immunity if the defender harmed someone while acting in accordance with the law.

This legislation has generally served as the basis for similar statutes passed in other states; thus, the focus of this chapter is on the provisions of the Castle Doctrine as enacted in the state of Florida.<sup>2</sup>

### The Castle Doctrine in Florida

Under the common law in most jurisdictions, a person outside their home or workplace has a duty to use all reasonable means to avoid an attack before responding with deadly force. This "de-escalation" requirement places a priority on human life. It

also reflects the notion that a person would rather retreat than kill their attacker and have to live with the consequences or, worse, accidentally kill an innocent bystander.

Florida's Personal Protection Bill eliminates the duty to retreat and creates four primary areas of concern:

- It replaces the common law "reasonable person" standard, which placed the burden on the defendant to show that their defensive action were reasonable, with a "presumption of reasonableness," or "presumption of fear" in many instances, shifting the burden of proof to the prosecutor to prove a negative.
- It extends the right to deadly self-defense to areas outside the home; once you reasonably fear attack or your actions are covered by the "presumption of reasonableness," you can legally use deadly force anywhere that you have a right to be.
- It broadens the situations in which one can legally respond with deadly force to include circumstances in which only property is threatened and the threat is not imminent, a significant change from the common law standard that only an

imminent threat to a person justifies deadly force.

- It provides blanket immunity, both criminal and civil, for a person using force as defined and permitted by the law.

### “Presumption of Reasonableness”

The first section of the Florida bill provides that a person may use force, including deadly force, when 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.”<sup>3</sup> Although it has no geographic limitations, this language largely tracks the traditional Castle Doctrine.

The second section, however, creates a new standard not seen at common law. It provides that a person is *presumed* to have reasonably believed that deadly force was necessary if the person against whom the force was used had entered or was in the process of unlawfully and forcefully entering a dwelling or occupied vehicle, or if that person was attempting to remove another against that person’s will.<sup>4</sup> Once this presumption is in place, the prosecutor is given the difficult task of proving a negative, making this a virtually “unrebuttable presumption.”

The test before the expansion of the doctrine asked what a “reasonable prudent person” in similar circumstances would have done if similarly attacked or threatened. This objective test has largely been abandoned in favor of a “presumption of fear.” This presumption prevents prosecutors—and the jury—from considering the actual facts that show whether the force used was reasonable or unreasonable, essentially eliminating prosecutorial discretion in evaluating whether the use of deadly force was justified.

### Right to Self-Defense in Areas Outside the Home or on Behalf of Others

The “presumption of reasonableness” is complicated by the fact that the Castle Doctrine now extends to public areas. This raises serious questions about whether real-world situations are ever as clear-cut as lawmakers assume them to be. What one may think is reasonable and what is protected by the law can be two different things:

- Would a woman have reasonable fear in a traffic altercation in which a man yells at her for “cutting him off” and then pulls into the same parking lot as she does, gets out of his car, approaches hers, and continues to yell at

### Practical Application of the Florida Law

The following is an illustration of the potentially serious problems posed by changes in no-retreat laws. Imagine that a nine-year-old girl is playing with her dolls outside her home. In the house next door, a known drug-dealer, Red Rock, is selling drugs when he notices a rival drug-dealer, Yellow Man, with whom he had an earlier confrontation, coming down the street. Red Rock retrieves a semiautomatic assault rifle to defend himself. Shots are exchanged, and in the aftermath, the little girl, once playing innocently, lies dead.

Both Red Rock and Yellow Man claim self-defense through the unprecedented changes in the Castle Doctrine law. (Although Red Rock was a criminal, a “prohibited person” can possess a firearm for short periods of time in matters of self-defense. So long as Red Rock did not own the firearm nor live in the residence where the firearm was located, he could invoke a legal defense under the expanded Castle Doctrine.)

If law enforcement cannot prove that Red Rock was engaged in an unlawful activity and that his fear of imminent bodily harm was unreasonable, he could claim self-defense. Likewise, assuming Yellow Man could legally possess a weapon, he would be justified in using a firearm in self-defense. This eliminates any legal recourse, civil or criminal, for the violent death of an innocent nine-year-old girl. Because the legislature provided blanket immunity for “self-defense,” courts are faced with situations in which a deadly defense may be legally justified, even if negligently or recklessly executed.

On the other hand, if the Castle Doctrine had not been expanded, Red Rock would have been required to retreat to an area—such as his home—that was safe. If he had done so, then innocent bystanders would have been spared even if the confrontation had occurred.

Would this shooting have been avoided if the Castle Doctrine were not expanded? Perhaps not, but the family of the victim would have legal remedies, and the two perpetrators could be held responsible for their actions rather than using the Castle Doctrine as a shield from the criminal and civil justice systems.

Sadly, this scenario is not fictional. It is based on a 2006 homicide case in Miami-Dade County.

her as he places his hand on the passenger door?

- Would a reasonable fear be present if a passer-by saw young men with cans of spray paint climb through the window of an abandoned house? What if it was a college dorm and the young men were from a rival college?

Certainly these are difficult situations, and a prosecutor would want to weigh carefully the specific facts of each scenario. But to presume from the outset, as Florida's law arguably does, that a deadly response in these situations is justified would be at best irresponsible; at worst, that assumption could create a new protected set of behaviors that might otherwise be considered hate crimes or vigilantism.

The expansion of the Castle Doctrine to more public areas, with no duty to retreat, also amplifies the risk to innocent bystanders and public safety personnel. Under the "traditional" Castle Doctrine, the risk of harm from the use of defensive deadly force (*i.e.* stray bullets from a gun) was usually confined to areas within the home. The new Florida law extends the right to self-defense to public areas such as a park or city street. The expanded language increases the potential danger to innocent third parties or passers-by. A stray bullet has a much greater potential for damage if it may stray into crowded areas filled with innocent community members, including children, unfortunate enough to be in the line of fire.

### **Use of Force in Defense of Property and Non-Imminent Danger**

According to the Florida law, the person legally using deadly defensive force need only know or have reason "to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred."<sup>5</sup> This language can be interpreted to allow for the use of deadly force even if the danger has ceased. The wording "had occurred" appears to shield from prosecution an individual who fires at fleeing suspects no longer posing a threat to the property owner. Likewise, the fact that one must now only have "reason to believe" that an unlawful entry is occurring increases the possibility of prejudice or simple mistake leading to tragic consequences.

Under the new Florida law, it is also now legal to use deadly force to respond to crimes against property, such as breaking and entering, even when there are no people in harm's way.<sup>6</sup> There is no duty to retreat or to attempt to avoid a violent confrontation. This turns the traditional value for human life reflected in the centuries-old

Castle Doctrine and self-defense laws on its head.

### **Criminal and Civil Immunity**

The fourth problematic provision of the Florida legislation grants immunity—from both criminal prosecution and civil litigation—to a person using defensive or deadly force under the law.<sup>7</sup> As discussed above, the unprecedented expansion of the Castle Doctrine has greatly increased the risk of harm to innocent bystanders. Yet Florida's law does not include exceptions for even the most egregious or unwarranted—if not reckless—actions. Under the current law, a citizen who intervenes in a potentially dangerous situation and injures an innocent passerby is not liable for any negligent or reckless acts as long as he or she successfully claims that his or her actions were legal under the expanded Castle Doctrine. Neither the victims nor their surviving family members have a criminal or civil remedy.

Allowing a reckless actor to claim self-defense and thereby escape criminal and civil accountability is an injustice. An exception for negligence, recklessness, or collateral homicides would give injured parties or their families the ability to pursue justice in the form of criminal or civil liability.

Apart from the issues above, a major practical question is how the legislature can provide this "blanket immunity" to the public at large when such broad immunity is not granted to law enforcement, whose job it is to act in defense of others. Law enforcement officers have only qualified immunity, even for actions in the line of duty. If a police officer shoots a fleeing felon or an individual in the commission of a felony, that officer is required to articulate in court why the use of force or deadly force was reasonable and necessary.

Society hesitates to grant blanket immunity to police officers, who are well-trained in the use of deadly force and require yearly testing of their qualifications to carry a firearm. Yet the expansion of the Castle Doctrine has given such immunity to citizens. Granting criminal and civil immunity to individuals claiming self-defense creates a conflict of standards between those entrusted with the duty of public safety and the public at large.

### **Effectiveness of the Expanded Castle Doctrine**

If the intent of the expanded Castle Doctrine is to create safer communities, one might expect to see a decrease in crime. However, the 2006 Florida annual crime statistics indicate just

the opposite result. Although other crimes decreased in 2006, gun crimes, including murders, armed robberies, and assaults, increased. In fact, according to the Florida Department of Law Enforcement Web site as of June 25, 2007, murders increased statewide by 42 percent.<sup>8</sup>

Of course there are caveats to be placed on official crime statistics, and many factors impact crime rates.<sup>9</sup> Nevertheless, it is imperative that solid empirical research explore whether the Florida legislation (and other similar state legislation) is having its intended effect.

<sup>1</sup> The full text of the Florida Act is set out in the Appendix at page.

<sup>2</sup> At the symposium, the group of experts examined numerous forms of the legislation but chose to focus on Florida, Michigan, Indiana, and Georgia in order to compare different language and determine if bills are generally adopted in whole or in part. See Appendix to compare each bill. Typically two areas of the law are being expanded in the new Castle Doctrine legislation: (1) extended right to self-defense

outside the home and (2) immunity from civil and criminal liability.

<sup>3</sup> § 776.012. Use of force in defense of person (See Appendix).

<sup>4</sup> § 776.013. Home protection; use of deadly force; presumption of fear of death or great bodily harm. In an attempt to address the concern of misinterpretation or mistake, this presumption does not apply in four situations: (1) when the person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling or vehicle, (2) the person sought to be removed is a child or grandchild or is in the lawful custody of the person against whom the force is used, (3) the person who uses defensive force is engaged in unlawful activity, and (4) the person against whom the defensive force is used is a law enforcement officer and is in the performance of his or her official duties and has been identified as such.

<sup>5</sup> § 776.013(1)(b).

<sup>6</sup> § 776.013(1)(a).

<sup>7</sup> § 776.032. Immunity from criminal prosecution and civil action for justifiable use of force.

<sup>8</sup> Brain Haas, Gov. Crist says state murders, gun crimes jumped in 2006, but Broward slips, Sun-Sentinel, June 26, 2007.

<sup>9</sup> FDLE statistics are those reported to the FBI under Uniform Crime Reporting standards, thus including crimes known to, and reported by, law enforcement agencies. See, for example, Rand and Rennison, 2002, for a discussion on the limitations of UCR and other crime indicators.

## LAW ENFORCEMENT CONCERNS WITH REGARD TO THE CASTLE DOCTRINE



**THE CASTLE DOCTRINE** and its proposed expansions may have profound effects on public safety. For law enforcement specifically, the most critical issues relate to officers' use of force in the line of duty, operational and training procedures, new requirements for the investigation of deadly force incidents, and officer safety. Other practical concerns that arise with regard to law enforcement and the Castle Doctrine expansion (Castle expansion) include officer attitudes about people invoking self-defense justifications, incidents of youth violence, and the possibility of an increasingly armed and trigger-happy citizenry.

### Officers' Use of Force

As noted above, law enforcement officers are held to very specific and strict standards with regard to the use of force. Police officers do not share in the immunity now afforded the general population under the expanded Castle Doctrine. Rather, officers who use deadly force in the line of duty are

subject to intense scrutiny to determine whether their actions were appropriate. If the trier of fact determines that their use of force was inappropriate, law enforcement officers can be held both criminally and civilly responsible.

At the same time, because the Florida legislation has removed the need to be in "actual or imminent" danger before justifying the use of deadly force, it has created a dangerous situation for law enforcement.

Of particular concern is officer safety during "no-knock" warrants. Officers can enter a home without announcing their presence only if they have a particular concern, articulated to the court issuing the warrant. Generally "no-knock" warrants issue when there is a fear that suspects will destroy evidence or there is probable cause that the occupants may have access to weapons. Because the expanded laws presume that breaking and entering justifies a deadly response, and harming a police officer is an exception only if the officer has been identified as such, officers may be put into an untenable position. Individuals in the home, including the targets of the warrant, may use deadly force against law enforcement, but law enforcement of-



## Increased Burdens on Law Enforcement

The expansion of situations in which an attacker can claim self-defense creates additional investigative demands, including:

- Questioning of witnesses regarding the accuracy of the defendant's story and identification of the original aggressor;
- Additional time spent on a particular crime scene collecting evidence or trying to determine if a claim of self-defense is justified,
- Involving the prosecutor in the early stages of investigation, and
- Educating the public.

Officers, held to a different standard, may not be justified in taking similar action.

Conversely, officers serving a “no-knock” warrant on a home may put innocent parties at risk when the person at home, who is not the target of the warrant, takes defensive action and the officers respond with deadly force.

### Operational and Training Requirements

Law enforcement officials at the NDAA symposium highlighted the concern that officer training does not adequately address issues that arise when the “new”

Castle Doctrine is invoked. In particular, the greatest training need is to properly train line officers on the new “presumption of reasonableness” standard and investigative strategies for on-scene evaluation of self-defense claims.

Because the courts’ interpretation of the new standard is only in its infancy, law enforcement officers may find it difficult—if not impossible—to determine whether the new law is properly invoked. Officer training would need to be continually updated to help define when and where the Castle expansion might apply.

### Increased Investigation Burdens

Officers also need additional training on the investigative tasks that they face when the potential for the new Castle Doctrine defense exists. Prior to the expansion of the Castle Doctrine, officers responding to a “public area” crime scene needed only to determine if an attack was imminent and whether there was a duty to disengage or retreat before using deadly force. With the changes to the law, officers must now anticipate claims of self-defense in far more cases.

Even if self-defense is not claimed at the time of initial police contact (at the time of the shooting), prosecutors now need to prepare for a defendant raising this claim after consultation with a defense attorney. As discussed above, the new “presumption of reasonableness” shifts the burden of proof in these newly expanded Castle Doctrine cases. Prosecutors and law enforcement must now gather evidence to demonstrate beyond a reasonable doubt that there was not a self-defense claim that would excuse or justify the use of deadly force, ide-

ally before charges are brought.

Proving a negative is very difficult when the evidence is in the hands of the defendant. Additionally, a claim of self-defense is very difficult for law enforcement and prosecutors to investigate after-the-fact, as the potential loss of evidence can impede efforts to ascertain the defendant’s reasonable belief in the necessity of deadly force. Proactive investigation work is therefore needed.

As a result, in those jurisdictions where the Castle Doctrine has been expanded, police chiefs, sheriffs, and prosecutors have officers and line prosecutors

investigating each shooting or assault as a potential self-defense claim under the Castle Doctrine. The increased investigative time needed to prove or disprove self-defense claims are a major concern for already overworked and understaffed law enforcement.

### Other Law Enforcement Concerns

For better or worse, the expanded Castle Doctrine also conveys practical concerns about law enforcement attitudes and the way these attitudes affect their performance. For example, officers may feel that the person on the receiving end of an encounter in which the Castle Doctrine is invoked “deserved” what he or she received. This is particularly true if the case involves two criminals. As a result, the officers may be less inclined to carry out the more intensive investigative work that is needed in cases involving the Castle expansion.

Additionally, because a large number of assaults occur outside the home, the expansion of no-retreat laws to areas outside the home will logically increase the number of defendants invoking the Castle Doctrine. This will further burden police officers’ investigative time. Police officers may become apathetic to hearing such self-defense claims every time they respond to a crime scene, which will only benefit those who deny liability because of the presumption of fear.

Apart from these practical concerns, law enforcement officers have expressed serious reservations about the potential impact of the expanded legislation on youth aged 14-18. Specifically, law enforcement considers this age group to be particularly desensitized to violence and more prone to “un-

provoked” violence as a result of being “disrespected.” The Castle expansion will not have a deterrent effect on juveniles and young adults claiming “being disrespected” as a reason for the occurrence of assaults, but instead could create a legal shield from criminal and civil liability.

Finally, as the general public becomes aware of their rights under the expanded legislation, it is possible that more people will purchase weapons and obtain permits to carry concealed weapons. Likewise, such expansions may lead to an increase in “shall issue” laws.<sup>1</sup> Should either of these two scenarios occur, law enforcement officers will face even more complex issues with regard to self-defense claims.

### **Doubts that the Expanded Castle Doctrine will Successfully Deter Crime**

Although law enforcement has significant concerns about the expanded Castle Doctrine, they identified at least one possible positive outcome. For law enforcement, as with the rest of society, the primary benefit of the Castle Doctrine expansion would be a deterrent effect on crime. Symposium experts opined that there were several prerequisites before the Castle expansion could hope to achieve a deterrent effect:

- The change in citizens’ rights under the expanded laws must be well-publicized.
- There must be an appreciation among would-be criminals that deadly force can be used against them, leading to a

change in criminal behavior.

Unfortunately, attendees at the NDAA symposium expressed little confidence that criminals would take the provisions of the Castle Doctrine into consideration before committing a crime. And in fact, research to date has found only marginal support for the claim that the right to bear arms and defend one’s home has a significant or widespread deterrent effect.<sup>2</sup> More realistically, the Castle Doctrine will be a tool for criminals who are building a defense.

Does the expansion of the law under the Castle Doctrine give criminals a legal defense against prosecution? It is too soon to say, but symposium experts were concerned about the effects on the criminal justice system. Soon, defense attorneys will become familiar with this new argument to justify previously criminal acts. Law enforcement, prosecutors, and the courts will have to be ready to address the increase of self-defense claims.

Prosecutors in particular will likely suffer the greatest challenges. As described in the following section, the new legal theory will likely result in an increased caseload and the admission of previously barred evidence at trial.

<sup>1</sup> “Shall issue” language in a Carrying Concealed Weapons (CCW) law narrows or eliminates the discretion of local gun boards by requiring them to issue a concealed weapon permit to any applicant who satisfied the specified criteria.

<sup>2</sup> The notable exceptions are Lott, Jr. (2000) and Lott, Jr. & Mustard (1996), whose research has been criticized heavily for methodological reasons, and Plassmann & Tideman (2001).

## **POTENTIAL IMPACT OF THE CASTLE DOCTRINE ON LOCAL PROSECUTORS**



**THE EXPANSIONS** to the Castle Doctrine are likely to have a profound impact on local prosecutors. The expanded legislation may impact prosecutors’ ability to ensure that “justice is done.” Symposium experts predicted a number of different challenges, including limitations on prosecutorial discretion created by the presumption of reasonableness provision, increases in self-defense claims, the admissibility of victims’ criminal history into evidence, and the right to immediate appeal.

### **Presumption of Reasonableness and Prosecutorial Discretion**

As discussed above, the presumption of reasonableness strips away prosecutors’ discretion in making charging decisions. The new laws have created a situation in which prosecutors—and, ultimately, the triers of fact—are unable to pass judgment on those individuals who negligently or recklessly choose to use deadly force. Prosecutors who may have once spent a month analyzing how defendants responded or how they should have responded are left with limited powers to administer justice for victims and defendants. An injustice

occurs when prosecutors are not allowed the discretion to analyze each case individually on its own unique facts.

Supporters of the Castle expansion argue that there is a need to limit prosecutorial overzealousness by creating the presumption of reasonableness for individuals who have seconds to react. This argument is unfounded. There are no studies showing how many self-defense defendants are charged by prosecutors and later acquitted by the triers of fact, much less that this number would be a cause for legitimate concern. In fact, symposium participants were unable to produce one such concrete case for illustrative purposes.

The presumption of reasonableness in self-defense cases generates questions prosecutors may never have the discretion to examine. Should not the necessity of a justifiable or excusable homicide rest on reasonableness and proportionality? Should a person be justified in shooting someone who is not an aggressor? In a stabbing case, is it reasonable to retreat after one stab, three stabs, or 17 stabs? These are questions prosecutors now toil over each day.

Prosecutorial restrictions created by the presumption of reasonableness can be demonstrated by the facts underlying the Florida Court of Appeals case *Quaggin v. State*.<sup>1</sup> In *Quaggin*, a 14-year-old boy was shot and killed by 76-year-old Mr. Quaggin in his home. On March 16, 1997, two young boys, aged 10 and 14, entered the property of Mr. Quaggin while their father worked at a nearby warehouse. The boys played on the property, which was described by all accounts as cluttered with piles of junk such as several trailers and old parade floats. The boys discovered wood they could use to build a fort in the nearby forest.

The two boys entered several trailers attempting to gain permission from the owner of the property to remove the items. Upon entering a trailer with a door that was slightly open, the 10-year-old boy testified he saw a light that made him believe someone may be in the trailer. According to testimony, the two boys attempted to look over a pile of junk in the middle of the room to determine if someone was inside when Mr. Quaggin jumped up and shot the 14-year-old boy, who died of his wounds.

The 10-year-old testified “A guy jumped up and he says ‘what [the] hell are you doing here,’ and like maybe one second passed, and he shot him. He didn’t give him time to respond.”<sup>2</sup>

Mr. Quaggin did not testify at trial but claimed self-defense. In statements to the police and the 911 tape, Quaggin stated

he was in fear for his safety and believed the two boys were stealing items from his home. Mr. Quaggin’s property had been burglarized 10 years earlier, while he was in Alaska.

Under the new law, Mr. Quaggin’s actions would be presumed reasonable. But should Mr. Quaggin be afforded the presumption of fear or reasonableness? Without prosecutorial discretion to charge Quaggin, a jury or judge would not have been able to decide the case based on its facts.

### **Increased Self-Defense Claims**

Not surprisingly, claims of self-defense are often used in an attempt to justify otherwise criminal acts. Once defense attorneys or defendants realize that the unprecedented extension of the Castle Doctrine can be used as a tool to avoid prosecution, it is very likely that self-defense claims will significantly increase. Allowing individuals to justify criminal acts by claiming self-defense is antithetical to the underlying intent of the Castle Doctrine.

Of course, just because a claim of self-defense is made under the Castle expansion does not mean the claiming party is justified. But increased claims of self-defense will burden already overwhelmed prosecutors. Advocates for the expansion of the Castle Doctrine argue that prosecutors do not investigate self-defense cases properly. But an increase in cases in which self-defense is claimed will impede prosecutors’ efforts to identify those cases where a deadly response was not justified. Instead, prosecutors and law enforcement now must investigate each case as a self-defense case before charges are brought. Extra hours, days, even months of investigation must take place to properly anticipate a claim of self-defense in every “use of force” or “deadly force” case.

### **Admission of Victim’s Criminal History into Evidence and Right to Immediate Appeal**

Another concern expressed by the symposium experts was the admission of the alleged aggressor’s criminal history into evidence at trial. Some states, such as Georgia, allow for the prior convictions, or even mere arrests or reports of violence, to be considered by the trier of fact. Such testimony is admissible even if the person using defensive or deadly force was unaware at the time of the incident of the “aggressor’s” prior criminal history or previous violent nature. This can paint a picture with no relation to the actual facts.

Because a jury could infer an incorrect state of mind of the individual using deadly force at the time of the incident, a con-

trolling question of law could be created from the admission of this type of evidence. A controlling question of law, such as the admission of an individual's prior criminal history or violent nature, must have a substantial ground for varying opinion and the potential to materially determine the outcome of the trial. These "close call" controlling questions of law may be directly reviewed through an interlocutory appeal, but most jurisdictions generally prohibit such appeals or limit such appeals to a few select exceptions.

When available, an interlocutory appeal, arguing that the evidentiary decision was a "close call" by the trial court and that the ruling seriously affected the ability of the prosecution to prove its case, may be the only way to avoid an acquittal. However, prosecutors must be aware of certain procedural re-

quirements that could impact such appeals. The filing of an interlocutory appeal does not automatically stay the order of the trial court. If a stay of the proceedings is desired, the prosecutor should first try to obtain that decision from the trial court before seeking a stay from the court of appeals.

Here too, the process favors the defendant. While double jeopardy essentially means that an interlocutory appeal is the only opportunity the prosecutor may have to seek appellate review, the defense can pursue both the interlocutory appeal and a claim of error in a post-conviction appeal.

<sup>1</sup> 752 So. 2d 19 (Fla. App. 2000).

<sup>2</sup> 752 So. 2d 19, 20 (Fla. App. 2000).

## PUBLIC HEALTH IMPLICATIONS OF THE CASTLE DOCTRINE



**FOR PROSECUTORS** and the law enforcement community, many of the issues that are raised by expansions to the Castle Doctrine are fairly obvious. What may not be so obvious are the implications for public health and safety. A rise in potentially violent encounters can have a tremendous impact on society, hospitals, emergency medical response personnel, mental health providers, medical insurance companies, and others.

As noted earlier, proponents for expanding the Castle Doctrine tend to argue that the legislation will have a deterrent effect on would-be predators—that criminals will be less likely to commit crimes if they know their would-be victims are likely to defend themselves and that the act of self-defense is legal. Although the spirit of the law may be to allow the public to feel safer, the expansions may instead create a sense of fear from others, particularly strangers, and force community members back into their homes seeking sanctuary from armed individuals in society.

Our attendees contended that the new legislation can lead to many negative consequences, including:

- An increase in armed crime as a result of criminals learning that they can use the Castle Doctrine as a defense;
- Escalations in violence that may not have otherwise occurred if people were not carrying weapons for self-defense;
- Increased lethality and increases in life-altering injuries as a result of self-defense acts;
- Decreased feelings of safety that stem from the perception that anyone, anywhere, at any time, might perceive the use of deadly force to be reasonable or justified due to a presumption of fear, even if danger is not imminent;
- A misinterpretation of physical clues that results in the use of deadly force, exacerbating culture, class, and race differences;
- A disproportionately negative effect on minorities, persons from lower socio-economic status, and young adults/juveniles;
- Mental health issues for people who use deadly force against another person or who find themselves attacked by individuals claiming the protection of a "presumption of reasonableness;" and

- Increased costs for medical, mental health, and rehabilitative care.

The extent to which these different consequences may be realized, as well as the consequences discussed earlier for law enforcement and prosecutors, depends on many factors. The most obvious of these are whether the expanded Castle Doc-

trine becomes widely known and cited, and whether it results in more people carrying weapons.

The effects of an expanded Castle Doctrine are unknown, but these questions and concerns demonstrate that there is a significant need for rigorous research to document any negative outcomes related to the Castle Doctrine.

## NEED FOR RESEARCH: CRITICAL QUESTIONS TO BE ANSWERED



**THE POSSIBILITY** of negative consequences resulting from expansions of the Castle Doctrine raises a number of questions about whether these new no-retreat laws represent good public policy. There is a wide range of potential outcomes. People may feel “safer” because they have a right to defend themselves in many more situations. On the other hand, people may feel less safe because of uncertainty about who might be carrying a weapon, who might interpret behavior as threatening, and the potential for the use of deadly force. People may opt to carry weapons for protection in response to feeling less safe, and those people who already carried weapons may be more readily inclined to use force with less of a suggestion of threat.

To date, there has been very little empirical study of the legislation and its potential impacts. It would be prudent for states considering expansions to their self-defense laws to wait until there is better evidence that the unintended negative consequences of these laws do not outweigh the possible positive impacts.

### **Existing Studies are Irrelevant or Inconclusive**

Much of the research relevant to the Castle Doctrine examines self-defense as the primary issue and predates the movement to expand the right to self-defense with no duty to retreat to places outside the home. Likewise, most of the research documenting the need for self-defense rights and no-retreat laws has focused on the prevalence of self-defense claims and methodological issues with regard to how such

claims are defined and documented. However, little research has been done to document *why* the right to self-defense and the incorporation of no-duty-to-retreat should apply to areas outside of one’s home.

In the first macro-level study of justifiable homicide, and in particular, homicide justified on the grounds of self-defense, MacDonald and Parker (2001) found a relationship between justifiable homicide rates and several factors. In particular, cities located in states that had a combination of lenient gun laws, high violent crime rates, and a large number of divorced men had higher rates of justifiable homicide. The lowest justifiable homicide rates were found in cities with high levels of police per capita, suggesting “the importance of the police in enforcing social control and reducing the tendency of citizens to take the law into their own hands” (p. 201).

These findings are consistent with later studies examining homicide rates, and in particular, household gun ownership and homicide (Miller, Hemenway, & Azrael, 2007). Although helpful in understanding the relationships between gun ownership, homicide, justifiable homicide, and other predictors of homicide rates, the Miller, et al. study does not explicitly explore the nature of the homicide, specifically, whether it was committed for self-defense in the home or in other areas as allowed under expanded Castle Doctrines.

With regard specifically to defensive gun use, the focus of research has largely been on determining the true prevalence of self-defense cases. On-going debate in the literature regarding methodological weaknesses in data collection, over-estimation, under-estimation, etc. poses more questions than

answers about the true nature and frequency of defensive gun use (see Kleck & Gertz, 1995; Hemenway, 1997; Cook & Ludwig, 1998; Smith, 1997; McDowall, Loftin, & Presser, 2000). The struggle to accurately document the number of times guns are used defensively will only be exacerbated by the expansion of the Castle Doctrine, which may “widen the net” of self-defense claims, raise definitional issues as to true self-defense and unsupported claims of self-defense, and create additional sources of data to be considered.

Very little research explores the behavioral implications of gun ownership and the likelihood of its use in self-defense. Such studies could provide important information about the potential impacts of Castle expansion legislation, particularly if gun ownership increases. Among the studies that do explore this behavior, the findings generally support increased negative behaviors among the gun owners (such as increased aggression) and in households in which there are guns (such as increased suicide rates). (Hemenway, Vriniotis, & Miller, 2006; Miller, et al., 2006).

Research on individuals’ willingness to use a firearm for self-defense reveals two important findings that warrant additional study in the context of the Castle expansion. First, there appears to be a direct correlation between the threat of physical harm and the willingness to use deadly force in self-defense; but, second, there does not appear to be a difference in willingness between those who own guns and those who do not own guns (Liquin, et al., 2002). Further research is needed to determine if the Castle expansion laws influence aggressive behavior and willingness to use deadly force, particularly with regard to the presumption of fear.

The research is also ambiguous on the deterrent benefits of gun ownership and defensive gun use. One study found that there was some deterrent effect of defensive gun use (as measured by injury to the person using the gun for defensive purposes), but that the deterrent effect was incident-specific and may in fact increase the chance of injury to women who use guns defensively (Schnebly, 2002). Wells (2002) found that the greatest potential deterrent effect of defensive gun use may be in locations other than the home, which could provide support for some of the changes in the Castle Doctrine. However, as Wells himself notes, his study did have some shortcomings and his findings warranted additional study. Lott (2000) found significant deterrent effects on crime in general in his study, but the research has been heavily criticized for methodological rigor.

### Questions for Legislators

Legislators and advocates should consider these questions before deciding whether to expand the Castle Doctrine and, if so, how to draft the legislation:

- What are the current contours of the Castle Doctrine, either in common law or statute, in your jurisdiction?
- How do you balance personal against public safety?
- Are there limits on how old the alleged aggressor must appear before a deadly response is reasonable?
- What remedies will be available for innocent victims of reckless or negligent actions?
- How will this affect public perceptions of safety?
- How will this affect concealed weapons and similar laws?
- Should prosecutors be able to make fact-specific charging decisions?
- What is the potential cost to the criminal justice system in terms of public health and safety?
- Should legislatures grant blanket immunity to citizens untrained in the use of deadly force?
- Are there existing standards in law for treating a “presumption” that would effectively hamstring prosecutors?
- Do we really feel safer knowing that approaching someone after a car accident to exchange driver’s license numbers and insurance information might be misinterpreted as an act of aggression or road rage?

To date, only one study explicitly deals with the Castle Doctrine and its impact on women in domestic violence settings. This is particularly relevant because, as discussed above, the judicial system’s failure to adequately protect victims of domestic violence may be one of the reasons for expanding the Castle Doctrine. The research, however, is not favorable on this point. Koons (2006) notes that the re-casting of Castle Doctrine legislation did *not* provide a direct benefit to women who live with their batterers, but rather created ambiguity in the law with regard to presumption of reasonableness. Considerable work is needed in this area as the laws are actually used in domestic violence cases, in order to determine if the changes in the law help battered women who live with their batterers overcome the idea that most reasonable women

would leave the situation before the need for the use of deadly force arises.

### **The Urgent Need for Further Research**

There are many questions that need to be answered to determine if it represents good public policy to expand the Castle Doctrine, particularly because there is no real evidence to determine why these specific expansions were proposed.

The authors and experts we assembled believe that research and evaluation of the legislative actions should be conducted to determine whether this targeted legislative effort is making America safer. Further, cases in which the Castle expansions are evoked should be followed through the criminal and civil justice system to determine if “clean-up” legislation should be enacted to eliminate unintended consequences and misuse by criminal defendants.

At the moment, two crucial lines of research are indicated before states take further legislative action to expand the Castle Doctrine. The first line of research seeks to substantiate arguments and assumptions made by proponents of the Castle expansion. As suggested by the discussion above, among the questions that need objective, data-supported answers are:

- What, other than sheer political will, is driving the push to expand the Castle Doctrine? Are these concerns justified?
- How often does someone breaking and entering unlawfully carry a weapon?
- How often is self-defense claimed in an assault or death where the trier of fact votes to convict? To acquit?
- What are the mental health implications of using deadly force?

The second line of research seeks to clarify the impact of the legislation that has expanded the Castle Doctrine. Some of these questions include:

- What are the exact provisions that have expanded the Castle Doctrine laws?

- How do these provisions change common law, and what are the implications of these changes for the criminal justice system and local prosecutors in particular?
- How often, under what circumstances, and by whom is the Castle Doctrine being invoked, and what are the outcomes of cases involving claims of self-defense using the Castle Doctrine?
- How does the expanded Castle Doctrine defense, or the potential of such a defense, impact investigative and prosecutorial processes?
- How does the Castle Doctrine expansion, by itself or in combination with other laws, influence individual behavior (e.g., does it increase the likelihood of purchasing a weapon, influence a person’s decision to carry a concealed weapon, increase a person’s likelihood to use deadly force, or deter criminal behavior)?
- Does the Castle Doctrine expansion have greater and/or differing impacts on certain segments of the population?
- What is the impact of the Castle Doctrine expansion on public health and safety in terms of increased emergency room admissions; increased serious, non-fatal injuries; insurance liabilities, etc.?
- How are people’s perceptions of personal safety influenced by the Castle Doctrine expansion?

Although these are just a few of the questions that could be asked of the Castle Doctrine expansion, they clearly demonstrate that there is a real and immediate need to test the utility and soundness of such laws, particularly as more and more states consider passing Castle Doctrine expansions.

NDAAs want to thank all of the symposium participants for their guidance and concerns regarding the expansion of the Castle Doctrine. This paper is the product of discussions that took place between symposium experts and is meant to assist prosecutors and other allied professionals in the field.

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## FLORIDA LEGISLATION

### § 776.012. Use of force in defense of person

A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, 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

### § 776.013. Home protection; use of deadly force; presumption of fear of death or great bodily harm

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

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

- (2) The presumption set forth in subsection (1) does not apply if:

- (a) The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pre-

trial supervision order of no contact against that person; or

- (b) The person or persons sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used; or
- (c) The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or
- (d) The person against whom the defensive force is used is a law enforcement officer, as defined in sec.943.10 (14), who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer.

- (3) 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.

- (4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

- (5) As used in this section, the term:

- (a) "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.
- (b) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.
- (c) "Vehicle" means a conveyance of any kind, whether

or not motorized, which is designed to transport people or property.

### § 776.031. Use of force in defense of others

A person is justified in the use of force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to prevent or terminate the other's trespass on, or other tortious or criminal interference with, either real property other than a dwelling or personal property, lawfully in his or her possession or in the possession of another who is a member of his or her immediate family or household or of a person whose property he or she has a legal duty to protect. However, the person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent the imminent commission of a forcible felony. 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.

### § 776.032. Immunity from criminal prosecution and civil action for justifiable use of force

- (1) A person who uses force as permitted in sec.776.012, sec. 776.013, or sec. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in sec.943.10 (14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
- (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.
- (3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred

by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

### § 776.041. Use of force by aggressor

The justification described in the preceding sections of this chapter is not available to a person who:

- (1) Is attempting to commit, committing, or escaping after the commission of, a forcible felony; or
- (2) Initially provokes the use of force against himself or herself, unless:
  - (a) Such force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or
  - (b) In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

## GEORGIA LEGISLATION

### An Act

To amend Article 2 of Chapter 3 of Title 16 of the Official Code of Georgia Annotated, relating to justification and excuse as a defense to certain crimes, so as to provide that a person who is attacked has no duty to retreat; to provide that such person has a right to meet force with force, including deadly force; to provide for civil immunity; to amend Article 1 of Chapter 11 of Title 51 of the Official Code of Georgia Annotated, relating to general provisions relative to defense to tort actions, so as to provide for civil immunity; to repeal conflicting laws; and for other purposes.

**BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:**

**SECTION 1.**

Article 2 of Chapter 3 of Title 16 of the Official Code of Georgia Annotated, relating to justification and excuse as a defense to certain crimes, is amended by inserting immediately following Code Section 16-3-23 a new Code section to read as follows:

“16-3-23.1.

A person who uses threats or force in accordance with Code Section 16-3-21, relating to the use of force in defense of self or others, Code Section 16-3-23, relating to the use of force in defense of a habitation, or Code Section 16-3-24, relating to the use of force in defense of property other than a habitation, has no duty to retreat and has the right to stand his or her ground and use force as provided in said Code sections, including deadly force.”

**SECTION 2.**

Said article is further amended by striking in its entirety Code Section 16-3-24.2, relating to immunity from prosecution and exception, and inserting in lieu thereof the following:

“16-3-24.2.

A person who uses threats or force in accordance with Code Section 16-3-21, 16-3-23, 16-3-23.1, or 16-3-24 shall be immune from criminal prosecution therefor unless in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful by such person under Part 2 or 3 of Article 4 of Chapter 11 of this title.”

**SECTION 3.**

Article 1 of Chapter 11 of Title 51 of the Official Code of Georgia Annotated, relating to general provisions relative to defense to tort actions, is amended by striking in its entirety Code Section 51-11-9, relating to immunity from civil liability for threat or use of force in defense of a habitation, and inserting in lieu thereof the following:

“51-11-9.

A person who is justified in threatening or using force against another under the provisions of Code Section 16-3-21, relating to the use of force in defense of self or others, Code Section 16-3-23, relating to the use of force in defense of a habitation, or Code Section 16-3-24, relating to the use of force in defense of property other than a habitation, has no

duty to retreat from the use of such force and shall not be held liable to the person against whom the use of force was justified or to any person acting as an accomplice or assistant to such person in any civil action brought as a result of the threat or use of such force.”

**SECTION 4.**

All laws and parts of laws in conflict with this Act are repealed.

**INDIANA LEGISLATION**

**Office of Code Revision Indiana Legislative Services Agency**

**IC 35-41-3**

**Chapter 3. Defenses Relating to Culpability**

**IC 35-41-3-1**

**Legal authority**

35-41-3-1 Sec. 1. A person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so.

*As added by Acts 1976, P.L. 148, SEC. 1. Amended by Acts 1977, P.L. 340, SEC. 7.*

**IC 35-41-3-2**

**Use of force to protect person or property**

35-41-3-2 Sec. 2. (a) A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:

- (1) is justified in using deadly force; and
- (2) does not have a duty to retreat;

if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

(b) A person:

- (1) is justified in using reasonable force, including deadly force, against another person; and

(2) does not have a duty to retreat; if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle.

(c) With respect to property other than a dwelling, curtilage, or an occupied motor vehicle, a person is justified in using reasonable force against another person if the person reasonably believes that the force is necessary to immediately prevent or terminate the other person's trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's immediate family, or belonging to a person whose property the person has authority to protect. However, a person:

(1) is justified in using deadly force; and  
(2) does not have a duty to retreat;  
only if that force is justified under subsection (a).

(d) A person is justified in using reasonable force, including deadly force, against another person and does not have a duty to retreat if the person reasonably believes that the force is necessary to prevent or stop the other person from hijacking, attempting to hijack, or otherwise seizing or attempting to seize unlawful control of an aircraft in flight. For purposes of this subsection, an aircraft is considered to be in flight while the aircraft is:

(1) on the ground in Indiana:  
(A) after the doors of the aircraft are closed for takeoff; and  
(B) until the aircraft takes off;  
(2) in the airspace above Indiana; or  
(3) on the ground in Indiana:  
(A) after the aircraft lands; and  
(B) before the doors of the aircraft are opened after landing.

(e) Notwithstanding subsections (a), (b), and (c), a person is not justified in using force if:

(1) the person is committing or is escaping after the commission of a crime;  
(2) the person provokes unlawful action by another person with intent to cause bodily injury to the other person; or  
(3) the person has entered into combat with another person or is the initial aggressor unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.

(f) Notwithstanding subsection (d), a person is not justified in using force if the person:

(1) is committing, or is escaping after the commission of, a crime;

(2) provokes unlawful action by another person, with intent to cause bodily injury to the other person; or

(3) continues to combat another person after the other person withdraws from the encounter and communicates the other person's intent to stop hijacking, attempting to hijack, or otherwise seizing or attempting to seize unlawful control of an aircraft in flight.

*As added by Acts 1976, P.L.148, SEC.1. Amended by Acts 1977, P.L.340, SEC.8; Acts 1979, P.L.297, SEC.1; P.L.59-2002, SEC.1; P.L.189-2006, SEC.1.*

### **IC 35-41-3-3**

#### **Use of force relating to arrest or escape**

35-41-3-3 Sec. 3. (a) A person other than a law enforcement officer is justified in using reasonable force against another person to effect an arrest or prevent the other person's escape if:

(1) a felony has been committed; and  
(2) there is probable cause to believe the other person committed that felony.

However, such a person is not justified in using deadly force unless that force is justified under section 2 of this chapter.

A law enforcement officer is justified in using reasonable force if the officer reasonably believes that the force is necessary to effect a lawful arrest. However, an officer is justified in using deadly force only if the officer:

(1) has probable cause to believe that that deadly force is necessary:

(A) to prevent the commission of a forcible felony; or  
(B) to effect an arrest of a person who the officer has probable cause to believe poses a threat of serious bodily injury to the officer or a third person; and  
(2) has given a warning, if feasible, to the person against whom the deadly force is to be used.

(c) A law enforcement officer making an arrest under an invalid warrant is justified in using force as if the warrant was valid, unless the officer knows that the warrant is invalid.

(d) A law enforcement officer who has an arrested person in custody is justified in using the same force to prevent the escape of the arrested person from custody that the officer would be justified in using if the officer was arresting that person. However, an officer is justified in using deadly force only if the officer:

(1) has probable cause to believe that deadly force is necessary

to prevent the escape from custody of a person who the officer has probable cause to believe poses a threat of serious bodily injury to the officer or a third person; and

(2) has given a warning, if feasible, to the person against whom the deadly force is to be used.

(e) A guard or other official in a penal facility or a law enforcement officer is justified in using reasonable force, including deadly force, if the officer has probable cause to believe that the force is necessary to prevent the escape of a person who is detained in the penal facility.

(f) Notwithstanding subsection (b), (d), or (e), a law enforcement officer who is a defendant in a criminal prosecution has the same right as a person who is not a law enforcement officer to assert self-defense under IC 35-41-3-2.

*As added by Acts 1976, P.L.148, SEC.1. Amended by Acts 1977, P.L.340, SEC.9; Acts 1979, P.L.297, SEC.2; P.L.245-1993, SEC.1.*

#### **IC 35-41-3-11**

##### **Mental disease or defect; use of justifiable reasonable force**

35-41-3-11 Sec. 11. (a) As used in this section, “defendant” refers to an individual charged with any crime involving the use of force against a person.

(b) This section applies under the following circumstances when the defendant in a prosecution raises the issue that the defendant was at the time of the alleged crime suffering from the effects of battery as a result of the past course of conduct of the individual who is the victim of the alleged crime:

(1) The defendant raises the issue that the defendant was not responsible as a result of mental disease or defect under section 6 of this chapter, rendering the defendant unable to appreciate the wrongfulness of the conduct at the time of the crime.

(2) The defendant claims to have used justifiable reasonable force under section 2 of this chapter. The defendant has the burden of going forward to produce evidence from which a trier of fact could find support for the reasonableness of the defendant's belief in the imminence of the use of unlawful force or, when deadly force is employed, the imminence of serious bodily injury to the defendant or a third person or the commission of a forcible felony.

(c) If a defendant proposes to claim the use of justifiable reasonable force under subsection (b)(2), the defendant must file a written motion of that intent with the trial court not later than:

(1) twenty (20) days if the defendant is charged with a felony; or

(2) ten (10) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date. However, in the interest of justice and upon a showing of good cause, the court may permit the filing to be made at any time before the commencement of the trial.

(d) The introduction of any expert testimony under this section shall be in accordance with the Indiana Rules of Evidence.

*As added by P.L.210-1997, SEC.5.*

## **MICHIGAN LEGISLATION**

### **768.21c Use of deadly force by individual in own dwelling; “dwelling” defined.**

Sec. 21c.

(1) In cases in which section 2 of the self-defense act does not apply, the common law of this state applies except that the duty to retreat before using deadly force is not required if an individual is in his or her own dwelling or within the curtilage of that dwelling.

(2) As used in this section, “dwelling” means a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter.

### **780.972 Use of deadly force by individual not engaged in commission of crime; conditions.**

Sec. 2.

(1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

(b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

(2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than

deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

**780.973 Duty to retreat; effect of act on common law.**  
Sec. 3.

Except as provided in section 2, this act does not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force.

**Prohibited Individual—**

As defined in **18 U.S.C. § 922 (g) & (n)** a prohibited person can not be in possession or receipt of a firearm or ammunition:

(g)It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and

Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence.

(n)It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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